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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 561 F.2d 1223. It is reproduced at pp. 1-53 of the separately-bound appendix filed with this Petition (hereafter cited as "App."). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is officially reported at 410 F.Supp. 541, and is reproduced at App. 55-80.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 20, 1977. On November 8, 1977 Mr. Justice Stevens entered an order extending the time for filing this Petition to November 25, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Does an employee's coverage under an employer funded pension plan, as a compulsory incident of his employment, involve the "sale" of a "security" to the employee and hence a transaction subject to the federal securities laws? If so, can a cause of action be posited on each of the several antifraud provisions of those laws by one who alleges that there were material misrepresentations and failures to disclose in connection with such a "sale?"

STATUTES AND RULE INVOLVED

This case involves §§ 2(1), 2(3), 3(a)(2), and 17(a) of the Securities Act of 1933, 48 Stat. 74 as amended (15 U.S.C. §§ 77a *et seq.*) and §§ 3(a)(10) and 10(b) of the Securities and Exchange Act of 1934, 48 Stat. 881 as amended (15 U.S.C. §§ 78a *et seq.*) and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. They are reproduced at App. 82 *et seq.*

STATEMENT OF THE CASE

1. Plaintiff's claim and the proceedings below.

Respondent John Daniel was denied a pension from the Local 705 International Brotherhood of Teamsters Pension Trust Fund because he failed to satisfy the pension plan's eligibility requirement with respect to continuity of service. He brought this class action under the anti-

fraud provisions of the federal securities laws[1] against the trustees of the Fund, Local 705, the International Brotherhood of Teamsters and others, alleging that he and others covered by the Local 705 pension plan are the victims of misleading statements and omissions to state material facts with respect to the plan's eligibility requirements. The complaint sought reformation of the plan so as to delete "all arbitrary length and continuity requirements" and judgment in the amount of "all pension benefits unlawfully denied Plaintiff and all other members of the class he represents" (C.A. App. 35a-36a).[2]

The complaint purported to satisfy the threshold requirements of the antifraud provisions—that there be a "sale" of a "security"—on the unprecedented theory that plaintiff Daniel and other employees in the group covered by the plan "have purchased and acquired an interest in [the plan] * * * by agreeing to provide their labor services to employers who have labor contracts" requiring such contributions (C.A. App. 34a). Defendants moved to dismiss the securities counts on the ground that there is no "sale" of a "security" in connection with such a "compulsory noncontributory" union pension plan, coverage under which is a compulsory incident of employment and which is wholly funded by employer contributions. The District Court accepted plaintiff's theory with some modification and denied the motion to dismiss. The

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[1] Counts I and II of the complaint—which are the only claims in issue here—seek relief under § 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and SEC Rule 10b-5, and under § 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)) (the "1933 Act"). Mr. Daniel also seeks relief under the common law and under various provisions of the labor laws (see App. 5, n.3).

[2] "C.A. App." refers to the joint appendix in the Court of Appeals. The Securities and Exchange Commission will be referred to as "SEC"; its brief in the court below will be referred to as "SEC Br." Other references to "Br." preceded by a name will similarly refer to a brief filed in the court below by that party or *amicus*.

District Court, determined (1) that pension plans are securities (App. 68-72) and (2) that there is a "sale" of a collectively bargained pension plan when union members vote to ratify an agreement negotiated by their union, if that agreement provides for employer contributions to a pension fund (App. 72-75). The Court was undeterred by its recognition that "the SEC had taken the position that with respect to those employee pension plans characterized as 'involuntary' or 'noncontributory' there is no sale within the meaning of the Securities Acts." (App. 73). The Court of Appeals affirmed on interlocutory appeal under 28 U.S.C. § 1292(b); the majority opinion, based on a theory of "sale" different from the District Court's, is described at pp. 8-9, *infra*.

2. Essential characteristics of a compulsory noncontributory union pension plan.

The organization and funding of the Local 705 plan are generally typical of collectively-bargained compulsory noncontributory plans.

The Local 705 Pension Trust Fund was established and is maintained within the framework established by § 302 (c) (5) of the Taft-Hartley Act, 29 U.S.C. § 186(c) (5). Consistent with the standards set forth in § 302(c) (5) and other relevant requirements (most notably § 401 of the Internal Revenue Code), the Local 705 pension plan was created by a Trust Agreement between Local 705 and certain employer groups (C.A. App. 62a, 64a, 72a-7). As is typical of such agreements the Board of Trustees (composed equally of employer and union representatives) was charged with formulation of "a plan for the payment of such retirement pension benefits, permanent disability pension benefits and death benefits as feasible," with the basic purpose as follows:

> "to pay the largest benefits possible which are consistent with the number of members becoming and likely to become eligible for such payments, the amount of funds which are available and which will probably become available, and the following of sound actuarial practice." (C.A. App. 64a-6, 7.)

The Agreement further made clear that "[n]o employee, or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund" until such time as he has become eligible for the specified benefits under the terms of the plan. (C.A. App. 64a-7).[3]

The Pension Plan—again typically—provides that each "Employer shall pay to the Fund on behalf of each regular employee per week the sum specified in the collective bargaining agreement between the Union and the Employer for any week in which the employee performs any services for the employer * * *" (C.A. App. 72a-21). Employee coverage is "compulsory"—that is, an individual employee has no option as to whether they will be made on account of his services; they are also "noncontributory." The employer contribution level is established by the collective bargaining agreement, which is negotiated as a whole between the union as the statutory bargaining representative and multi-employer bargaining associations. Like other such plans, the Local 705 Pension Plan fixes the level of pension benefits and specifies detailed eligibility requirements based on length of service, continuity of service and age. Compare *Johnson* v. *Botica*, 537 F.2d 930, 932-933, 936-937 (C.A. 7).

Section 302(c) (5) permits pension benefits to be paid "either from principal or income or both." The actuarial factors that determine the rate of pension payments that can be given to retirees under a trustee-managed

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[3] Although it repeatedly stated that pension plan participants receive an "interest", the court below did not dispute—though it discounted—the proposition that employees have only "a contingent expectancy of receiving pension payments at a future date." (App. 16).

plan are enumerated as follows by a leading text, Melone, *Collectively Bargained Multi-Employer Pension Plans*, Pension Research Council, Wharton School of Finance and Commerce (Homewood, Ill., Richard D. Irwin, Inc., 1963): (1) "[t]he mortality experience of both active employees and pensioners"; (2) "turnover" by "[e]mployees who terminate their coverage under the plan for reasons other than death or retirement"; (3) "investment income earned on the accumulated assets of [the] * * * fund"; (4) "the expense of administering a pension program"; (5) "[t]he age at which employees retire"; (6) employers' "future contribution levels", which are "one of the most important factors." *Id.* at 77-85. Melone further notes the actuarial impact of the "initial accrued liability" for employees who—like Mr. Daniel—are given pension credit for employment prior to the commencement of contributions.[4] *Id.* at 88-89. Reemphasizing the importance of future employer contributions, he notes that "either contributions or benefits may have to be adjusted according to the experience over a long period" in order to keep the pension plan solvent and provide continuing benefits at appropriate levels. *Id.* at 94.

While investment income is a factor in determining the amount of pension benefits that can be paid to retirees, benefits come largely from contributions made with respect to work performed by employees who for one reason or another never become pensioners and from contributions made with respect to work performed by employees who are still working at the time of payment of pension benefits to retirees. See also, generally, Bernstein, *The Future of Private Pensions* (New York, N.Y., The Free Press of Glencoe, 1964), pp. 39-46; Allen, Melone & Rosenbloom, *Pension Planning* (Homewood, Ill., Richard D. Irwin, Inc., 1976), pp. 72-77. See also C.A. App. 144a-146a, 149a-150a.

[4] At the time of creation of the Local 705 Pension Fund, Mr. Daniel received full credit for his five years of prior service, service for which no contributions had been made.

The relative significance of investment income and the other factors for pension benefits is concretely exemplified by uncontested data subsequently submitted to the district court in connection with the class action motion. That data shows, *inter alia*, that an employee retiring in 1975 under the Local 705 Pension Plan had retirement benefits with a then current actuarial value of $57,951, of which only $14,542 was attributable to contributions to the fund resulting from his own employment and interest on those contributions (C.A. App. 184a-8). In other words, only one-fourth of the actuarial value of his expected pension benefits was in any way traceable to his own employment, and the remaining three-fourths resulted from contributions made with respect to other employees covered by the plan.

3. Proceedings in the Court of Appeals.

The defendants sought and were granted leave to appeal under 28 U.S.C. § 1292(b) from so much of the order as denied the motions to dismiss the securities laws counts. In the Court of Appeals, the Department of Labor filed a brief *amicus* in support of the defendants' position; the SEC filed a brief *amicus* in support of the appellee. These agencies also presented oral argument. Two additional briefs *amicus* were filed on appellants' side and three on appellee's side. The *amici* were in accord on one proposition: the extraordinary importance of the District Court's ruling that pension plans such as that in this case are subject to the securities laws.[5] Plaintiff's counsel agreed, stating that this is "an exceptional and important case." [6]

[5] Pertinent excerpts from the submissions of the *amici* are set forth at nn.11-13 of the Local 705 Petition herein.

[6] Plaintiff's Response to Petition for Permission to Appeal at 17.

The Court of Appeals affirmed. In an opinion by Judge Cummings, the court agreed with the District Court that "Plaintiff's interest in the pension fund is a 'security'" (App. 11). It characterized the union member as an "investor" (App. 13-17), and concluded that the *Howey*[7] standards for an "investment contract" were satisfied (App. 17-21). The court concluded also that "plaintiff's security was acquired in a 'sale'" (App. 34). But unlike the District Court, it determined that there is the sale of an interest in a pension plan whenever an employee accepts or remains in employment covered by a pension plan.[8] The court determined there was a sale not only for purposes of § 10(b) of the 1934 Act, but also under § 17(a) of the 1933 Act which it held, in accordance with prior Seventh Circuit decisions, creates an implied private cause of action. (App. 39-42)

The Court of Appeals incorrectly stated that "defendants and *amici* who support their position urge that the Employment Retirement Income Security Act of 1974 (ERISA) has repealed the anti-fraud provisions of the 1933 and 1934 Acts insofar as they apply to union pension funds," and went on to conclude that ERISA did not effect such a repeal. (App. 42, footnote omitted.) Actually, the argument was that Congress had enacted ERISA with the understanding that the securities laws were inapplicable to the relationship between plans such as this and their participants and that this Congressional action should be respected in construing the securities laws, particularly since securities law coverage would conflict with several policy decisions Congress had made in en-

[7] See *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 301 approved in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852.

[8] The court did not expressly approve or disapprove the district court's theory that ratification of a collective bargaining agreement which provides for employer contributions to a pension plan constitutes a sale. To this, it stated only that such ratification establishes the volitional element, if such is necessary for a "sale." (App. 36-37).

acting ERISA. Yet, the court made a policy judgment that the anti-fraud provisions of the securities laws would provide a desirable addition to the ERISA requirements. (App. 46-48). To the extent it discussed the demonstration by defendants and *amici* on their side that affirmance of the District Court's decision would create enormous potential liabilities for all pension funds, the court's opinion characterized those arguments as a "parade of horribles" and dismissed them out of hand as the product of the "zeal [of] advocates." (App. 49-50).

Judge Tone filed a separate concurring opinion in which he professed "certain doubts" about the opinion of the court, calling this "a close and difficult case." He said that some of his doubts flowed from the "ordinary meaning" of the words employed in the federal securities laws and from "Congress' basic purpose in adopting" those laws. He also indicated some discomfort with "attempts to stretch the securities laws beyond their traditional scope" and acknowledged this Court's recent decisions indicating "pronounced disfavor" with such attempts. (App. 51). He expressed a quite different view of the SEC's historical and present position regarding the securities laws' applicability to noncontributory pension plans than that stated by Judge Cummings (Compare App. 52 with App. 25-27), protested that the "Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position" (App. 52), and agreed with the defendants that "[m]embers of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before [the court]." *Id.* He concluded, however, that Congress should be deemed to have left the matter in a posture where the applicability of the securities laws to noncontributory pension plans would be "determined by the Supreme Court" (App. 53).

REASONS FOR GRANTING THE WRIT

THE UNPRECEDENTED AND UNWARRANTED EXPANSION OF THE SECURITIES LAWS BY THE COURT BELOW CREATES IMMEDIATE AND SERIOUS DIFFICULTIES FOR THE FINANCIAL STABILITY AND ADMINISTRATION OF THE ENTIRE PRIVATE PENSION SYSTEM

Introduction

One knowledgeable court has observed:

> The securities laws in question, designed to safeguard the integrity of investment decisions, have been in operation for over forty years. Yet until the 1975 decision in *Daniel* * * * no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws. Congress has repeatedly indicated its belief to the contrary.[9]

The novelty of the decision below raises the suspicion that once again, as in *Forman*,[10] *Blue Chip*,[11] *Hochfelder*,[12] and *Green*,[13] a lower court has expanded the securities laws to achieve a result which Congress never intended. And the fact that Congress, acting on the clearly expressed understanding that it was filling a statutory vacuum, has twice enacted legislation which dealt with

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[9] *Robinson* v. *United Mine Workers of America, etc.*, 435 F.Supp. 245-247 (D.D.C., Gesell, J.) (footnote omitted). Judge Gesell's surprise doubtless stemmed in part from his own experience as an attorney at the SEC from 1935-1940, and as Technical Assistant to its Chairman from 1940-1941. See 1 *Who's Who in America*, 1137 (1977).

[10] *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837.

[11] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723.

[12] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185.

[13] *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462.

the precise problem of the nature and timing of disclosure to which participants and beneficiaries in collectively bargained and other involuntary noncontributory pension plans are entitled, is itself, as we shall develop, a powerful reason why the judiciary should not now pour new wine into these 40-year-old bottles. But the principal reason why certiorari should be granted is that the Court of Appeals' sharp reversal of the prior understanding creates immediate and enormous uncertainty and confusion which will burden employers, labor unions, pension fund trustees and plan administrators, the executive departments and the courts until this Court authoritatively determines whether the securities laws cover the relationship between involuntary noncontributory pension plans and their participants. Because they deem the securities laws to be inapplicable, pension plan administrators have uniformly failed to make disclosures to employees at the times and in the detail which is required under the theory of the decision below. Their funds, aggregating over $150 million (App. 24) are subject by the decision below to vast retroactive liabilities because of noncompliance with these laws. If the decision below is unreviewed, they must determine whether and in what amount they should account for these contingent liabilities, and whether they should now undertake the expensive and burdensome obligations to which they are not properly subject if the decision below was wrong. Their problems will be compounded because compliance with new disclosure obligations based on a broad and undefined securities law standard of materiality will have to be superimposed upon the existing disclosure and regulatory system created in 1958 and greatly expanded in 1974, a system in which Congress has dealt with the precise nature and timing of disclosures to which such participants and beneficiaries are entitled.

In Part I of our Argument we describe these serious adverse consequences in greater detail. In Part II we urge the substantiality of the question presented, showing first that the decision below is inconsistent with this Court's precedents construing the securities laws and second that it contravenes the prior universal understanding of the coverage of the securities laws, which Congress shared when it enacted two laws which deal specifically with disclosure by pension plans to their participants.

I. THE DECISION BELOW CREATES IMMEDIATE ADVERSE CONSEQUENCES FOR ALL INVOLUNTARY NONCONTRIBUTORY PENSION PLANS.

For over 40 years, employers, unions and pension fund trustees and plan administrators have operated under the belief that the federal securities laws are not applicable to the transactions whereby an employee accepts employment, or continues in employment, or votes on a collective bargaining agreement providing for employer contributions to a compulsory pension fund. As a consequence, they have not acted with the perception that they were selling a security. Certainly, they did not anticipate that they had the duty to disclose those matters which the court below suggested should have been disclosed. For example, it is doubtful that any of them have ever furnished actuarial data and assumptions to employees and prospective employees, yet the opinion below is replete with assertions that compliance with the antifraud provisions of the securities laws would have required such disclosures supposedly because they would enable such employees to determine their "risk of loss." (App. 8, 46, 47).

Pension funds' potential exposure is not limited to claims by those who, like Daniel, have failed to receive their pensions because of the operation of qualifying pro-

visions like break-in-service rules. The actuarial premises by which the amount of requisite employer contributions to a pension fund is determined in order to provide the anticipated benefit always include an assumption that a substantial amount of contributions will be made with respect to the labor of those who will leave their employ prior to vesting, and in fact a very large portion of fund assets available to pay pensions is derived from contributions made with respect to the employment of those who move on to other jobs. All such employees could now contend that the non-disclosure of such actuarial assumptions was a violation of the antifraud provisions of the securities laws as to them and that they were therefore entitled to damages equal to the amounts paid into the funds by reason of their employment.

Further, it would be a rare fund indeed which would have advised employee participants of the "success or failure" of the trustees' management or of the type of investments which were made, information which, as the court below notes, plaintiff complains that he never received (App. 7).

Nor do the opinions below represent the outer limits of what it will now be contended should have been, but was not said to plan participants, for as the Court of Appeals observed:

> When, as is often the case, the communication material [was] prepared by persons not thoroughly cognizant of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading. (App. 38, n.42, quoting ERISA testimony on behalf of the American Society for Personnel Administration).

To this point our discussion has related only to the view of the court below that the antifraud provisions of the federal securities laws are applicable. The problems

created by this exposure to damage actions are problems enough, but the problems do not stop there.

A determination of securities law coverage inevitably gives rise to the question whether the registration requirements of § 5 of the 1933 Act are applicable. The Court of Appeals gave three different answers to that question. First, at App. 27, note 32, it declared: "[T]he registration provisions of the 1933 Act do not apply to securities consisting of interests in pension plans." It promised to "show [why] in the opinion," but it did not, because it could not. Rather, in the immediately following discussion it relied on § 3(a)(2) of the 1933 Act as amended in 1970 [14] which, whatever else it may mean, is in terms limited to funds "maintained by a bank" or by an insurance company [15] (App. 29). It then tried to give comfort by quoting plaintiff's brief for the otherwise unsupported proposition that "because most employee pension plans are bank maintained, registration is not required for most employee pension plans." (App. 29, n.35, quoting Plaintiff's Br. 37-38). However, the requirement that a "trust fund [be] maintained by a bank," the key to § 3(a)(2) exemption, is not satisfied merely by having a bank account, the seeming predicate for plaintiff's claim that "most" plans are exempt from registration. In fact, the SEC's staff has interpreted the exemption available to trust funds maintained by a bank "to be unavailable where a trustee bank acts as a mere custodian . . . and does not exercise substantial investment responsibility." [16] Minimally, this would rule out funds which had their own investment manager or which used outside advisers which were not banks.[17] While petitioner does not have information which would show the number of pension funds that have all of their assets managed by other than banks or insurance companies, a study issued by the SEC itself shows that at the end of 1975, of the aggregate $145.6 billion asset value of all private noninsured pension funds, only $93.5 billion were managed by banks and trust companies. Thus, funds with assets of at least $50 billion would be nonexempt from registration, even if § 3(a)(2) were construed as exempting from registration all pension funds "maintained by a bank or in a separate account maintained by an insurance company." See SEC 35 Statistical Bulletin 552 (November, 1976).

Apparently uncomfortable with an interpretation which affords exemption from registration only to those plans which are "bank maintained," the court later took a different tack and suggested that: "Because of the long time and consistent administrative practice [of not requiring registration], these pension funds might be deemed beyond the scope of the registration requirements even if they are not already exempted by [§ 3(a)(2)]" (App. 50, n.61). The court then reiterated the unsupported assumption that "most [pension] funds . . . are invested by the trust department of major banks"

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[14] As the court itself recognized, the SEC has no general power to create exemptions from the registration requirements of the 1933 Act (App. 29, n. 34).

[15] In fact, § 3(a)(2) has nothing whatever to do with employee interests in a pension fund. It pertains only to dealings between banks and insurance companies on the one hand and those who establish or manage pension funds on the other hand with respect to the investment of pension fund assets. (See p. 38, n.53, *infra* and pp. 22-28 of the Local 705 Petition.)

[16] *Sterling National Bank & Trust Co.*, 1975-1976 Transfer Binder, CCH Fed. Sec. L. Rep., ¶ 80,433 (Feb. 10, 1976); See also *Bank of America*, 1971-72 Transfer Binder, CCH Fed. Sec. L. Rep., ¶ 78,614 (Dec. 8, 1971).

[17] The court below observed that a "portion of local 705 Pension Fund is maintained by the trust department of major Chicago banks." (App. 29, n.35). The balance is self-invested by the trustees largely in United States Government obligations. The court did not answer the question of whether or not this qualifies the Local 705 fund as one which is "maintained by a bank" within the meaning of Section 3(a)(2). (App. 29).

and stated that this is "apparently" why the SEC maintains that 96% of all pensions are "so exempted" (*Id.*) Yet in the same breath it quoted language from the SEC brief showing that the 96% estimate is the percentage of all pension plans which are qualified under the Internal Revenue Code. (*Id.*)

Given the inconsistent, unsupported and problematical attempts of the court below to limit the potential impact of the registration provisions of the Act, it is not surprising that commentators on the opinion question whether there is any way to "carve up" the securities laws so that the antifraud provisions are applicable to pension fund interests but the registration provisions are not. Hence they foresee little protection from contentions that many if not most funds should have registered if the securities laws are applicable at all.[18] While it is understandable that the SEC does not so contend, given its immediate objective here, nothing bars private litigants, especially with class action incentives, from so doing.

It is not necessary to quantify the potential liabilities for past omissions to realize that they are substantial and far-reaching as well as inconsistent with Congress's determination that pension funds should not be burdened with the financial consequence of retroactive application of new rules.[19] Nor will the adverse impact of the decision below be confined to the pension funds themselves, for the opinions below have already inspired additional lawsuits and undoubtedly will continue to spawn still

[18] B. W. Nimkin, BNA Pension Reporter No. 155, p. A-12-13 (Sept. 19, 1977); William J. Chadwick, Pensions and Investments, p. 3 (Sept. 26, 1977).

[19] II Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O., 1976) (hereinafter, "ERISA Leg. Hist.") at 3177.

more. Petitioner cannot develop a complete list of post-*Daniel* actions which are based in whole or in part on the claim that the federal securities laws are applicable to employee coverage under pension or welfare plans. However, the seventeen cases listed in Appendix A hereto in which petitioner has been named a party and other cases brought to its attention by the bar, suggest the dimensions of the problem.

The burden imposed upon the federal courts by garbing a state common law fraud claim in the trappings of federal jurisdiction, is not lightly assumed. Cf. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 40. The cost of bearing that burden must be reckoned in the overloading of judges with a consequent reduction of time and attention to those matters which are properly and traditionally the province of the federal judicial system.[20] The problem is exacerbated when actions can be filed and maintained as class actions, as has already happened here.[21]

[20] The complaint in *Daniel* asserts federal causes of action arising under § 9(a) of the National Labor Relations Act and § 302(c)(5) of the Taft-Hartley Act as independent bases for federal jurisdiction. However, the causes of action under the federal securities laws are obviously of far greater interest to plaintiff as a class representative and add a substantially broader dimension to the case.

[21] In *Daniel* itself, the District Judge has certified a class consisting of

> "All persons (1) who are now, or who were, members of Local 705 of the IBT, and (2) who have purchased or otherwise acquired an interest in, through a contribution to or on whose behalf a contribution has been made to, the Local 705 Pension Fund, which requires for the payment of a full retirement benefit a total period of service in excess of twenty (20) years."

This class numbers over 15,000 persons. In certifying the class, the Judge did not say how the action will be managed if "[p]articular employees must show in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing him injury" or how he and the litigants will deal with such ques-

The impact of considerations of past liability is only half the story. If *Daniel* is not reviewed and reversed, the pension fund community must then consider whether, when and how it should comply with the opinions below.

The SEC's brief below dealt with the subject of what affirmative disclosures pension funds must make to avoid antifraud liability with carefully equivocated minimizations,[22] and the court below asserted that not much would be required. (App. 44, 48-50) The bar, understandably, takes a more cautious view.

> Despite the Seventh Circuit's comforting comments regarding the burdens imposed by its decisions [sic] the impact on the collective bargaining process is likely to be significant.
>
> * * * *
>
> Adequate disclosure under the federal securities laws of contracts as complicated as a pension plan and trust agreement cannot be lightly effected, and generally require extremely careful drafting. * * *

Dan L. Goldwasser, *Pension & Executive Compensation '77*, New York Law Journal (October 3, 1977), p. 29.

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tions as whether a particular employee was aware of a plan's "key requirements," or whether a particular employee can establish the factual prerequisites for tolling the "applicable statute of limitations as to him," issues which the Court of Appeals says are still to be resolved. (App. 50-51)

[22] E.g.: "The antifraud provisions, by contrast [with registration provisions], do not establish a system for affirmative disclosure consisting of the preparation or filing of documents. While they could, *under some circumstances, require that a person make affirmative disclosures* (which may be oral or written) necessary in order not to mislead a securities purchaser, the antifraud provisions are essentially a generalized prohibition against fraudulent activity." (SEC Br. 5 emphasis added).

"[T]he antifraud provisions do not constitute a general requirement of *detailed* affirmative disclosure, either oral or written." (SEC Br. 58 emphasis added)."

Aside from disclosures with respect to the plans themselves, the Court of Appeals' desideratum of a "self-executing compulsion to disclose" what it dubs the "statistically determinable risk that many employees covered by a plan will never receive their pension benefits" (App. 46-47, see also *id.* 8, 50), creates a real dilemma. Actuarial assumptions are not actuarial facts. Even when they are based upon experience data, they speak of a statistical universe. An actuarial assumption that half of the employees upon whose employment contributions are paid will move on to other jobs before vesting occurs says little or nothing to a 40-year-old who is prepared to make a career decision. Indeed, providing such data to a 40-year-old employee could be misleading where the assumption, or even the data upon which it is based, is heavily weighted by the mobility of the 20 to 30 year group. Similar problems arise when the statistical universe embraces categories as diverse as laborers and general foremen, as it so often does. Lawyers practised in securities law compliance could opt to protect a pension fund from potential future liability by providing employees with verbatim copies of complex actuarial reports with the caveats that what is submitted (a) is based generally not on fact but assumption, (b) to the extent it is based on past data, is not necessarily predictive of the future, and (c) may have no bearing as to that particular individual. They would then ask "what other 'disclosures' should be made to avoid liability where the only limiting factor to contentions of non-disclosure is the imagination of counsel for potential plaintiffs"? The only safety would appear to be in an equally boundless anticipation. That is the securities laws approach.

This is not what Congress has prescribed. Congress's response to the acknowledged inadequacies of pension fund disclosures to employees was to enact ERISA with its carefully prescribed disclosure requirements. The key disclosure document under ERISA is the "summary plan

description" which must "be written in a manner calculated to be understood by the average plan participant" and must cover precisely described categories of information. ERISA, § 102, 29 U.S.C. § 1022. The problems attendant upon reconciling the disclosure requirements of ERISA with the additional requirements imposed by application of the federal securities laws are numerous.[23] Even the question of when disclosures are required to be made is now in doubt.[24] And, of course, there is the entire problem of whether SEC registration is required, see pp. 14-16, *supra*.

One of Congress' principal objectives in enacting ERISA was "to reduce duplication of effort . . ., duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators [and] employers . . ." ERISA, Section 3004(a). The impressing of securities laws requirements and potential Securities and Exchange Commission regulation upon that required under ERISA and regulated by the Department of Labor and the Internal Revenue Service flies in the face of this Congressional objective.

Compliance with ERISA and the regulations enacted thereunder should have produced a state of relative as-

[23] One authority has observed that "[u]nder the securities laws, additional disclosures may be required in order to make those mandated under ERISA not misleading." Dan L. Goldwasser, *Pension & Executive Compensation, '77*, op. cit. p. 18, *supra* at 10.

[24] The SEC argued below that "a sale occurs when the employee decides to take or keep a job . . ." (SEC Br. 59, see also *id.* 41, 49, 51). The Court of Appeals adopted this view and the concomitant that "material facts, including, of course, risk of loss, be disclosed prior to the investment decision" (App. 46). More recently the Chairman of the SEC, seeking to assuage the questioning Chairman of the Senate Human Resources Subcommittee on Labor, has said that the antifraud provisions of the securities laws could be satisfied by disclosure made 90 days after employment (as ERISA provides) and stated that he does not read the opinion below as requiring pre-employment notification. BNA Pension Reporter, No. 159, p. A-16 (October 17, 1977). Such inconsistencies serve to intensify the problems that *Daniel* has created.

surance for those concerned with pensions. Instead, the opinion below has created a state of vast uncertainty as to what is now required, with regard to both substance and geographic applicability. Should *Daniel* be followed in the Seventh Circuit and ignored in California and the District of Columbia where four district court judges have held that the federal securities laws do not apply to interests in compulsory, noncontributory funds (see *Cinnamon, Hurn, Robinson* and *Wiens* cases cited in Appendix A)? If the answer is thought to be that *Daniel* need be followed only in the Seventh Circuit, how would that answer be applied where, as is so often the case, a single pension plan covers employees in a number of jurisdictions? Little wonder that one knowledgeable authority has said that *Daniel* "creates nightmares for large companies." [25]

II. THE COURT OF APPEALS ERRED.

A. This Court's Precedents Preclude the Court of Appeals' Novel Holding That Compulsory Noncontributory Pension Plans Are Within the Scope of the Securities Laws.

1. In *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (*"Forman"*), this Court reversed a Second Circuit decision that "stock" purchased by occupants of a cooperative apartment project was a "security" as to which a private action could be brought under the securities laws. This Court's analysis in *Forman* compels disapproval also of the conclusion of the court below that a participant in an involuntary noncontributory pension plan acquires a "security." In *Forman*, this Court explained:

> The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely un-

[25] Remarks of James D. Hutchinson, formerly Administrator of Pensions and Welfare Benefit Programs, Department of Labor, quoted in *Pensions and Investments* (September 26, 1977) p. 3.

> regulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. (*Id.* at 849).

The Court of Appeals failed to heed *Forman's* teaching that the "focus of the Acts" constitutes a significant restriction on their coverage.[26] The heart of the matter is that when an individual becomes a participant in an involuntary non-contributory pension plans he is not in the capital market; he is in the labor market. In his capacity as wage earner and potential pension beneficiary the employee is not an "investor" in any sense understood by Congress when it was protecting investors in the securities markets, and he does not acquire anything which can reasonably be assimilated to any of "—the many types of instruments that in our commercial world fall within the ordinary concept of a security" H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933), quoted in *Forman*, 421 U.S. at 847-848. And it likewise stretches these laws far beyond their original scope to hold, as the Court of Appeals did, that an individual's acceptance of or

[26] Viewed most narrowly, *Forman* is very much in point as illustrating this Court's certiorari policy, for there certiorari was granted "[i]n view of the importance of the issues presented. . . ." (421 U.S. at 847) The impact of this case on involuntary non-contributory pension plan parallels that of *Forman* on nonprofit cooperative housing corporations: here, as there, the issue is the basic one of securities laws coverage. Moreover, it cannot be gainsaid that the potential impact of the decision below is even greater than that of the decision reviewed in *Forman*, because pension plans which are now swept under the securities laws cover far more persons than occupy housing cooperatives.

remaining in covered employment gives rise to a "purchase" and "sale" of an interest or participation in a pension plan.

Even as the shareholders in *Forman* decided basically whether they wanted to live in a particular place, so the employee's decision here is whether he wishes to work for a particular employer. But the court below sought to differentiate the cases: "It is clear that the union member does not intend to purchase a commodity or realty for personal use; rather he parts with his money in the hope it, through the management of others, can fund his retirement." (App. 17, n.20) But this is simply contrary to fact. The employee does not part with money; he performs labor. The money which the fund receives is contributed by the employer for the benefit of the employee group as a whole; a particular employee cannot choose to receive it at the time he works and may have no expectation of ever receiving it.[27] The Court of Appeals has simply obliterated the essential differences between involuntary noncontributory plans and voluntary contributory plans. Its description also disregards a basic element of all collectively-bargained plans, namely that they are negotiated by a union as representative of the entire group, rather than of any individual.[28]

2. *Forman* reaffirmed the proposition that coverage under the securities laws is to be determined according to the economic reality of the situation; the court below misperceived that reality in numerous respects, only some of which can be described in this Petition.

[27] This may occur because the employee does not intend to remain with the employer for a period sufficient to provide vesting, or because he became covered in his employment too late in life to achieve eligibility, or for numerous other reasons.

[28] Compare *Robinson, supra*, 435 F.Supp. at 247: "As in *Forman*, interests in the Trust are inalienable, and any surplus will be converted into extended benefits for all rather than invested for the individual miner's profit."

a. Forman teaches, by example, that "economic reality" is not preserved by taking a complex transaction, breaking it into small parts and then determining that the totality is covered by the securities laws because one element bears a resemblance to other transactions which are covered, but whose other characteristics are entirely different.[29] So here, the economic reality of the transaction is doubly distorted by characterizing an individual's acceptance and performance of a job which is covered by a collectively bargained pension plan as the "purchase" of a "security". First, it necessitates isolating from the employees' total compensation a single "fringe benefit", the employer's contribution to the pension plan. Second, it characterizes the employee's participation in the pension plan on the basis of a single factor which increases the amount of money in the pension fund—its investment performance—to the exclusion of other factors which are more important: the use of a pooled fund specifically authorized through § 302(c)(5) of the Taft-Hartley Act, where contributions are made with respect to the labor of individuals who will never be beneficiaries,[30] and the advantage of current contributions to the fund far in excess of those made when the beneficiary was acquiring eligibility. And it also excludes consideration of other far more important determinants of the amount of the benefit, if any, which the participant will ultimately receive: the participant's compliance with the eligibility requirements (which may be impossible through no fault of his own because he is discharged, or his em-

[29] Precisely such fragmentation was the line of analysis advocated by the SEC in *Forman* but rejected by this Court. See, 421 U.S. at 851-858. (Brief for the Securities and Exchange Commission, No. 74-157, Oct. Term, 1974, p. 17).

[30] See, *e.g.*, *Johnson* v. *Botica*, 537 F.2d 930, 935-936 (CA 7); *Local Union No. 5, Sheet Metal Workers' International* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636 (CA 6). See also, *Walsh* v. *Schlecht*, 429 U.S. 401, 408-410.

ployer goes out of business); the award of past service credits; the trustees' determination of how much can be paid, consistent with the interests of other participants, and the beneficiary's individual life expectancy. Each of these factors is entirely foreign to "* * * 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" 421 U.S. at 847-848. While the SEC argued in *Forman* that "an investment contract type of security may exist where investors are motivated by any significant economic inducement"[31] that view did not prevail.

b. Another misunderstanding of the nature of these plans appears in the court's rejection of the International's argument that there is no security because

> employees do not even have an interest in the pension plan except in the attenuated sense that they have a contingent expectancy of receiving pension payments at a future date. (App. 16)

The court responds:

> [M]ere contingent expectancies are the rule rather than the exception in the equity markets. Profits in an equity security require that the market value plus accrued dividends of a stock be greater than the stockholder's cash basis. Thus profits are contingent on the successful operation of the common enterprise, there the issuing corporation. (*Id.*)

But while a stockholder is not *assured of a profit* unless the enterprise is successful, even if it is unsuccessful he does own a present share of the enterprise, stock which he can sell for *some* money as long as the corporation is in existence, at least short of its bankruptcy. On the other hand, a participant in a pension plan can never convey any "interest" therein, no matter how successful

[31] Brief for the Securities and Exchange Commission, No. 74-157, Oct. Term, 1974, p. 15. See also Brief for Respondents, *id.*, p. 27.

the pension fund is in accumulating earnings. And though conceding that the analogy it draws between covered employment before benefits vest and the situation of a stockholder forced to sell his stock at a net loss "is not exact", the court regards the difference to be immaterial:

> [W]e think that a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer, is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future. (*Id.*)

But here again the court errs, because the right to receive benefits *is* subject to unilateral withdrawal by both pension trustees and the employer. The broad power of pension trustees to establish and modify pension eligibility requirements is well established.[32] And there are many ways in which the employer can effectively destroy the potential eligibility of some or all of his employees.[33] Such action is completely unilateral where the employees are unrepresented; and even where the employees are represented, it is elementary that the employer is not obligated to acquiesce in the union's demands. See *e.g.*, *Porter Co.* v. *NLRB*, 397 U.S. 99, 109. Thus, where the obligation to contribute to the fund is established by collective bargaining, the employer can withdraw from the plan by agreement with the union (if it determines this to be in the employees' interest) or, if the union objects, by succeeding in a test of economic strength. Moreover, this Court has recognized the employer's unilateral right to go out of business, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, which would likewise put an end to

[32] See *e.g.*, *Pete* v. *United Mine Wkrs. of Am. Welf. & R.F.*, 517 F.2d 1275 (C.A.D.C.).

[33] ERISA, and perhaps § 302(c)(5) of the LMRA impose limitations on the power of employers or pension trustees to withdraw the right to a benefit or defeat the expectancy of a benefit.

that employer's funding of a single-employer plan or contributing to a multiemployer fund. So, too, the cases are unfortunately legion where an employer has shut down a plant, thereby depriving many employees of their jobs and their pension expectations as well.[34] And of course the employer can foreclose an individual employee from ever attaining eligibility by discharging him, which he may do unilaterally, except insofar as a collective bargaining agreement restricts the exercise of that power.

c. Economic reality is only camouflaged by calling a employee an "investor" who makes an "investment of money" by working in covered employment or by analogizing his participation in the pension plan to stock options,[35] bonds and debentures,[36] or mutual funds and

[34] See e.g., *Malone* v. *White Motor Company*, No. 76-1184 *cert. granted*, 46 U.S.L.Wk. 3183, Oct. 3, 1977 *to review* 545 F.2d 599 (C.A. 8); *Dwyer* v. *Climatrol Industries, Inc.*, 544 F.2d 307 (C.A. 7), *cert. denied*, 430 U.S. 932; *Craig* v. *Bemis Co., Inc.*, 517 F.2d 677 (C.A. 5); *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128 (C.A. 3), *cert. denied*, 409 U.S. 1126; *Baake* v. *General American Transportation Corp.*, 351 F. Supp. 962 (N.D. Ill.).

While an employer is obligated to bargain about such a shutdown, a strike to prevent a shutdown will rarely if ever be successful, since the employees can only withhold labor which, by nature of the problem, the employer does not want.

[35] See App. 18-19, citing *Collins* v. *Rukin*, 342 F.Supp. 1282 (D. Mass.). All that case decided on this point was that "the Court declines to hold that the [employment] context as a matter of law requires that the *explicit inclusion of stock options in the definitional sections* of the 1933 and 1934 Acts *be disregarded* for the purpose of determining the question of subject matter jurisdiction." (*Id.* at 1288, emphasis added).

[36] See App. 19, n. 23, equating the "fixed return" of bonds and debentures with the fixed level of pension payments. But in bonds, etc., the amount of the return is fixed in the instrument, and therefore is known at the time of purchase, and depends on how much money the purchaser pays, for that determines the number of bonds he receives. In contrast, the amount of the monthly payment to beneficiaries is not fixed until the time of their retirement (that is, until the employee has completed the years of labor which the court below held to be his "purchase"), and the actual return which

variable annuities.[37] Such word play "ignore[s] the ancient wisdom that calling a thing by a name does not make it so." *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174.

d. Contrary to *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199, the court below took it upon itself to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning" in order to conclude that there is a "purchase" and a "sale" within the meaning of § 10(b) of the 1934 Act and § 17 (a) of the 1933 Act whenever an individual accepts or remains in covered employment. Those terms do not describe every economic transaction in which an individual provides value for a return or for the expectation of a return. One would never say that an employee "purchases" his wages by performing labor; yet the Court of Appeals held that by performing labor an employee "purchases" an interest in a pension plan to which his

any individual will receive depends not only on the rate of payments, but also on whether he ever achieves eligibility and how long he lives thereafter. Further, bonds and debentures are ordinarily negotiable, and most significantly, are expressly included within the statutory definitions of "security."

[37] (App. 23). To enumerate just some of the differences between both of these investments and participation in a pension fund, a participant in a pension fund does not contribute specified sums of money, he may not sell, trade or redeem his interest, he does not have a proportionate share of the underlying portfolio and he does not entrust his personal capital to the pension plan administrators; moreover, the amount of his benefit is fixed by the trustees on the basis of numerous considerations which do not include the specific amount of money paid in because of his labor, but do include primarily the long term interests of the fund and other participants and the likelihood of continued or increased employer payments. (See pp. 24-25, *supra*). The income variances of the fund bear only a small, if any, relation to that ultimate fixed benefit. Unlike mutual funds and variable annuities, participations in a non-contributory pension plan represent a *collective* interest in an undivided fund.

employer contributes as partial compensation for his labor. Moreover, the terms "purchase" and "sale" normally connote that something has been conveyed from the seller to the purchaser (and usually in some direct relation to the amount of money paid by the purchaser). Yet the trustees of a pension plan convey no interest to an individual when he commences covered employment or when he performs labor thereunder; indeed, until he has stopped working (or "purchasing" under the usage of the court below) the employee can receive no benefits from the fund. In thus expanding coverage of the securities laws beyond the normal meaning of their language, the court violated the precepts of *Hochfelder*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472-474, and *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733, n. 5, 749-751 (see also *id.* at 756-757, concurring opinion).[38]

The result and reasoning of *Blue Chip* are especially in point in the present case. Since the Local 705 pension plan was established after Daniel commenced the employment on which he bases his eligibility (see p. 6, n.4, *supra*), it is insufficient for Daniel's claim to hold that acceptance of covered employment is a purchase; his cause of action depends on the further proposition that continuation in covered employment also constitutes a purchase. Yet, in this respect, he stands on no better footing than a stockholder allegedly lulled into keeping his monetary investment, who is denied standing to sue

[38] Section 2(a)(3) of the 1933 Act provides that "[t]he term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value." Sections 2(a)(13) and 2(a)(14) of the 1934 Act provide respectively that "[t]he terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" and "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." As we have seen (p. 5, *supra*), there is no interest which an employee "acquires" or a pension fund "disposes of" when, according to the court below, a purchase and sale occurs.

by *Blue Chip*.[39] The decision below thus equates the acceptance of employment with the purchase of stock, but then treats continuation in employment *more favorably* for the purposes of standing under the securities laws than a decision to hold the stock. This is truly a paradoxical result, given that the securities laws were "designed to safeguard the integrity of *investment decisions*" (*Robinson* v. *UMW*, *supra*, 435 F.Supp. at 247, emphasis added).

Moreover, it is true here, as it was in *Blue Chip*, that recognizing the cause of action would create a "social cost rather than a benefit," 421 U.S. at 741, and for the same reasons: The holding that continuation in employment is a "purchase" "throw[s] open to the trier of fact many rather hazy issues of historical fact the proof of which depends almost entirely on oral testimony." (*Id.* at 743).[40] And since such "an action under Rule 10b-5 will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement" (*id.* at 742), the expense of defending against a 10b-5 claim would invariably be greater than paying a pension to a claimant even if he is ineligible under the pension plan's rules. Plan trustees will thus be put to the truly unenviable choice of spending the fund's assets to defend a lawsuit, or disregarding the plan's eligibility requirements. Under either choice, the individuals who do qualify under the plan's rules would be the ultimate losers, because less money would be available to pay their benefits.

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[39] *Blue Chip* reserved the question whether a nonpurchaser could sue under § 17(a) of the 1933 Act. We believe that the result should be the same, at least with respect to involuntary noncontributory pension plans, because the language of the statutes is not materially different for present purposes, and because the problem of proof and other possibilities of abuse which were stressed in *Blue Chip* and are present here are identical if suit is brought under the 1933 Act.

In any event, there is a conflict among the circuits as to whether § 17(a) *ever* gives rise to a private cause of action. Compare the decision below with *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783 (C.A. 8), followed in *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 159 (C.A. 8). That issue is obviously a recurring and important one, which would merit this Court's attention even if it arose in a less important context than is presented by the broader issues of this case. The likewise important question of whether an implied private right of action arises under § 10(b) of the 1934 Act and Commission Rule 10b-5 for misrepresentations and omissions relating to such non-securities market contexts as becoming or remaining a participant in a compulsory non-contributory pension plan would also be reached if this Court were to conclude that a participation is a "security" and the transactions whereby that "security" is acquired is a "sale" within the meaning of the federal securities laws.

[40] This point is further developed, *id.* at 746, in reasoning which is also directly in point:

> Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representation contained in it damaged him.

Compare App. 6 where the court below took note of the statement in Daniel's affidavit that the Local 705 pension plan "was a material factor in his continuing employment with Local 705 covered employers [and that] if he had known that Local 705 would interpret the pension plan as requiring uninterrupted service of 20 years, he would have sought employment with an adequate retirement plan." And see App. 37, n. 41 where the court below observed that "Daniel's affidavit reveals material reliance on pension benefits in retaining his job."

In sum, even if participations in involuntary noncontributory pension plans are securities, "the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good." (*Id.* at 747-748, quoted with approval in *Hochfelder*, 425 U.S. at 214-215, n.33.)

3. In driving to the result that the securities laws applied, the Court of Appeals was evidently prompted by its strong feeling that such coverage is both necessary and desirable. (App. 24, 33-34, 36, n.40, 37, n.41, 46-51.)[41] But this Court forcefully rejected such result-oriented expansion of the coverage of the securities laws, in *Forman*: "The determination of whether and in what manner federal regulation may be required for housing transactions, where the characteristics of an investment in securities are not present, is better left to the Congress, which can assess both the costs and benefits of any such regulation." (421 U.S. at 859, n.26). The court's error is even more serious here, because, as we next show, Congress has in fact acted on the problem and chosen to deal with it through legislation addressed to the special characteristics of pension plans, rather than by forcing this relationship into the pre-existing mold of the securities laws.

---

[41] The court below said, "[r]educed to fundamentals, economic reality mandates the realization of the immense importance of private pension plans to the American capital markets." (App. 24.) That proposition is incontrovertible, and the activities of pension funds in the capital markets, that is, the investments made by the plan trustees, are of course subject to the securities laws. But the issue in this case is whether the relationship between involuntary noncontributory pension plans and their participants involves a transaction subject to the securities laws, and it is the economic reality of that transaction on which the decision must turn.

B. The Decision Below is Contrary to the Prior Understanding of the Securities Laws, which Congress Shared in Enacting Specific Legislation Concerning Disclosure by Pension Plans to Employees.

Congress has twice enacted legislation designed to protect the interests of participants and beneficiaries in noncontributory involuntary plans, and dealt therein with the precise problem of the nature and timing of disclosure to which plan participants and beneficiaries are entitled. Congress did so in 1958 in the Welfare and Pension Plan Disclosure Act (WPPDA), and in 1974 more comprehensively through ERISA. On both occasions the SEC disclaimed either authority or expertise concerning collectively bargained pension plans, and it reinforced the Congressional understandings—first (prior to WPPDA), that employees were not at all protected by federal law with respect to information concerning pension benefits, and thereafter (prior to ERISA), that existing law was inadequate, in part because no law provided employees with sufficient information. At no time were the Congressional committees studying pension plans advised that the securities laws (specifically § 17(a) of the 1933 Act and § 10(b) of the 1934 Act) already obligated plan administrators or others to provide employees who obtain or choose to retain employment covered by a collectively bargained pension plan with information concerning that plan, or that those laws dealt in any manner with the relationship between such pension plans and their participants. The committees were told just the opposite. And in both instances they legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to that relationship.

In 1957, two alternative proposals for pension reform were before the Senate. One of these, by Sen. Douglas, would have vested jurisdiction in the SEC, and the other, by Sen. Ives, proposed to vest responsibility in the Department of Labor. The SEC commented in detail on

this proposed legislation. Although it observed that "[b]oth bills provide for disclosure to beneficiaries and to the public" [42] (*id.* at p. 63), the SEC's Report and Memorandum gave no hint that the SEC believed that such disclosure was already required by the securities laws.

Acting SEC Chairman Andrew D. Orrick testified that "[t]he functions of the Securities and Exchange Commission are devoted to the regulation of the capital securities markets. * * * But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital securities markets." [43] Against this background, Congress determined to regulate welfare and pension plans and to vest administrative responsibility in the Department of Labor rather than the SEC. See the Senate Report quoted by the court below, (App. 44, n.53).

In 1965, the President's Committee on Corporate Pension Funds filed a unanimous report, joined by the Chairman of the SEC, Mr. Manuel F. Cohen, which recommended legislation for increased disclosure to, and reme-

[42] Hearings Before the Subcommittee on Welfare and Pension Plan Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess., pp. 62 *et seq.*

In the previous Congress, the Subcommittee had issued a report which stated:

> Thus, with the exception of the ineffective sections of the Labor-Management Relations Act, 1947, and the Internal Revenue Code, as discussed above, there presently exists no Federal statute, regulation, or authority which attempts to protect the rights of the beneficiaries of welfare and pension plans.

S. Rep. 1734, 84th Cong., 2nd Sess., 60 (1956).

[43] *Id.* p. 107. The same views were expressed in an SEC staff memorandum, (*id.* at 119, quoted in part at App. 44, n.53) which said also:

> Many of the plans involved in this legislation are the fruits of collective bargaining. Accordingly, these plans are inseparably intertwined with labor-management relations. Abuses in this area then have their main effect upon an economic area in which the Commission does not possess expertise.

dies for, pension plan beneficiaries.[44] And in 1972, the then SEC Chairman, Mr. William J. Casey stated in a letter to the Subcommittee which was responsible for what became ERISA:

> "[W]e believe that employee benefit plans *should* be subject to the requirement of adequate disclosure of investment returns based upon appropriate adjustment for volatility. In this way, the participants as well as the Secretary of Labor would be advised of the extent to which the plan's investment assets were being subjected to varying degrees of investment risk." [45]

These recommendations would have been pointless if Messrs. Cohen and Casey had believed that the 1933 and 1934 securities laws already required disclosures from involuntary noncontributory pension plans to their participants.[46]

[44] The President's Committee recommended "a requirement for the disclosure of additional information related to the investment activities of retirement plans, by amendment of the Welfare and Pension Plans Disclosure Act. Disclosure of investment holdings and activities in much more detail than is now required, *perhaps in the same manner as is required of investment companies under S.E.C. regulation*, would seem useful and entirely feasible without impairment of retirement plan operations. President's Committee on Corporate Pension Funds, *etc., Public Policy and Private Pension Programs—A Report To The President on Private Employee Retirement Plans* (1965), p. 78.

[45] (Emphasis added) S. Rep. No. 92-1150, 92d Cong., 2d Sess. 68.

[46] The court says "that the SEC has historically *advocated* a hands-off approach to the regulation of pension plans with respect to disclosure requirements holds no brief for exempting pension plans from the anti-fraud provisions of the securities acts." (App. 44, our emphasis). But the statements of the SEC cannot accurately be so described. The SEC did not favor a general "hands-off" policy; on the contrary, as we have seen, in 1972 its Chairman affirmatively recommended that legislation governing disclosure by pension plans to their participants be enacted; and in 1957 what it advocated was that jurisdiction over such regulation be vested in an agency with greater competence over the subject than the Commission, not that no such legislation should be enacted. More significantly, the Commission's observations were not mere "advocacy" but rather were

At the outset of its investigation that Senate Subcommittee had caused a detailed analysis to be made of all legislative regulation of pension plans, the results of which were set forth in the 1971 Interim Report [47] and were then carried forward in subsequent committee reports in both bodies, in a summary entitled "*The Existing Law*".[48] The majority opinion interpreted the Report's discussion of the role of the securities laws as stating only that the *registration* requirements of the 1933 Act were deemed to be inapplicable, and not that the anti-fraud provisions of both Acts are inapplicable (App. 43-44). It described the failure to make this distinction as "defendants' quintessential error," (App. 44) but it is plainly the majority below which erred. For, the Interim Report stated that "pension and profit sharing plans are exempt from *coverage* under the Securities Act of 1933 * * * unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer." [49] The Court's reading is also inconsistent with other portions of the Interim Report which depict the peripheral role of the SEC [50] and

disclaimers of authority under the then-existing state of the law, which in the context of the proposals before Congress on those occasions could only have been understood as assertions that no legislation for which it was then responsible involved the protection of the rights of participants and beneficiaries under collectively bargained pension plans.

[47] Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972).

[48] S. Rep. No. 93-127, 93rd Cong., 1st Sess., 4-5 (1973), I ERISA Leg. Hist. 587, 590-591; H.R. Rep. No. 93-533, 93rd Cong., 1st Sess., 3-5 (1973), II ERISA Leg. Hist. 2348, 2350-2352.

[49] Interim Report at 96 (our emphasis). The fact that the Report also observed that those plans which are covered must be "*registered*" (court's emphasis) cannot narrow the word "coverage" to encompass only the registration requirements.

[50] Only the Labor Department and the Treasury Department (through the Internal Revenue Service) were considered to have

which do not even mention the securities laws in the section entitled "Legislative Regulation".[51]

The majority below notes that "the Congress that enacted ERISA" was not "unaware that the SEC considered interests in pension funds to be securities under the 1933 Act unless excepted." (App. 44, n.53, referring to the Institutional Investor Study, hereinafter "SEC Study"). However, as Judge Tone recognized (App. 52), Congress' awareness of the SEC Study cuts *against* the conclusion that Congress believed the anti-fraud provisions to be applicable and only the registration provisions to be inapplicable. For the SEC Study also declared that "the Commission Staff has taken the position that the Securities Act *does not apply* because there is no 'sale' or 'offer of sale' of a security." [52] That the Study correctly described the SEC's consistent interpretation of the laws which it is directed to enforce is confirmed by the SEC's actual practice: The Commission *never* exercised the authority it now claims; it *never* regulated noncontributory involuntary pension plans under the anti-fraud provisions of the 1933 and 1934 Acts, either by rules, or interpretive guidelines, or enforcement pro-

"any degree of control over the administration and operation of private pensions." Interim Report, at 91.

[51] Interim Report, at 23-29. The summaries in the Reports cited at p. 36, n.48, *supra*, stated "there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." They listed the WPPDA of 1958, the Labor-Management Relations Act of 1947, and the Internal Revenue Code.

[52] SEC Study, p. 996, emphasis added. The foregoing is contained in a subsection entitled "(1) Corporate pension and profit-sharing plans—(a) Plans not providing for voluntary contributions." (*Id.*) In the next subsection, "(b) Plans providing for voluntary employee contributions" (*id.* at 997) the SEC Study described the Commission's no-action position with respect to "registration" of participations in certain voluntary contributory plans.

ceedings. (See 1933 Act §§ 19(a), 20, 24; 1934 Act §§ 21, 23(a)(1).

In sum, Judge Tone was clearly right when he stated, "Members of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before us." (App. 52, concurring opinion).[53] He declined to give

[53] The majority below read a 1970 amendment to § 3(a)(2) of the 1933 Act as approving what the court considered to be the SEC's practice of exempting involuntary noncontributory pension plans from registration, but subjecting them to the anti-fraud provisions. As some of the manifold objections to that interpretation are discussed at pp. 22 to 28 of Local 705's Petition, we shall here merely note the major inadequacies in the court's opinion.

One of these has already been mentioned: the court's opinion is internally inconsistent with respect to whether all or some pension plans are now exempt, and if only some are, whether all plans qualified under § 401 of the Internal Revenue Code, are exempt, or only qualified plans maintained by a bank or by an insurance company account. Contrast App. 27, App. 28, n.34 and App. 50, n.61, which we discuss at pp. 14-16, *supra*. *Second*, the court bases its interpretation on the proposition that § 3(a)(2) was subject to a fundamental change of focus when the House Committee added the words "single or" (App. 31) but does not mention that the Springer-Moss colloquy, which was clearly intended to explain the addition of those words, authoritatively states that they changed the meaning of the exemption only "slightly." 116 Cong. Rec. 33287 quoted in Local 705's Petition. *Third*, the court cites no reference in the legislative history which shows that Congress even knew of the existence of the administrative practice which was assertedly being codified; this omission is not due to oversight, but was unavoidable because there is no such reference. *Fourth*, the court does not even reflect upon the inherent unlikelihood of its scenario, whereby Congress changed the whole focus of major legislation on the basis of a letter from one attorney, without hearing from any of the numerous parties who would be affected, and without spelling out in debate or committee report precisely what it had done. *Finally*, the court's interpretation of the 1970 amendment is flawed by its failure to recognize that the 1971 Institutional Investor Study describes an administrative practice which, insofar as pertinent here, is the precise opposite of that which the court says was codified in 1970, see p. 37, *supra*.

controlling weight to that fact, however, because he attributed to Congress the understanding that the question was open in "the Supreme Court [which] has been known to disagree with" the SEC, and that it "appears likely that Congress has chosen to leave the matter in that posture." (App. 53, concurring opinion). We submit that it is most unlikely that Congress made that choice. There is simply no evidence in the legislative record to justify the surmise that Congress even contemplated the possibility that the securities laws might apply to the relationship between involuntary noncontributory pension plans and their participants. Its description of "the existing law" in the final reports issued by the respective committees of the House and Senate (see p. 36, n.48, *supra*) evidences that Congress was confident that it was entering an area in which there were no existing federal laws, except for the Internal Revenue Code and WPPDA, which were substantially superseded by ERISA, and the NLRA which simply prescribes the structure of collectively bargained plans. Moreover, if Congress had been given any reason to entertain a doubt on this score, it most probably would have taken steps to prevent the securities laws from expanding into this area, for the avoidance of bureaucratic duplication and conflict was one of Congress' principal objectives.[54] At the very least, when one pro-

[54] See, *e.g.*, ERISA § 3004 quoted at p. 20, *supra*. See also, *e.g.*, Senator Williams' explanation of the bill which was enacted:

> One of the thornier problems confronted by the conferees was the question of arranging a workable administrative and enforcement structure that would incorporate the historic role of the Internal Revenue Service with respect to qualified plans as well as the broader role visualized for the Labor Department in terms of safeguarding the interests of participants and beneficiaries and applying its expertise in connection with collectively bargained plans and matters impinging on the field of labor relations. By carefully assigning specific functions to each agency, the Senate bill tended to create a dominant role for each agency and minimize the degree of overlapping. III ERISA Leg. Hist. 4770.

ceeds, as Judge Tone did, from the understanding that this is apparently the first time that the SEC has taken the position "that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws" (App. 52), one must agree with him that "this is a close and difficult case." (App. 51).

The majority below, however, accepted the SEC's revisionist history, of which Judge Tone perforce said: "The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position." (App. 52). In consequence, the majority gave the Commission's present views far greater weight than they deserve under the circumstances (see *e.g.*, *Forman*, 421 U.S. 837, 858, n.25, followed in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143; *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 n.27) and insufficient weight to the position which the SEC took in the first forty years. (See also *Hochfelder*, 425 U.S. at 212-214; Compare *Labor Board* v. *Drivers' Local Union*, 362 U.S. 274, 292.)

But the paramount importance of this history stems from the fact that Congress has twice enacted pension legislation in reliance on the SEC's existing interpretation. Even as the SEC "is not now free" [55] to assert that the securities laws regulate this subject, so, too, is the courts' freedom circumscribed, for the principled basis of this rule of construction is not that the agency should be estopped, but that the manifested Congressional will should be enforced. Thus even if, as Judge Tone apparently believed, the securities laws are so elastic that the

[55] *Bell Aerospace Co. Div. of Textron, Inc.* v. *NLRB*, 475 F.2d 485, 494 (C.A. 2), (Friendly, J.), quoted with approval and affirmed on this point, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289. Judge Friendly concluded, based on a careful examination of this Court's precedents, that "when an administrative construction has been long in effect, the agency cannot make a big change, especially after a reenactment or substantial amendment, but can make smaller ones."

courts could permissibly have applied them to reach involuntary noncontributory pension plans absent intervening Congressional action, the enactment of WPPDA and ERISA under the circumstances detailed herein forecloses this choice. These laws embody Congressional policies concerning the regulation of pension plan disclosure which the courts may not override and frustrate by rejecting the assumptions on which Congress justifiably proceeded. Compare *Califano* v. *Sanders*, 430 U.S. 99, 105-108.[56]

In sum, the court below has attributed to the 73rd Congress a legislative intent far beyond "the focus of the [1933 and 1934] Acts [which] is on the capital market of the enterprise system" (*Forman*, 421 U.S. at 849), and it has substituted for the determinations of the 93rd Congress its own strongly-felt views that the antifraud provisions of the securities laws should "supplement ERISA" to protect employees, whom it called "investor[s]", in making what it called "an investment decision." (App. 46-47).

[56] The Court of Appeals accepted the argument in the SEC's brief that the "no-sale" theory should be abandoned because it is now generally recognized that a noncontributory pension plan is not a gift. But here again the court below failed to apply the precepts laid down by this Court. "In interpreting the statute it is not our task to consider whether Congress was mistaken" in 1933 and 1934 in its view of the nature of a noncontributory involuntary pension plan: "rather, we must construe the statute in light of the impressions under which Congress did in fact act." *Moor* v. *County of Alameda*, 411 U.S. 693, 709; see also *Brown* v. *GSA*, 425 U.S. 820, 828; *Califano* v. *Sanders*, 430 U.S. 99, 107 n.7. It is especially unfitting for the courts to attribute the present, more sophisticated appreciation of the nature of these pension plans to the 73rd Congress because when later Congresses also rejected the "gift" theory, they concluded not that the securities laws should govern but that special pension legislation was necessary.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Blassie v. *Amalgamated Meat Cutters and Butcher Workmen of North America Retirement Plan and Trust Fund, etc., et al.*, No. 76-C-681 (N.D.Ill.)

Cinnamon v. *Brooks, et al. and Southern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund*, No. CV-77-204 LTL (C.D.Cal.) [Counterclaim based upon the federal securities laws dismissed on May 20, 1977; on November 8, 1977, the court dismissed the amended counterclaim which relied upon the Seventh Circuit's decision in *Daniel*]

Coffey v. *McCarthy, et al. and New England Teamsters and Trucking Industry Pension Fund*, No. 77-1863-C (D. Mass.)

Crabtree v. *International Brotherhood of Teamsters, et al. and Central States, Southeast and Southwest Areas Pension Fund*, No. 76-610 (E.D.Ky.)

Dutchak, et al. v. *International Brotherhood of Teamsters, et al. and Central States, Southeast and Southwest Areas Pension Fund*, No. 76-C-3803 (N.D.Ill.) [class action]

Hurn v. *Retirement Fund Trust of the Plumbing, Heating and Pipe Industry of Southern California*, No. 76-2487-AAH (C.D.Cal.) [Count based upon federal securities laws dismissed; see 424 F.Supp. 80]

McCart, et al. v. *Hartzer, et al. and Central States, Southeast and Southwest Areas Pension Fund*, No. 76-292-1 (S.D.Iowa)

O'Neil v. *Marriott Corporation, et al.*, No. M-77-495 D.Md.) [class action involving Marriott Corporation Employees Trust]

Papuga v. *International Brotherhood of Teamsters, et al. and Local 705 Pension Fund*, No. 77-C-2327 (N.D.Ill.)

Patton v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, No. C-76-1354 (N.D.Ohio)

Pliner v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, No. C-77-55 (N.D.Ohio)

Robinson v. *United Mine Workers of America Health and Retirement Funds, et al.*, Civ. No. 77-0698 (D.D.C.) [class action; securities law count dismissed; see 435 F.Supp. 245]

Ross v. *International Brotherhood of Teamsters and Western Conference of Teamsters Pension Trust, et al.*, No. C-77-1650-RFP (N.D.Cal.)

Schlansky v. *United Merchants and Manufacturers, Inc.*, Civ. No. 76-5799 (S.D.N.Y.) [class action involving Pension Plan and Group Life Insurance Plan for Employees]

Skytt, et al. v. *Waggoner et al. and International Union of Operating Engineers Pension Trust*, No. 77-1550 RMT (C.D.Cal.) [class action]

Stoelzing v. *Robbins, et al. and Central States, Southeast and Southwest Areas Pension Fund*, No. 77-0464-CV-W-4 (W.D.Mo.)

Wiens v. *International Brotherhood of Teamsters, et al. and Western Conference of Teamsters Pension Fund*, No. 76-2517-IH (C.D.Cal.) [Securities law counts dismissed; see BNA Securities Law Reporter (No. 397, April 6, 1977, p. A-13)]

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-754

77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs

JOHN DANIEL,

Respondent.

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 76-1855
JOHN DANIEL,

JOHN DANIEL,
Plaintiff-Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2865—Alfred Y. Kirkland, *Judge.*

Heard April 4, 1977—Decided August 20, 1977

Before CUMMINGS and TONE, *Circuit Judges,* and JAMESON, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* Plaintiff is a resident of Illinois and has been a member of defendant Local Union 705 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America since 1951. He also purports to serve as the representative of the class of all members of all affiliate locals of the Teamsters International who have "purchased and acquired an interest in a Teamsters' pension fund." The original defendants were Local 705, the International Brotherhood, three classes (Teamster local unions with pension funds similarly situated to Local 705, trustees of such pension

* The Honorable William J. Jameson, Senior District Judge of the District of Montana, is sitting by designation.

funds and all officers of locals with such pension funds), and Louis Peick, an officer of Local 705 and a trustee of its pension fund. Additional defendants added by amendment are Local 705's Pension Fund and seven individuals representing that pension fund and all other Teamster pension funds.

According to the complaint, the Teamsters locals negotiate labor contracts with companies across the United States for the benefit of their members who are employees of such companies. Under these contracts, Teamster members agree to provide their services as employees of the companies in return for wages and various other forms of consideration. Since 1955, most of those labor contracts negotiated by the Teamsters have provided for the establishment of pension funds for their union members. Under the labor contracts, the employing companies make set payments into the pension funds for Teamster members "as part consideration for the labor services provided by such union members." (Complaint par. 12) These payments are held in trust and invested by pension trust fund trustees who are equally divided between employer and union representatives. Therefore, the Teamster member employees contribute their labor services in return for their participating interests in the pension trust funds and their wages and fringe benefits.

Again, according to the complaint, the Teamsters pension plans do not differ *inter se* in any material respect for the purposes of this case. Each was a defined benefit pension plan where employees are offered various benefits if they meet certain eligibility requirements. Actuarial assumptions based on estimated union member turnover, mortality and the rate of return on fund capital are used to determine the amount the employer must contribute so that the pension fund will be able to pay the promised benefits to union members as they retire without jeopardizing the payment of benefits to future and antecedent retirees. The pension trust funds have lengthy vesting periods. If a Teamster member does not meet the length of service requirement of the vesting period, the entire contribution

paid into the trust fund for him is forfeited, thereby extinguishing his interest in the fund. Local 705's pension fund had a twenty-year vesting period, a typical provision.

In addition to the lengthy plan-vesting periods, most of the Teamsters pension plans require continuity of employment with employers who have entered into labor contracts with the Teamsters.[1] Under this continuity or "break-in-service" rule, no pension benefit is available to a Teamster union member who has been employed by covered employers for the full vesting period but whose employment with covered employers is not continuous and uninterrupted. Employer-paid contributions are also forfeited when the union member cannot meet the break-in-service requirement of his pension plan's vesting rule.

The monies contributed to the pension funds are invested by the trustees thereof, and it is alleged that each trust fund "over the long run [is] reasonably expected to grow through the accumulation of dividends, interest and other earnings." (Complaint par. 15) Failure to meet the length or continuity requirements of the pension fund's vesting provision also causes the forfeiture of a union member's participating interest in these accumulated earnings. When the complaint was filed in 1974, plaintiff had work for covered employers for 22½ years, but his service was interrupted by an involuntary four-month break in service from December 1960 to April 1961.[2] Because of this

1. A survey of 32 pension plans representing over half of the Teamster membership disclosed no other plan which would have absolutely disqualified a man in Daniel's circumstances. Most plans have continuity requirements but involuntary breaks in service are usually remediable upon satisfaction of certain requirements. Local 705's continuity requirement has been so modified for a break in service occurring after 1970 (International Br. at 9 n. 12).

2. According to plaintiff's supporting affidavit, from April 1961 to July 5, 1961, his employer's bookkeeper embezzled the employer's contributions to the Local 705 Pension Fund. Plaintiff reported this embezzlement to Local 705. It subsequently treated his break in service as a seven-month interruption, although it had assured him at the time of his report to it about the lapse vis-a-vis his pension rights that it "would take care of whatever had to be done on account of the embezzlement." (App. 95a)

interruption in service, Local 705 has refused to pay plaintiff any pension benefits whatsoever and the employer contributions paid on his behalf and the earnings accumulated therefrom have been forfeited.

Count I of the complaint asserts that beginning in 1955 and continuing to the present, defendants misrepresented certain material facts and omitted to make other material facts by making misleading statements which in general related to the value of a member's participating interest in his local pension fund. The misrepresentations concerned misleading statements as to the length and continuity requirements of the pension plan's vesting provision. Defendants are said to have made omissions of material facts by failing to inform the members that they would receive no pension benefits whatsoever if they did not meet the length or continuity requirements of the vesting provision and that, upon failing to satisfy these requirements, the contributions made on their behalf into the fund and the earnings accumulated therefrom would be forfeited. Defendants allegedly also omitted to state that the fund's actuarial basis was arbitrary. Other omissions are said to be the failure to disclose pertinent information needed to disclose the actuarial basis upon which the funds were grounded and the actuarial likelihood that a union member will not receive any pension benfits at all. Finally, plaintiff alleged a failure to state that the defendants have unlawfully diverted pension funds for the benefit of persons other than the pension trust beneficiaries.

Plaintiff claims in Count I that although he purchased an interest in the pension fund by providing labor service to an employer with a labor contract with the Teamsters, he sustained substantial losses which were a direct and proximate result of a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder by the defendants. Besides requesting class relief, plaintiff requested the district court to find that defendants violated Section 10(b) and Rule 10b-5 and to reform the pension fund agreements by deleting the length

and continuity requirements of the vesting provision. The plaintiff also sought a judgment requiring defendants to pay pension benefits unlawfully withheld from plaintiff and his class. In addition, a judgment was sought in the amount of any interests which had been diverted from their proper purposes.

Count II of the complaint sought similar relief under Section 17(a) of the Securities Act of 1933. However, neither this nor any other count of the complaint charged that the registration requirements of that Act were applicable.[3]

Plaintiff's Affidivait

Four months after the docketing of his complaint, plaintiff filed an affidavit which we treat as part of the pleadings for purposes of our review of the order below denying the motion to dismiss. The affidavit showed that he had only an elementary school education and had joined Local 705 in April 1950 when he became a truck driver with an employer who had a collective bargaining agreement with that Union. He worked continuously as a truck driver with Local 705 contracting employers from April 1950 through November 1973, except for an interruption from December 5, 1960, until April 1961, when he was involuntarily laid off wholly because of the adverse economic condition of his employer.[4] Plaintiff tried unsuccessfully to find any trucker's work during this time period. He retired because of cataracts on December 1, 1973, at the age of 63. Since his retirement, Daniel has not worked at all.

3. The original complaint contained three additional counts, and a fourth was added by amendment on February 7, 1975. The plaintiff thereby seeks relief for the defendants' alleged breach of their duty of fair representation under Section 9(a) of the National Labor Relations Act ("NLRA"), 29 U. S. C. 159(a), and for the failure of the pension fund to be established for the "sole and exclusive benefit of the employees," as required by Section 302(c)(5) of the NLRA, 29 U. S. C. 186(c)(5). Finally, the plaintiff seeks to recover under common law theories of breach of fiduciary duty, fraud and deceit. Since they are not involved in this appeal, the additional counts will not be discussed further herein.

4. See note 2 *supra*.

In 1955, plaintiff learned of Local 705's pension fund and understood that as a Local 705 member he would be eligible to receive retirement benefits upon completing 20 years of employment with Local 705 covered employers. He believed that employer contributions to the Local 705 pension fund would finance the retirement payments which he would receive after 20 years of employment. This retirement plan was a material factor in his continuing employment with Local 705 covered employers. If he had known that Local 705 would interpret the pension plan as requiring uninterrupted service of 20 years, he would have sought employment elsewhere with an adequate retirement plan. The communications he received from Local 705 did not disturb his understanding that he would receive a pension after 20 years of employment with covered employers.[5]

In June 1971, plaintiff received a letter from defendant Peick stating that after 20 years of covered service and at 60 years of

5. Pension plan booklets describing pension plans are often designed "to sell the plan * * *," D. McGill, Fulfilling Pension Expectations 17 (1962) (Institute for Public Interest Representation's Br. at 12). For example, these materials do not forthrightly disclose in terms understandable to a truck driver with a limited education the

> "minimum length of time considered to constitute a break-in-service in the Local 705 Pension Fund 20 years continuous service vesting rule; such materials do not disclose that all contributions made on behalf of a Local 705 member into the Local 705 Pension Fund (and all accumulated earnings on the aggregate of such contributions) will be forfeited following any proscribed break in service; and such materials do not disclose either the actuarial bases on which the Local 705 Pension Fund has been estabilshed or the likelihood that any Local 705 member will ever receive a pension benefit." (Pl. Br. at 5)

Indeed, one *amicus* siding with defendants admits that this lack of disclosure is rampant generally in the pension field:

> "Thus employees are often not aware of the fact that the actual realization of benefits depends upon meeting certain benefit eligibility conditions, depends upon prudent management of the retirement fund, depends upon contributions by their employer sufficient to pay retirement benefits as they come due, and depends upon their employer remaining in business." (Erisa Regulations Industry Committe's Br. at 19-20).

age or over, a retired employee would receive a monthly pension of $400. He expected to receive such a pension on his retirement. One of Local 705's booklets advised him that the purpose of the pension fund was to take care of him and his family in case of retirement and that the funds afforded protection to him, his wife and unmarried children under 18 years of age. He relied on such assurances that the fund would provide for financial security in his old age.

He did not learn until December 1973 that his involuntary 4-month layoff caused the Draconian result of total forfeiture of his pension. He never learned of the success or failure of the trustees' management of the Local 705 pension fund nor was he advised of the type of investments being made by the trust fund. During several months prior to this December 1, 1973, retirement, he visited Local 705's office on five to eight occasions to arrange for his pension and was not then advised that he was ineligible to receive it. After Daniel's retirement, he was told for the first time that his 4-month involuntary break in service made him ineligible to receive any pension benefits. On December 26, 1973, and on March 28, 1974, he appeared before the Local 705 trustees, but they refused to reverse the prior denial of his pension. He and his fellow Local 705 members had always had the common understanding that they would receive a retirement benefit after 20 years of covered employment and that no employer contributions could be forfeited. Other members of Local 705 were shocked to learn that a Local 705 member with Daniel's record of employment could be denied all pension benefits because of a temporary break in service. Indeed neither the defendants nor the *amici* who support their position dispute that this is "unfair in the extreme, shocking to the conscience" (Secretary of Labor's Br. at 21).

Local 705, Peick and the International Brotherhood of Teamsters filed motions to dismiss Counts I and II of the complaint on the ground that the court lacked subject-matter jurisdiction and that they failed to state a claim upon which relief could be

granted.[6] Local 705 and Peick also maintained that the action under Counts I and II was barred by the limitations provisions of the Securities Act of 1933 and the Illinois Statute of Limitations.[7] On March 1, 1976, the district judge handed down a memorandum opinion and order denying the motions to dismiss as to all counts and holding the anti-fraud provisions of the securities laws applicable. This opinion is reported in 410 F. Supp. 541. The effect of the opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F. Supp. at 551), that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts. Subsequently, the court entered an order denying defendants' motions to reconsider its refusal to dismiss Counts I and II but certified their application for interlocutory appeal under 28 U. S. C. § 1292(b). The certification was limited to Counts I and II of the complaint. The controlling question of law certified to this Court can be easily identified by the district court's careful circumscription of its holding below with respect to Counts I and II, *viz.*:

> "The Court makes no finding here beyond the narrow holding that the complaint alleges the sale of a security for purposes of application of the anti-fraud provisions of the Securities Acts, and that the complaint alleges violations of those provisions. The Court makes no finding with respect to applicability of any other sections of those Acts to employee pension plans such as the one here litigated." 410 F. Supp. at 553.

6. Local 705 and Peick included additional defenses in their motion to dismiss as to Counts I and II as well as some defenses directed at the other Counts of the complaint. The International answered the complaint and subsequently filed a motion to dismiss Counts I and II only, based on an asserted lack of subject-matter jurisdiction and failure to state a claim.

7. On appeal, the limitations defense has been abandoned.

Thereafter we granted permission to appeal.[8] Three *amici curiae* have filed briefs urging reversal and four urge affirmance.[9] We affirm.

Modality of Analysis

The securities cases in the Supreme Court's 1976 October Term have underscored its recently expressed methodology in interpreting the securities laws. See *e.g.*, *Piper* v. *Chris-Craft Industries, Inc.*, 45 LW 4182; *Santa Fe Industries, Inc.* v. *Green*, 45 LW 4317. Analysis begins with the relevant statutes themselves. After a study of their language and any court-added gloss, attention shifts to the statutes' legislative history. Additional considerations weigh in the balance. The history of the SEC's administration of the securities laws often can add a substantive gloss of its own which is entitled to the usual administrative deference (*Investment Company Inst.* v. *Camp*, 401 U. S. 617, 626-627) so long as it does not become lawmaking. *Ernst & Ernst* v. *Hochfelder* 425 U. S. 185, 212-214. And to the extent that these more cogent interpretive tools are not dispositive of the statutes' meaning, additional considerations of policy may tip the scales. *Id.* at 214 n. 33. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737. We shall use this methodology in our analysis of this case.

Statutes

Both of the major anti-fraud portions of the federal securities laws are relied upon in this complaint. Count I charges a breach of Section 10b of the Securities Exchange Act of 1934 (15

8. The district court has not yet ruled upon plaintiff's and defendants' respective motions for class action certification.

9. Those favoring affirmance are the Securities and Exchange Commission (SEC), the Gray Panthers, the Institute for Public Interest Representation (IPIR) and the Teamsters for a Democratic Union. Opposed are the Secretary of Labor, the Erisa Regulations Industry Committee (ERIC) and the National Coordinating Committee for Multiemployer Plans. The General Counsel of the SEC and a representative of the Secretary of Labor participated in the oral argument.

U. S. C. § 77j(b))[10] and Rule 10b-5 thereunder (17 C. F. R. § 240.10(b)-5)[11] while Count II alleges a violation of Section 17(a) of the Securities Act of 1933 (15 U. S. C. § 77q(a)).[12]

10. Section 10b provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

11. Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

12. Section 17(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

This being an appeal from an order denying a motion to dismiss, the allegations concerning the use of the jurisdictional means and the making of material misrepresentations, the omissions to state material facts or the use of manipulative or fraudulent devices are treated as true by defendants. Their argument is based upon the phrase "in connection with the purchase or sale of any security" in Section 10b and Rule 10b-5 and the phrase "sale of any securities" in Section 17(a). Defendants assert that these anti-fraud provisions are inapplicable on their face on the ground that plaintiff's interest in the pension fund is not a "security" and was not acquired by him in a "sale."

Plaintiff's Interest in the Pension Fund Is a "Security"

The term "security" is defined in Section 2(1) of the 1933 Act (15 U. S. C. § 77b(1))[13] and Section 3(a)(10) of the 1934 Act (15 U. S. C. § 78c(a)(10).[14] In each statute, the

13. Section 2(1) of the 1933 Act provides:

"When used in this title, unless the context otherwise requires—

(1) the term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract,* voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." (Emphasis supplied.)

14. Section 3(a)(10) of the 1934 Act provides:

"When used in this title, unless the context otherwise requires—

(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract,* voting-trust certi-

(Footnote continued on next page.)

definition of "security" includes any "investment contract."[15] Since the same Congress which passed both the 1933 and 1934 Acts clearly indicated that its definition of "security" in the 1934 Act was intended to be " 'substantially the same * * *' " as in the 1933 Act, cases construing either definition can be used interchangeably. *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837, 847 n. 12; *Tcherepnin* v. *Knight,* 389 U. S. 332, 336, 342. Therefore we need not break out separate lines of analysis in order to determine the existence of a security under Section 10b of the 1934 Act and Section 17(a) of the 1933 Act.

In construing the statutory term "security," guidance is provided by two overriding principles. First, as remedial legislation the securities acts should be construed broadly to effectuate their purposes. Congress purposely defined the term "security" broadly, and it has been construed liberally by the Supreme Court in order to protect the public from speculative or fraudulent schemes. *Tcherepnin* v. *Knight,* 389 U. S. 332, 336, 338. Secondly, in searching for content in the term "security," form should be disregarded for substance and the emphasis should be on economic reality." *Id.* at 336.

With this background, attention can now focus on whether plaintiff's interest in the Teamsters' pension fund is an investment

(Footnote continued from preceding page.)

> ficate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill or exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." (Emphasis supplied.)

15. Plaintiff does not seriously press the theory that he had a "certificate of interest or participation in any profit-sharing agreement" but rather relies on the "investment contract" theory. Since we find merit in the "investment contract" theory, we have no occasion to express a view on the adequacy of the "certificate" theory under the facts of this case where Daniel has no document which evidences his interest in the Local 705 Pension Fund.

contract. An investment contract was defined by the Supreme Court in *SEC* v. *W. J. Howey Company,* 328 U. S. 293, 298-299, to mean

> "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

In *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837, 852, the Supreme Court reiterated this rule and stated that

> "[t]his test, in short-hand form, embodies the essential attributes that run through all the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

"What distinguishes a security transaction [from every other form of commercial dealing] is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use." *Id.* at 858.[16] As demonstrated below, the elements of the Howey rule are present here, for under the Local 705 Pension Fund, money is invested in a common enterprise, the management of which is committed to a third party, and from which profits and income are reasonable expected.

The Union Member as an Investor

In the present case, the money invested in the pension fund came from employer contributions paid on behalf of the employee. The local defendants maintain that non-contributing

16. The International's argument that a union member is not an investor "in any sense understood by Congress when it was protecting investors in the securities markets" (Br. 12) is addressed *infra.*

beneficiaries of a fund cannot be conceptualized as investing in the fund, citing *SIPC and SEC* v. *Morgan, Kennedy & Cox, Inc.*, 533 F.2d 1314 (2d Cir. 1976). In *Morgan, Kennedy*, the Second Circuit was asked "to determine whether the one hundred and eight employee beneficiaries of a trust created under a profit-sharing plan qualify as 'customers' of a bankrupt broker-dealer for the purpose of receiving compensation for losses available to such customers under the Securities Investor Protection Act of 1970 (SIPA), 15 U. S. C. § 78aaa *et seq.*" *Id.* at 1315. The statutory definition of "customer" read in pertinent part "persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities *received, acquired* or *held* by the debtor from or for the *account of such persons* * * *" (emphasis supplied). *Id.* at 1316. Prior Second Circuit law had used investor and customer status interchangeably. *Id.* at 1317. In *Morgan, Kennedy* it was the trust as an entity as represented by the trustees, rather than its beneficiaries, who were the customers of the debtor broker-dealer. The account was held in the trustees' names and the individual beneficiaries' identities were totally unknown to the broker-dealer. Moreover, control over investment decisions was exercised exclusively by the trustees. "The employee-beneficiaries * * * made no purchases, transacted no business, and had no dealings whatsoever with the broker-dealer in question respecting the trust account." *Id.* at 1318. Common sense mandated the conclusion that the individual beneficiaries were not customers of the broker-dealer. Because of the *sui generis* definition of customer/investor under the Securities Investor Protection Act of 1970, *Morgan, Kennedy* is irrelevant to the question whether the union members have made an investment in the meaning of the 1933 and 1934 Acts.

More relevant is the recent case of *Klamberg* v. *Roth*, [76-77 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,747 (S. D. N. Y. 1976). There the court held that the plaintiff as beneficiary in an employee pension plan had standing to bring an anti-fraud action against the plan trustees:

> "Fraud perpetrated by a trustee in the purchase or sale of securities on behalf of the trust has a tangible impact on each beneficiary, no matter how many beneficiaries are thereby affected and regardless of the precise purposes of the trust. The policies behind the *Birnbaum* rule are not undermined * * *" *Id.* at 90,630.[17]

The employer contributions to the plan's pension fund constitute a sector of the total employee compensation structure. *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (7th Cir. 1948), certiorari denied, 336 U. S. 960. "Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation." Welfare and Pension Plans Disclosure Act of 1958, S. Rep. No. 1440, 85th Congr., 2d Sess. (1958), reprinted in 3 U. S. Code Cong. and Admin. News 4137, 4139. This thesis is accepted by the courts, see, *e.g.*, *Lewis* v. *Benedict Coal Co.*, 311 U. S. 459, 469; *Employing Plasterers' Assoc.* v. *Journeymen Plasterers' Protective and Benevolent Soc'y*, 279 F. 2d 92, 99 (7th Cir. 1960), and the commentators alike. P. Drucker, The Unseen Revolution 8, 34 (1976); Note, Legal Problems of Private Pension Plans, 70 Harv. L. Rev. 490, 494 (1957). Indeed the International Brotherhood has conceded[18] these pension funds "constitute a form of compensation for an employee's labor" (Br. 12).[19] Realistically speaking, employees

17. *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), certiorari denied, 343 U. S. 956, confined recoveries under Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder to buyers and sellers of securities.

18. In the district court, the International Brotherhood did not challenge that an "investment contract" was involved here. Even now all the defendants agree that "the SEC has consistently taken the position that interests in some pension plans are "securities" (Joint Rep. Br. at 2).

19. The International Brotherhood argues that the employee, once employed, has no individual control over either the fact or amount of the contributions to the fund. Such issues of investment autonomy are best addressed in the context of the existence of a sale. Consequentiy we defer the bulk of our discussion on these issues until our discussion of whether a sale of an instrument found to be a security can be said to have occurred.

are putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck. Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans, 29 Law & Contemp. Prob. 795, 803-804 (1964).

The International maintains that employees do not even have an interest in the pension plan except in the attenuated sense that they have a contingent expectancy of receiving pension payments at a future date. But mere contingent expectancies are the rule rather than the exception in the equity markets. Profits in an equity security require that the market value plus accrued dividends of a stock be greater than the stockholder's cash basis. Thus profits are contingent on the successful operation of the common enterprise, there the issuing corporation. Whether an employee is found to have covered employment before his benefits vest or a stockholder is forced to sell his stock at a net loss does not eject his interest in the respective common enterprises from the bounds of the *Howey* definition of security. Realizing this analogy is not exact, we think that a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer, is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future.

The Local defendants attempt to erect a dichotomy between wages *per se* and the fringe benefits of employment which together make up an employee's total compensation by referring to sections of the Bankruptcy Act, the Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act and the Sherman Act which purportedly raise such a distinction for the purposes of those Acts. The existence of a wage/compensation dichotomy in other unrelated statutes is wholly irrelevant to whether a union member has made an investment under the *Howey* rule. The *Howey* test only requires that the employer-paid contributions to the pension fund can be properly considered to be economic compensation to the employee. This

proposition is universally accepted by the courts and commentators. Accordingly, the investment of money prong of the *Howey* rule has been satified.[20]

The Pension Fund as a Common Enterprise

Under *Howey*, it is "immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." 328 U. S. at 299. As a result, the common enterprise can properly take the form of a trust fund investing in the capital markets where the beneficiaries' common relationship with the enterprise is an undivided interest in such a trust without the beneficiaries having certificates evidencing their interest or the power to transfer their interests in the trust. See *Collins* v. *Rukin*, 342 F. Supp. 1282, 1286 (D. Mass. 1972). Presumably, an investor who purchases a minority block of stock from a close corporation whose shares have restraints on their alienation may still sue for fraud under the securities laws. *Holdsworth* v. *Strong*, 545 F. 2d 687 (10th Cir. 1976) (*en banc*) Here the enterprise is common to all of the Local 705 members. The pension fund trustees self-admittedly exercise exclusive control over the common enterprise and the investment of its assets. The pension fund which receives the union members' investments is a common enterprise under *Howey*.

Profits from the Efforts of Others

The Local defendants point principally to *United Housing Foundation* v. *Forman*, 421 U. S. 837, in arguing that the pension fund does not generate profits in the *Howey* sense.[21]

20. The International makes the overly facile analogy to *Forman, supra*, that just as the "shareholders" in *Forman* decided whether to live in a particular place, the union members made the decision whether to work for a Teamster shop. It is clear that the union member does not intend to purchase a commodity or realty for personal use; rather he parts with his money in the hope it, through the management of others, can fund his retirement.

21. Defendants do not contest that whatever is expected from the common venture will be solely derived from the efforts of persons other than the venture's investors.

In *Forman*, profits were defined as follows:

> "By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner* [320 U. S. 344] (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin* v. *Knight, supra* (dividends on the investment based on savings and loan association's profits). In such cases the investor is 'attracted solely by the prospects of a return' on his investment. *Howey, supra,* at 300." *Id.* at 852.

It is conceded that the expected payout to a beneficiary will exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit. Black's Law Dictionary. However, the Local defendants attempt to discredit this gain as a *Forman* "profit" because, on an amortized basis, some of the gain may be attributable to "pooled" contributions of all participating employers, forfeitures of employees whose pension rights do not vest or to increased contributions negotiated by the union.

Initially it may be noted that gain relative to a security can derive from sources other than the direct efforts of the managers of the common enterprise. In both *SEC* v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473 (5th Cir. 1974), and *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F. 2d 476 (9th Cir. 1973), certiorari denied, 414 U. S. 821, the gain present for any particular investor in those pyramid sales schemes had as its source a substantial fraction of the investment of another investor in the scheme. Similarly, the payout to a maturing annuitant in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, was more likely to derive from investments of new annuitants than from a return on his original investment and the compounded income earned on it.[22] Moreover, realizing a profit

22. Both *Turner* and *Variable Annuity* were cited in *Forman*. The Supreme Court did not speak disapprovingly of either case. 421 U. S. at 852 n. 16 and 857 n. 24.

from a non-transferable stock option given in exchange for services would depend upon the investor having enough money to execise the option. *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972). Yet in all of these cases the investor's interest was still characterized as a security.

In any event, only a portion of the gain can even arguably derive from non-investment sources. A substantial part of the gain (which even defendants concede to be at least 25%, International Br. at 10-11) will derive from traditional return on the pension fund participant's investment, a dollar-profit element in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustees' management of the pension fund.[23] For example, the current weekly contribution to the Local 705 pension fund of $24 invested at the current maximum bank interest rate of 7½ percent per annum on a compounded basis generates a substantial sum of money. At this rate, over a 20-year career, almost $25,000 is invested and if earnings are accumulated on a tax-deferred basis pursuant to Section 401 of the Internal Revenue Code (26 U. S. C. § 401), the profit over capital contribution will be over $33,000. An increase of 1% in return on a pension fund's capital can allow benefits to be increased by 20% (SEC Br. at 11). It is precisely this promise of retirement benefits far in excess of the pensioner's investment that forms the economic inducement to invest in a pension fund.[24]

23. That this profit element is fixed because pension payments are set at specific levels from time to time is wholly immaterial to gain being profit in the *Forman* sense. A number of instruments which all would concede to be securities (bonds, debentures, etc.) are fixed return.

24. The district court also noted "there is no warranty that the trust will be able to fund the supposed fixed benefits due to members of the plaintiff class". 410 F. Supp. at 550. This resulting risk was deemed to generate "risk capital" return under *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P. 2d 906 (1961). Some doubt as to the validity of the risk capital approach exists. See *Forman*, 421 U. S. at 857 n. 24. Since traditional profits are present in our case, we need not explore the risk capital theory beyond noting that pensioners are far from taking "no risk in any significant sense." *Id.; El Khadem* v. *Equity Securities Corp.*, 494 F. 2d 1224 (9th Cir. 1974), certiorari denied, 419 U. S. 900.

Recently the district court for the District of Columbia has decided that surviving spouses and dependents of deceased coal miners, who claimed a right to permanent health care coverage by the United Mine Workers, did not have an interest in the United Mine Workers of America 1950 Benefit Plan and Trust, which provides health benefits for active and retired miners, their families, dependents and survivors, that could be deemed to be a "security" under the 1933 or 1934 Acts. *Robinson* v. *United Mine Workers of America Health and Retirement Funds et al.*, Civ. No. 77-0698 (D. D. C. July 29, 1977). Although conceding that the district court's opinion in *Daniel* was distinguishable from his case (mem. op. 3 n. 1), Judge Gesell in *dicta* disagreed with the reasoning of Judge Kirkland in *Daniel.*

The *Robinson* opinion was based squarely on the gloss *United Housing Foundation* v. *Forman,* 421 U. S. 837, gives to the term "investment contract" appearing in the securities acts' definitions of "security." Judge Gesell's "reluctance" to find the *Robinson* plaintiffs' interest to be an investment contract was based entirely upon his view that *Forman* foreclosed such a result (mem. op. 3). *Robinson* is not applicable here.

In no sense could the spouses and dependents of the deceased coal miners in *Robinson* be viewed as investing in the fund since they contributed nothing to the employers in return for the employers' payment of per-tonnage royalties into the trust fund on behalf of and in return for the services of the union miners. The *Robinson* plaintiffs were donees instead of purchasers, so that the requisite *Blue Chip* sale (421 U. S. 723) was lacking.

Unlike *Daniel,* where Local 705 members could affect the employers' payments into the pension fund or the allocation of contributions between pension fund payments and current wages by failing to ratify a given contract with set contribution levels, the *Robinson* plaintiffs were powerless to increase or decrease payments or convert them to their personal use. Additionally, there was no expectation of profit in *Robinson,* because benefits were to be paid out of the employers' current contributions to

the trust rather than depending on the fund's capital. In *Daniel,* however, funding of the benefit program was crucially dependent on profits from the investment of the fund capital. Further, all the assets of the pension fund not committed to pay out current benefits were invested at risk for profit.

Although the UMW Benefit Plan included retirement benefits for retired miners and lump-sum death benefits to their heirs, only the length of time health care coverage was to be extended to the plaintiffs was in issue in *Robinson.* That case therefore involved merely the consumption of "free" medical care rather than, as in *Daniel,* an actual dollar financial return on investment, *i.e.,* "an expectancy of dollar benefits," which the investor could then use to purchase anything he chose. 421 U.S. at 852-853.

To declare the *Robinson* plaintiffs' interest in the benefit plan to be a "security" would indeed have required "a degree of creativity unwarranted by the realities of the transaction and the function and purpose of the securities laws" (mem. op. 3). As already shown, to declare Daniel's interest to be a security does not require such an attempt "to stretch the securities laws beyond their traditional scope" (mem. op. 5). Finally, the legislative history relied upon in *Robinson* concentrates on the registration provisions of the securities laws rather than the anti-fraud provisions, as discussed more fully *infra.*

Economic Reality

The literal passage of the *Howey* test is only the first hurdle. The definitional sections herein involved are introduced with the phrase "unless the context otherwise requires." This context is, of course, economic reality in view of the surrounding factual circumstances. *Emisco Industries, Inc.* v. *Pro's, Inc.,* 543 F. 2d 38 (7th Cir. 1976). As. Mr. Justice Powell explained in *Forman*:

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated

securities market. The focus of the Acts is on the capital market of the enterprise system, the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. Thus, in construing these Acts against the background of their purpose, we are guided by a traditional canon of statutory construction:

> " '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 459 (1892)." 421 U. S. at 849.

If an interest is not a security in economic reality, abuses should be remedied by Congress rather than by an over-liberal extension of the securities laws. *Id.* at 859 n. 26.

However, the economic inducement for plaintiff's interest in the pension fund was investment for a profit to provide wherewithal in his retirement. This plaintiff's interest in the fund embodies many of the significant characteristics typically present in the instruments concededly covered by the securities acts. *Id.* at 851. Plaintiff has an undivided interest in the Local 705 Pension Fund consisting of the aggregate of all monies invested on behalf of Local 705 union members by covered employers for whom those members worked. Those monies are managed and invested by the pension fund trustees in stocks, bonds, mortgages and other investments for the sole benefit of Local 705 members. As such, the Local 705 Pension Fund resembles a mutual fund, *viz.* a pool of money invested for the benefit of the mutual fund shareholder by the fund manager. The amount of payout to any particular member would depend upon his length of service in covered employment, the extent of funding in the plan and the monthly pension determined by the trustees. Their success in money management will be one of the most

important factors in determining the amount of payout. A Local 705 member invests $1,248 per year through his employer contributions into that fund. Since an interest in a mutual fund is a security, the interest in a pension fund should also be considered a security. See, Testimony of SEC Commissioner Purcell, Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 895 (1941). Otherwise the trustees of private pension plans with annual employer contributions of $23 billion for the benefit of 30 million employees[25] will be able to mislead their beneficiaries with immunity from the anti-fraud provisions of the 1933 and 1934 Acts.

Not only is plaintiff's interest like an interest in a mutual fund, it is also like an interest in a variable annuity contract. Variable annuity contracts have been held to be securities within the securities laws. *SEC* v. *Variable Annuity Life Insurance Co.,* 359 U.S. 65; *SEC* v. *United Benefit Life Ins. Co.,* 387 U. S. 202. The securities in *VALIC* and *United Benefit* were investment vehicles designed to provide a return on capital upon retirement. Even though the annuity contract in *VALIC* contained several elements of traditional life insurance and although the flexible fund annuity in *United Benefit* contained a minimum insurance type guarantee, the Court separated the conventional life insurance attributes from the security involved. See, *e.g., United Benefit, supra,* at 207. Similarly, the employment fringe benefit aspect of a pension can be separated from its security aspects. Plaintiff can be both an investor and employee. See, *e.g., SEC* v. *Koscot Interplanetary, Inc.,* 497 F. 2d 473, 476 (5th Cir. 1974); *Collins* v. *Rukin,* 342 F. Supp. 1282 (D. Mass. 1972). As in *VALIC* and *United Benefit,* a Local 705 member is entitled to full disclosure of the material of the enterprise in which his money is put so that he can intelligently appraise the risks involved.

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25. Skolnick, Private Pension Plans, 1950-74, 39 Social Security Bulletin 34 (June 1976).

Reduced to fundamentals, economic reality mandates the realization of the immense importance of private pension plans to the American capital markets. As a Senate Report has disclosed:

> "In 1940, an estimated four million employees were covered by private pensions; in 1950, the figure had more than doubled to 9.8 million; in 1960, over 21 million employees were covered; and in 1973, approximately *30 million workers participated*. Currently, *one-half* of the industrial work force in the United States are members and participants of private pension plans. It is projected that by 1984, 42.3 million workers will be covered by private pension plans. The growth of the assets owned or controlled by pension funds has closely paralleled this expansive growth. Total estimate assets of pension plans have accelerated from $2.4 billion in 1940 to *$150 billion in 1973* and are increasing at a rate projected to exceed $250 billion by 1980." (Emphasis added) S. Rep. No. 93-127, 93rd Cong., 2d Sess. 2-3 (1973).

Because of favorable tax provisions and economies of scale, pension funds are the most efficient way for an employee to invest. N. Ture, the Future of Private Pension Plans 3 (1976). On a relative scale, his pension plan will probably be a Teamster member's largest investment. On an aggregate basis, private pension funds control a huge amount of the capital markets. At the end of 1972, they held 11% in value of all New York Stock Exchange listed stocks and in the same year they accounted for over 23% of the dollar value of all shares traded there. If the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized.

Legislative History and SEC Interpretation

Not only do the cases support considered this interest as an investment contract, but so do the legislative history and the

SEC's interpretation of the securities acts. The legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans. However, subsequent legislative action[26] and accompanying SEC interpretation[27] do provide a measure of guidance in construing the 1933 and 1934 Acts.

Thus in 1934, the Senate adopted an amendment to the 1933 Act to exempt from registration

> "an offering made solely to employees of an issuer or of its affiliates in connection with a *bona fide plan for the payment of extra compensation* or stock-investment plan for the exclusive benefit of such employees". 78 Cong. Rec. 8708 (1934). (Emphasis supplied.)

The amendment was eliminated in conference in order to protect participants in such plans who

> "may be in as great need of protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73d Cong., 2d Sess. at 41 (1934).[28]

In 1941, SEC Commissioner Purcell commented on the 1934 rejection of the Senate amendment as requiring the SEC to interpret the 1933 Act as applying to employee pension funds

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26. As to the signficance of subsequent congressional expressions wtih respect to the meaning of earlier statutes, see *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U. S. 267, 274-275; *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380-381.

27. As to the significance of subsequent SEC administrative practice with respect to the meaning of the securities laws, see *United States* v. *National Ass'n of Securities Dealers*, 422 U. S. 694, 725; *Chemehuevi Tribe of Indiana* v. *FPC*, 420 U. S. 395, 409-410.

28. Since the 1934 Act was passed by the same Congress that passed the 1933 Act, this legislative history is tantamount to being actual 1933 Act history and should be credited accordingly. *Tcherepnin* v. *Knight*, 389 U. S. 332, 336, 342.

Recently, class action suits against employee profit-sharing plans have charged that the managers of these plans have failed in their responsibilities by investing too much in the employer's own stocks. Employees Wrath Hits Profit-Sharing Plans, Bus. Week, July 18, 1977 at 25.

which involve the sale of securities as "investment contracts."[29] In his view, this included any

> "plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date * * *." 1941 Hearings at 895-896.

Commissioner Purcell also noted that the 1940 Congress was aware of the economic congruence between employee pension plans and ordinary mutual funds because it defined an "employees' security company" as one type of "investment company" in Section 2(a)(13) of the Investment Company Act of 1940. 1941 Hearings at 895. Consequently, an employee pension plan is regulated by the 1940 Act unless it falls within an exemption from registration. See, *e.g.*, 15 U. S. C. §§ 80a-3(c)(11) and -6b.

Similarly, the opinion of theAssistant General Counsel of the SEC in 1941 was that "security" within the definition of the 1933 Act included employee pension plans.[30] More recently, former Chairman Cohen of the SEC also has testified on the basis of his own expertise as to the common understanding of a number of institutional investors that interests in a pension plan fall within the definition of a security in the 1933 Act.[31] Like Commissioner Purcell, he explained that is why they had to be specifically exempted from the Investment Company Act of 1940

29. Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 895-896 (1941) (1941 Hearings).

30. Opinion of Assistant General Counsel of SEC [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,195 (1941).

31. Hearings on S. 3598 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92 Cong., 2d Sess. 231 (1972). In those hearings, Mr. Cohen included Ch. VII of the Summary Volume of the SEC's 1971 *Institutional Investor Study* which states that interests of participants in employee pension plans meet the definition of security in the 1933 Act. See also Interim Report, Senate Committee on Labor and Public Welfare, S. Rep. 92-634, 92d Cong., 2d Sess. 96 (1972). The defendants concede the SEC has treated interest in pension funds as securities since 1971 (Rep. Br. at 5).

(15 U.S.C. § 80a-3(c)(11)). Additionally, he commented on the similarities between a pension fund and a mutual fund investment. Accordingly, Professors Mundheim and Henderson have characterized the SEC's interpretation of "security" as used in the securities laws as including an interest in employee pension plans as that "traditionally taken."[32]

Congress has evidenced agreement with the SEC's position that interests in pension funds are securities by way of the Investment Companies Amendments Act of 1970. Recognizing that interests in employee pension funds are "securities," in 1970 Congress decided to exempt them from the registration requirements of Section 5 of the 1933 Act (15 U. S. C. § 77e) if the employee pension fund was maintained by a bank or in a separate account maintained by an insurance company (15 U. S. C. § 77c(a)(2(A)).[33] This exemption was to codify the

32. Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 Law and Contemp. Prob. 795, 811 (1964). The defendants and some *amici* rely on comments by Congressman Wolverton, a member of the House Committee that reported the 1933 and 1934 Acts, sitting on the Committee before which Commissioner Purcell was testifying that he did not believe Congress intended to regulate pensions under the securities laws. 1941 Hearings, at 870-871, 878, 888, 913. Although the 1934 Congress did not specifically focus on pension funds, the 1934 abortive Senate amendment does show Congress did have some forms of employee security plans in mind. Certainly, the definition of security adopted is broad enough to include the plans.

Moreover, the statements by Congressman Wolverton deal with "supervision" or "regulation" under the 1933 Act, *viz.*, registration. But as we show in the opinion, the registration provisions of the 1933 Act do not apply to securities consisting of interests in pension plans. It might be that a realization of this fact will calm concerns about undue "regulation or employee benefit plans." Statement of Representative Dent, 174 D. L. R. at A-6 (BNA, Sept. 7, 1976).

33. The exemption comprehends, in pertinent part:

> "Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of *securities*. * * *
>
> * * * * *
>
> "any interest or participation in a single or collective trust fund maintained by a bank or in a separate account main-

(Footnote continued on next page.)

long established administrative practice of the Commission in exempting certain pension funds from the registration requirements of the 1933 Act. H. R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970). A similar exemption amendment was provided with respect to the 1934 Act. 15 U. S. C. § 78c(a)(12).[34]

(Footnote continued from preceding page.)

tained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, *other than* any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (*other than interests or participations in the trust or separate account itself)* issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section (401(c)(1) Title 26. The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter." (Emphasis supplied)

34. The 1934 Act provision provides:

"The term 'exempted security' or 'exempted securities' includes—

"any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation issued in connection with (A) a stock-bonus pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, other than

(Footnote continued on next page.)

This action of course shows that Congress considered such pension funds to be securities that would not be exempt from registration absent the 1970 Amendments. Therefore, if the Local 705 Pension Fund is being maintained by a bank,[35] the interests involved here would be securities exempt from registration. However, exemption from registration and reporting requirements does not mean exemption from Section 17(a) of

(Footnote continued from preceding page.)

any plan described in clause (A) or (B) of this paragraph which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26; and such other securities (which may include, among others, unregistered securities the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an 'exempted security' or to 'exempted securities.'"

This provision specifically exempts only interests in collective trust funds while the 1933 Act exemption includes interests in single funds. However, the final clause of the exemption quoted above gives the SEC plenary authority to exempt other securities from the reporting requirements of the 1934 Act. The comments of the General Counsel of the SEC speaking for the Commission in argument before us suggests the SEC in the exercise of this power has decided that interests in pension funds are "exempted securities" under the 1934 Act.

However, under the 1933 Act the SEC's interpretative and quasi-legislative powers are limited to Section 3(b) which provides "no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the exceeds $500,000" (15 U.S.C. § 77c(b)). Accordingly, in order to achieve exempted status for securities such as interest in pension funds under the 1933 Act, Congress could not rely on SEC administrative practice being binding as it could under the 1934 Act. Thus the wording differences between the 1933 and 1934 Act represent a need to codify the administrative practice under the 1933 Act.

35. A large portion of Local 705's Pension Fund is maintained by the trust departments of major Chicago banks. See note 61, *infra*. Plaintiffs represent that "because most employee pension plans are bank maintained, registration is not required for most employee pension plans" (Pl. Br. at 37-38).

the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, as the House Committee on Interstate and Foreign Commerce realized in its report.[36] See also 15 U. S. C. § 77q(c).

Defendants and the *amici* who support their position seek to downplay the importance of the 1970 Amendments by arguing that the 1970 exemption relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds, claiming that the sale to employees of interests in the underlying pension fund is entirely outside the scope of the 1970 act. However, these arguments relate to legislative history concerning an earlier version of the Act which referred only to "collective" trust funds. A close study of the legislative history shows that the version of the Act which was finally adopted contemplated the interests sold to employees in the underlying pension fund.

The principal stimulus for the amendment to the 1933 Act in 1970 was to settle the legal status of certain commingled investment accounts maintained by banks and insurance companies.[37] As a result the early versions of the bill only exempted:

> "any interest or participation in a *collective* trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954" (emphasis added).

36. Report of the House Committee on Interstate and Foreign Commerce on the Investment Company Amendments Act of 1970. H. Rep. No. 91-1382, 91st Cong., 2d Sess. 10, 43 (1970).

37. "Banks maintaining these collective funds would solicit money from various institutional investment vehicles, including pension funds, and would promise to commingle the funds to take advantage of the economies of size that could be gained in the securities market and the investment expertise of the bank's analysts. Since an interest in such collective funds held by an individual pension fund is a security and the bank collective fund an investment company, efforts were made to exempt this security from the registration provisions of the Securities Act and the collective fund from the Investment Company Act." (SEC Br. 32 n. 40)

See, *e.g.*, S. 34, 91st Cong., 1st Sess. 65 (1969), reprinted in S. Comm. on Banking and Currency, *Analysis of S. 34*, 91st Cong., 1st Sess. 119 (1969). After the Senate passed a bill containing this language, the General Counsel of the Sperry-Rand Corporation wrote a letter to the House Subcommittee considering the legislation pointing out that the bill did not exempt interests in single trust funds. Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., Part 2 at 929-931. His suggestion was to add the language "or any employees' stock bonus, pension or profit-sharing trust" after "separate account maintained by an insurance company."

In response to this suggestion, the Subcommittee reported out a bill with the added phrase "single or" to precede the phrase "collective trust fund maintained by a bank." This version, later passed by the House, thereby altered the focus of the exemption to encompass interests in the underlying pension funds. The Conference Report went along with the House version:

> "The Senate bill exempted from the registration requirements of the 1933 Act certain collective trust funds maintained by a bank or in a separate account maintained by an insurance company.
>
> "The House amendment would have codified a long established administrative practice of the Commission by making it clear that this exemption applied not only to collective trust funds, but also to single trust funds.
>
> "The conference agreement follows the House version." H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970).

Two subsequent changes in the language of the exemption show the shift to include interests in the underlying plans. Although the Conference Committee generally adopted the House version, it did include a small modification. Since the House provision exempted interests in all pension funds, it was contrary to the SEC's administrative position that non-registration of pension interests did not apply in all situations. In particular, the SEC required registration where an amount in excess of the

employer's contribution to a pension fund is allocated to the purchase by the fund of securities issued by the employer. In order to conform the exemption, a provision was included to exclude the above situation from exemption. *Id.* at 24.

This exclusion generated another legislative fillip. The exclusion applied when the excess was used to purchase securities issued by the employer. Since interests in pension funds are themselves securities, the exclusion could potentially be interpreted to require registration of all pension plans where any money is contributed to the pension plan directly by employees, since they could be conceptualized as buying securities.[38] Accordingly, Section 3(a)(2) of the 1933 Act was amended one week after the passage of the 1970 Amendments to make it clear that the term "security issued by the employer" did not include the securities consisting of the interests in the pension fund. See 116 Cong. Rec. 40608 (Dec. 9, 1970).

Therefore the 1970 Amendments show that Congress intended to conform the 1933 Act to the SEC's administrative view that, although interests in pension funds did not need to be registered in most cases, they are nonetheless securities. See 116 Cong. Rec. 33287 (Sept. 23, 1970). When conjoined with the above-detailed legislative history and SEC interpretation, the 1970 Amendments provide substantial support for the proposition that an interest in an employee pension fund is a security.

Policy

Perhaps the main reason that pension plans are not specifically mentioned in the legislative history of the 1933 and 1934 Acts themselves is the fact that in the early 1930's pension plans were still a rarity. In the early decades of the 20th century, only 38% of invested capital was invested indirectly, and of this amount only 1/10 of 1% was invested in pension funds. By

38. "In particular, there was concern that where an insurance company maintained a separate account to fund pension benefits for its own employees, interests in such an account might be considered securities issued by the employer." (SEC Br. 34 n. 44.)

1962, the indirect sector of the capital markets had jumped to 83% and pensions constituted 27% of this amount. Hearings Before the Subcommittee on Fiscal Policy, U. S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 17-18 (1970). Since 1955, the asset value of pension plans has exceeded the total accumulated by the other three major institutional investors: mutual funds, life insurance companies and property and liability insurance companies. We are informed by an *amicus curiae* that the book value of private pension plan assets is $216.9 billion, the largest single source of private investment capital in the economy.

Because employee pension plans are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of investment vehicle that the securities acts were passed to regulate. To proclaim that the securities laws encompass securities consisting of interests in pension plans is "quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it * * *." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737. The type of fraud allegedly perpetrated on the plaintiff is among those the securities laws were passed to prevent and remedy.

Of course, the normal scheme of the securities acts require registration as well as providing anti-fraud remedies. However, as demonstrated above, the 1970 Amendments codified the SEC's practice of exempting pension funds from the registration requirements of the 1933 Act. Thus declaring an interest in a pension fund to be a security will not subject any plans to registration which are not already so subject. Consequently, since the anti-fraud provisions do not impose an undue burden on anyone, they should be available to employees to remedy fraud. Mundheim and Henderson, *supra*, at 814. The proper inquiry then is not whether interests in employee pension plans are securities but rather why such a vital investment vehicle

should be nevertheless excluded from the protection of the securities laws. We now turn to this inquiry.

Plaintiff's Security Was Acquired in a "Sale"

Defendants maintain that even if the plaintiff's interest is a security, his cause of action is defeated because he did not acquire it in a sale.

The 1933 Act defines "sale" as including

> "every * * * disposition of a security or interest in a security for value" (15 U.S.C. § 77b(3)).

and the 1934 Act defines "sale" as including "any contract to sell or otherwise dispose of" (15 U. S. C. § 77c(a)(14)). Accordingly, in both Acts, a "sale" of an interest in a pension fund depends upon whether there has been a disposition of it. Here plaintiff acquired an interest in the Local 705 Pension Fund, and as shown, that interest is a security. Therefore, there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts. The 1933 Act also requires that the disposition be "for value." Here plaintiff's giving of his services and the employer's contribution on behalf of the employee constitutes value, thereby meeting the "for value" requirement. See S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958). From the employee's viewpoint, the contributions to the pension fund are part of his compensation and the value flows from him to that extent.[39] From the employer's viewpoint, the contribution flows

39. Union spokesmen for both the United Auto Workers and the Teamsters have testified that pensions are deferred wages which are given high priority in collective bargaining. As to the UAW, see Hearings before the Senate Subcommittee on Private Pension Plans of the Committee on Finance, 93d Cong., 1st Sess. 467 (1973). As to the Teamsters, see Hearings before the Special Subcommittee on Labor, House Committee of Education and Labor, 87th Cong., 1st Sess. 225 (1961). This was the recurrent theme emerging from the ERISA [Employment Retirement Income Security Act] hearings as well:

> "An important theme which emerged from Subcommittee hearings related to the basic dichotomy in the rationale for a pension plan. Repeatedly, witnesses volunteered testimony that

(Footnote continued on next page.)

from the employee, constituting a part of the employee's compensation package. In either event, value has been given for a security, so that erection of a direct-indirect dichotomy is unwarranted. *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 954-955 (S. D. N. Y. 1971, Mansfield, J.); see also *Hector* v. *Wiens*, 533 F. 2d 429, 431-433 (9th Cir. 1976); cf. *Pete* v. *United Mine Workers*, 517 F. 2d 1275, 1287 (D. C. Cir. 1976).

The defendants maintain there is a controlling conceptual distinction between "non-contributory" plans and plans where the employee first receives cash and then pays over such cash into the pension fund. We refuse to subscribe to undue liberalism. An employee's performance of services satisfies the for value requirement of the 1933 Act. See *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972); *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961); *Lawrence* v *SEC*, 398 F 2d 276 (1st Cir. 1968); see also *Truncale* v. *Blumberg*, 88 F. Supp. 677 (S. D. N. Y. 1950); *Hector*, *supra*, at 432. Recent SEC interpretations also support the view that an interest in a non-contributory plan is gained for value. *Oklahoma National Gas Co.* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,583 (1971); *Allis-Chalmers Corp.* [72-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,803; *Keene Corp.* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,475; *Missouri Research Laboratories, Inc.* [72-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,036.

Defendants argue that there can be no sale because the contribution to the pension fund is compulsory. However, the definitions of "sale" in the 1933 and 1934 Acts do not require volition.

(Footnote continued from preceding page.)

> they regarded their pension benefits as deferred wages. Since labor negotiations resulting in wage increases through collective bargaining invariably include some consideration of pension benefits, employees believe that had pensions not been included in the settlement package, they would have received higher wage commitments." S. Rep. No. 92-634, Interim Report of Activities of the Pension Welfare and Pension Plan Study, 1971, 92d Cong., 2d Sess. 75 (1972).

In any case, volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union.[40] Similarly, in the corporate merger context (where a vote by the shareholders to merge is binding notwithstanding any individual shareholder's vote to the contrary), cases under the anti-fraud provisions have held that a sale occurs where there is no voluntary action by the alleged purchaser. *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627, 635 (2d Cir. 1967); *Zeller* v. *Bogue Electric Manufacturing Corp.*, 476 F. 2d 795 (2d Cir. 1973); *International Controls Corp.* v. *Vesco*, 490 F. 2d 1334 (2d Cir. 1974), certiorari denied, 417 U. S. 932. The volition argument in a no-sale conclusion in the merger context, which was used only in the registration milieu, was derived from SEC Rule 133 (33 C. F. R. § 230-133 (1964)) but it was rescinded in 1972. In rescinding that rule, the Commission characterized that rationale as "only correct in the formalistic sense" in that it

40. The Teamsters maintain that a local whose constitution requires member ratification of pension plan agreements such as 705's is a rarity. Be that as it may, in our mobile society, an employee will be faced with a number of employment decisions during his career, and as he ages, such shifts will be more and more affected by the pension plan offered by a prospective employer. Accordingly, an employee may be faced with a meaningful decision even in the case of a compulsory plan whether to acquire interests in the pension fund. See Note, *supra*, 70 Harv. L. Rev. at 494. Needless to say, this construct does not render the individual employee a party to the bargain with the employer in the technical labor law sense. In this sense, the Union remains the exclusive agent.

Amicus ERIC suggests that if ratification is the doctrinal reed upon which a finding of volition is hung, unions will quickly eliminate ratification votes. First, we have shown that volition can exist even if ratification does not. But in any event, volition is not necessary for a sale under the securities acts. Even in a worst-case analysis, movement away from contract ratification would probably be limited. Elimination would require constitutional amendment which would presumably be difficult to achieve, requiring, in effect, a vote to weaken union democracy.

"overlooks the reality of the transaction." As the SEC pointed out, the "corporate action * * * is not some type of independent fiat, but is only the aggregate effect of the voluntary decisions made by the individual stockholders * * *." 37 Fed. Reg. 23631, 23632 (Nov. 7, 1972). To like effect, the Local 705 Pension Fund contributions are not an independent employer fiat but rather represent the aggregate effect of the union members.

Also, plaintiff's affidavit shows that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension. When an employee decides to retain his job, his decision results in his continuing to give value in the future and in his further acquisition of interests in the pension fund.

In its brief as *amicus curiae*, the SEC has persuasively shown why it formerly reached a different result for the purposes of the 1933 Act's registration provisions in the case of plans that are either non-contributory or compulsory. It was reasoned that there was no sale involved for a non-contributory plan because there was no direct investment of money by the employee, consistent with the then current legal view that the employer's contributions were gifts. Although the SEC recognized that an individual had a choice whether to become or remain an employee, it was thought that the choice would never turn on representation concerning the pension plan.[41] Therefore

41. This in invalid in our case because, Daniel's affidavit reveals material reliance on pension benefits in retaining his job. Moreover, now that pension benefits have become such an important part of the total wage package, this conclusion has little, of any, general application. See S. Rep. No. 1734, Welfare and Pension Plan Investigation, 84th Cong., 2d Sess. 11-13 (1956); Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor, 87th Cong., 1st Sess. 32 (1961); Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 99 (1972). Pensions are second only to wages as a reason for membership rejection of settlement proposals and are well ahead of such factors as vacations, hours and overtime working conditions and seniority. Simkin, Union Membership Rejection of Contract Settlements, Labor Relations Yearbook 332, 342 (IPlR Br. at 13).

compulsory plans were not considered to involve sales. Testimony of Commissioner Purcell, 1941 Hearings at 896-897; Opinion letter of the Assistant General Counsel of the SEC, 1 CCH Fed. Sec. L. Rep. ¶ 2105.53; Testimony of Chairman Cohen, Hearings on Amendment No. 438 to S. 1659 Before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., part 3, at 1326 (1967). See also 3 SEC Institiutional Investor Study 980 quoted in Rep. Br. at 7-8.

These positions were never taken as to the anti-fraud provisions and are no longer viable even as to the registration provisions because non-contributory pensions are no longer viewed as a mere gift. Even though the Commission had in the past applied a no-sale rule to pension trusts as to the registration requirements of the 1933 Act, that rule was not administratively and should not be judicially applied to the anti-fraud provisions of both Acts. *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 465-466. The purposes of the registration and anti-fraud provisions differ (*The Exchange National Bank of Chicago* v. *Touche Ross & Co.*, 544 F. 2d 1126, 1139 (2d Cir. 1976), so that a narrow view of "sale" would be most inappropriate as to fraudulent activity. *Collins* v. *Rukin*, 342 F. Supp. 1282, 1287-1288 (D. Mass. 1972). Since "sale" as used in the two securities laws is not limited to transactions covered by the commercial laws of sales but is to be broadly construed in view of the need for anti-fraud protection,[42] we conclude that

42. As one industry spokesman has testified:

"The magnitude of the investment employers make in pension benefits for employees, encourages the tendency to present the plan in the most positive terms possible so that a return in positive employee attitudes can be realized on the investment. This leads to over simplification and an advertising sales approach. When, as is so often the case, the communication material is prepared by persons not thoroughly cognizant of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading." Testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 765 (1973).

the present disposition to plaintiff falls within the definitions of sale in the two statutes. See *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262, 266-267, 269 (7th Cir. 1967).[43]

Section 17(a) of the 1933 Act Creates a Private Cause of Action

It is well settled that Section 10b of the 1934 Act and Rule 10b-5 give rise to a private right of action for the breach of its substantive terms. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730-731. The existence of a private right of action under Section 17(a) of the 1933 Act is not as universally admitted. *Id.* at 733 n. 6. Since we proceed on the assumption that the operative provisions of the anti-fraud sections of the 1933 and 1934 Acts are identical for the purposes of this lawsuit, the validity of our unitary analysis requires that we deem Section 17(a) of the 1933 Act as creating a private action under the facts of this case.

As a preliminary matter, Judge Kirkland rejected Local 705's and Peick's argument that Section 17(a) of the Securities Act of 1933 does not create a private cause of action, 410 F. Supp. at 546. In the court below and in its principal brief here, no argument was presented by the International Brother-

43. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, on which defendants rely, reaffirmed the *Birnbaum* rule (note 17 *supra*) that liability under Section 10(b) of the 1933 Act and Rule 10b-5 requires a purchaser and seller. It does not weaken our holding in *Dasho* that "sale" in the securities laws is a comprehensive term not to be narrowly construed. Similarly, *Alabama Power Co.* v. *Davis*, ... U. S. ....., 45 LW 4588, is not contrary to the opinion below. That case merely categorizes pension plans as a compensation for length of service rather than for daily services rendered as required under the prevailing conceptualization on employee rights given returning veterans under the Military Selective Service Act. Although *Hurn* v. *Retirement Trust Fund*, 434 F. Supp. 80 (C. D. Ca. 1977), and *Wiens* v. *International Brotherhood of Teamsters*, BNA Sec. Reg. and L. Rep. No. 397 at A-13 (C. D. Ca. 1977) (where the district judge gave his ruling from the bench), support defendants, neither contains an in-depth discussion and we respectfully decline to follow them.

hood as to the existence or nonexistence of a private cause of action under Section 17(a). The language of Section 17(a) (15 U. S. C. § 77q(a)) is certainly broad enough to imply such a right. In fact, Section 17(a) is more specific than Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. § 78j(b)) under which private rights of action have been commonly approved. See *Blue Chips Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730. Accordingly, in another opinion by the same district court as below, Judge McGarr also held that Section 17(a) impliedly calls for a private right of action. *Local 734 Trust* v. *Continental Illinois National Bank & Trust Co.*, [73-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,565 at 95,963 (N. D. Ill. 1974). After noting that various courts have expressly recognized the existence of such a remedy while others have assumed it, the *Local 734 Trust* court concluded "there seems to be little practical value in denying the existence of a private action under § 17 once [as here] it is established that a plaintiff has an action under § 10(b) of the 1934 Act."[44]

In *Surovitz* v. *Hilton Hotels Corp.*, 342 F. 2d 596, 604 (7th Cir. 1965), reversed on other grounds, 383 U. S. 363, we first assumed there was a private cause of action under Section 17(a), for Judge Major stated "[t]he plain language of that Section convinces us that any cause of action arising under that Section is a right of the person injured by the acts and practices therein proscribed." In *Schaefer* v. *First National Bank of Lincolnwood*, 509 F. 2d 1287, 1293 (7th Cir. 1975), this Court squarely held that Section 17(a) permits a private cause of action, stating:

44. For similar rulings by the court below, see *Freed* v. *Szabo Food Service, Inc.*, [61-64 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,317 (N. D. Ill. 1964); *Schaefer* v. *First National Bank of Lincolnwood*, 326 F. Supp. 1186, 1190 (N. D. Ill. 1970), affirmed in this respect, 509 F. 2d 1287, 1293 (1975); *contra, Reid* v. *Mann*, 381 F. Supp. 525, 526-528 (N. D. Ill. 1974), noting the divergence of opinion on the subject.

> "Since [as here] fraud as well as negligence has been alleged and the section 10(b) claims established plaintiffs' section 17 claim will be allowed to stand."[45]

In Local 705's main brief before us, the Section 17(a) point is only mentioned in passing (Br. 21). Similarly, in their joint reply brief, defendants do "not particularize with respect to the non-applicability of [Section 17(a)]" (Reply Br. 8 n. 19). Defendants there observed that the 1933 Act relates to the initial issuance of securities and the 1934 Act relates to the resale market and then reasoned that Section 17(a) is the only anti-fraud provision even possibly applicable here.[46] Finally, the reply brief states that defendants "raise but do not argue the absence of an implied right of private action under Section 17(a)" (*ibid.* n. 9). In sum, defendants either do not contest or only weakly contest the existence of a private right of action under Section 17(a) where a "sale" of a "security" is present. Having decided that the definitions of a "sale" and "security" have been met by this complaint, we reaffirm *Schaefer*

45. In *Globus* v. *Law Research Service, Inc.*, 418 F. 2d 1276, 1283-1284 (2d Cir. 1969), certiorari denied, 397 U. S. 913, the Second Circuit decided there was a cause of action under Section 17(a) because there was "little practical point in denying the existence of an action under Section 17 once it is established that an aggrieved buyer has a private action under Section 10(b) of the 1934 Act." The court cited many authorites upholding a private right of action for a violation of Section 17(a).

46. As Judge Friendly has noted, *"courts have shrunk from a literal reading* that would extend the reach of the statutes beyond what could reasonably be thought to have been intended in these two great pieces of legislation and *would produce a seemingly irrational difference in the scope of their anti-fraud provisions." Exchange Nat. Bank, supra,* at 1133. (Emphasis supplied.) Here the security is plaintiff's interest in the pension plan, These interests generically arose when the pension plan was first formed for the benefit of Local 705 members. This was the primary distribution of the securities. Since Daniel was a member of Local 705 at this time, he has standing to sue for fraud in the primary distribution under Section 17(a) of the 1933 Act. Each year Daniel paid more value into the fund and from time to time plan amendments were effected which Daniel claims contributed to his being defrauded. This is the conceptual predicate for finding a secondary distribution under Section 10b of the 1934 Act.

and therefore hold that Section 17(a) permits Count II to proceed.[47]

The Anti-fraud Provisions of the Federal Securities Laws Have Not Been Pre-empted by ERISA

The defendants[48] and the *amici* who support their position urge that the Employment Retirement Income Security Act of 1974 (ERISA) has repealed the anti-fraud provisions of the 1933 and 1934 Acts insofar as they apply to union pension funds. Since we have concluded that the securities laws apply to a union member's interest in his pension fund, pre-emption may only be declared in the face of an explicit repealer provision or the most cogent repugnancy between the securities and pension regulatory schemes. Cf. *Gordon* v. *New York Stock Exchange,* 422 U. S. 659, 682-683. Neither of these triggering conditions for pre-emption of the securities laws is present in this case.

Section 514(d)[49] of ERISA (29 U. S. C. § 1144(d)) is a general savings clause which provides that ERISA shall not be construed to supersede any federal law or rule thereunder. At the same time, Congress preserved state securities laws (29 U. S. C.

47. In *Sanders* v. *John Nuveen & Co., Inc.,* ..... F. 2d ..... (7th Cir. 1977), we found it unnecesary to decide whether a private right of action exists under Section 17(a) when it is not accompanied by a viable Rule 10b-5 claim (slip op. 8-9). Where, as here, the Section 17(a) count accompanies a viable Rule 10b-5 count, *Sanders* requires proof of *scienter* under Section 17(a) (slip op. 9).

48. In the court below, the International Brotherhood conceded that ERISA does not exempt "employee pension plans from the Federal Securites Laws, either expressly or by implied repeal." International's Sup. Memo. in support of Its Motion to Dismiss at 4 (Oct. 9, 1975).

49. Section 514(d) provides in pertinent part:

> "Nothing in [ERISA] * * * shall be construed to alter, amend, modify, impair, or supersede, any law of the United States * * * or any rule or regulation issued under any such law."

§ 1144(b)(2)(A)) in Section 514(b)(2)(A)[50] and they generally do not exempt pension interests from their anti-fraud provisions.[51] Thus ERISA's own savings clause by its own terms strongly suggests that pre-emption was not intended.

The defendants attempt to counter the statute's explicit terms by arguing that since it was universally believed pension funds were outside the scope of the securities acts. Congress saw no need to explicitly exempt a truism. But see *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 416 n. 20, 437. Defendants strain for support in the legislative history of the various pension regulatory acts. But all of the sources cited by the defendants[52] support only the proposition that

> "Pension and profit sharing plans are exempt from coverage under the Securities Act of 1933 (15 U. S. C. 77 *et seq.*), unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. A voluntary contributory plan is one to which both the employee and the employer contribute and in which employees

50. Section 514(b)(2)(A) provides in pertinent part:

> "[N]othing in this title shall be construed to exempt or relieve any person from any law of any State which regulates * * * securities."

51. The Illinois Securities Law of 1953 defines a security, for our purposes, in terms identical to the federal acts. 1975 Ill. Rev. Stat. Ch. 121½, Section 137.2-1. Pension interests are covered by the definition since "securities issued by or pursuant to * * * employee pension trusts or plans" are freed from registration requirements. 1975 Ill. Rev. Stat. 121½, Section 137.3-0. A similar definition of security and exemption from registration is included in the Uniform Securities Act which has been adopted in 32 jurisdictions. 7 Uniform Laws Ann., Uniform Securities Act §§ 501(1) and 402(a)(11) (1970) and Cumulative Annual Pocket Part at 342 (1976).

52. S. Rep. No. 1440, 85th Cong., 2d Sess. reprinted in 3 U. S. Code Cong. & Admin. News 4145 (1958); Welfare and Pension Plans Investigation, Hearings before the Senate Subcomm. on Labor and Public Welfare, 84th Cong., 1st Sess. 943-945 (1955); S. Rep. No. 1734, 84th Cong., 2d Sess. 57, 60 (1956); 3 U. S. Code Cong. & Admin. News, 93d Cong., 2d Sess. 4649, 4863 (1974); *id.* at 4641-4643, 4840-4842, 4847. See Mundheim and Henderson, *supra,* at 837.

> voluntarily participate. If the plan's investment in the employer's securities exceeds the employer's contribution, both the employer's securities and the interest in the plan must be *registered* under the Securities Acts with the SEC." Interim Report of the Private Welfare and Pension Plan Study, 1971, S. Rep. No. 92-634 of the 92d Cong., 2d Sess. 96 (emphasis supplied).

Herein lies the defendants' quintessential error. They confuse the requirements of the 1933 Act's registration provisions with the anti-fraud provisions of the 1933 and 1934 Acts. The registration provisions are designed to assure that investors will be furnished with all material information concerning an informed investment decision. The mechanism to implement this objective includes filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer. In contradistinction, the anti-fraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather the anti-fraud provisions are essentially a generalized self-executing prohibition against fraudulent activity. There is no invitation "to create a federal common law governing the management of pension plans." *Lugo* v. *Employers Retirement Fund*, 529 F. 2d 251, 255 (2d Cir. 1976), certiorari denied, 45 L. W. 3250.

The fact that the SEC has historically advocated[53] a hands-off approach to the regulation of pension plans with respect to

53. The Senate Report on the 1958 pension act explained:

> "Serious consideration was given earlier to placing the administration of the bill with the Securities and Exchange Commission on the basis of its past experience in the administration of disclosure type legislation. However, as the official representatives of the Securities and Exchange Commission clearly indicated that they did not feel they were the proper agency to handle the administration of this type of legislation and as they felt that the taking on of this function might interfere with their presently established functions, this consideration was abandoned."

S. Rep. No. 1440, 85th Cong., 2d Sess., reprinted at 3 U. S. Code Cong. & Admin. News, 4137, 4156 (1958). See also 1957 Hearings

(Footnote continued on next page.)

disclosure requirements holds no brief for exempting pension plans from the anti-fraud provisions of the securities acts. Nor does the fact that ERISA provides for disclosure of a plethora of information after its effective date of January 1, 1975,[54] and that it heavily regulates the pension industry *ipso facto* dictate that pension funds should enjoy a blanket exemption from the anti-fraud sections. Although banks and life insurance companies are subject to stringent regulation, bank securities and insurance variable annuities and flexible funds are subject to the anti-fraud rules of the securities acts, even though they are sometimes exempt from the registration regulations of the acts. *Tcherepnin* v. *Knight*, 389 U. S. 332; *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65; *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202; *SEC* v. *National Securities, Inc.*, 393 U S. 453.

(Footnote continued from preceding page.)

at 107, 119. The SEC's decision not to accept a regulatory role to enforce disclosure of material investment information was largely based on the conclusion that:

> "Inasmuch as welfare and pension plan beneficiaries generally have no individual choice as to the securities to be purchased by a welfare or pension fund, the type of meaningful information to be furnished to them as to the management, investments and transactions of their funds may involve quite different criteria from those presently employed by the Commission under the various Federal Securities Acts." *Id.* at 119.

The SEC did not apparently object to being given plenary jurisdiction over individual retirement accounts. ERISA Leg. Hist., Vol. III at 4605. Nor was the Congress that enacted ERISA unaware that the SEC considered interests in pension funds to be securities under the 1933 Act unless excepted. See note 31 *supra*.

54. It should be noted that the defendants concede that certain voluntary and contributory pension plans are subject to both the securities laws' registration requirements and ERISA (Rep. Br. 206). The securities laws apparently have not torpedoed such plans. This seems to follow from the continuing registration of such plans. In fact, the disclosure requirements are becoming complementary as the SEC in its revisions of Form S-8 attempts to avoid duplication of, but not defer to the ERISA requirements. Form S-8. Sec. Act Release No. 33-5488 (1974), CCH Fed. Sec. L. Rep. ¶ 7197; Sec. Act Release No. 5767 (Nov. 22, 1976), [76-77 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 80,809; *SEC* v. *Garfinkle* [74-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,020 (S. D. N. Y. 1975).

Reading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA makes good sense. The requirements of ERISA do not substitute for the protections afforded by the anti-fraud provisions because the securities laws require that all material facts, including, of course, risk of loss, be disclosed prior to the investment decision (*TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438) while ERISA disclosure limits itself to the plan provisions[55] without a particularizing of how likely benefits may be lost (ERISA Section 102 (29 U. S. C. § 1022)) and may be made 90 days subsequent to the investment commitment.[56] ERISA Section 104(b)(1)(A) (29 U. S. C. § 1024(b)(1)(A)). Defendants have not shown that ERISA would provide relief to persons who have acquired an interest in a pension fund where false or misleading representations have been made at inception or during subsequent ratifications or upon a job offer.[57] Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statis-

55. ERISA has other *post-hoc* disclosure times. Thus the amended provisions of a pension plan need not be disclosed until after adopted (ERISA Section 104(b)(1)(B) (29 U. S. C. § 1024(b)(1)(B)) and then only summaries of the changed provisions are given until five years later when they must be incorporated into the integrated plan summary. In the establishment of a new plan, disclosure can occur within four months of adoption. *Id.*

56. Circumscribing the utility of ERISA disclosure further are the widespread disclaimers of liability for incorrect plans description or analysis which are contained in most post-ERISA summary plan description booklets. Under Section 14 of the 1933 Act and Section 29 of the 1934 Act, waivers of liability regarding securities are ineffective. See *Wilko* v. *Swan*, 346 U. S. 427; *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ... F. 2d ..... 7th Cir. July 26, 1977).

57. Moreover the denial of pension benefits to John Daniel occurred before the effective date of ERISA. Section 502(a) of ERISA, 29 U. S. C. § 1132(a), provides a right of action for a pension fund beneficiary "to obtain • • • appropriate equitable relief • • • to redress • • • violations" of any provision of Title I of ERISA ("Protection of Employee Benefit Rights") 29 U. S. C. §§ 1001-1144. However, there is no provision of Title I which generally prohibits the making of false or misleading representations to an employee concerning the pension fund.

tically determinable risk that many employees covered by a plan will never receive their pension benefits.[58] Thus the anti-fraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan, protecting them from losing benefits through ignorance of the plan provisions. Consequently, we conclude it would be unwarranted to impute an intent on the part of Congress for ERISA to override the federal or state securities laws, *SEC* v. *Garfinkle* [74-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,020 (S. D. N. Y. 1975), where protections offered by ERISA do not fully overlap those of the anti-fraud provisions of the securities acts. *Cf. Califano* v. *Sanders*, 45 LW 4209, 4210-4211.

Judge Kirkland's disposition is not repugnant to the regulatory scheme outlined by ERISA. Although the defendants assert any remedy given plaintiff would contravene Section 203(b)(1)(F) of ERISA (29 U. S. C. § 1053(b)(1)(F))[59] because that Sec-

58. "ERISA § 102(b) (29 U. S. C. § 1022(b)) requires that summary plan descriptions include a statement of 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.' In theory, employees should be able to infer from this information in the plan description that there is a risk of loss, and perhaps the nature of that risk. The Departement of Labor has interpreted the statutory language very narrowly, however, in proposed rules issued on June 9, 1975, 40 Fed. Reg. 24654, on which the Department has stated plan administrators may rely. 41 Fed. Reg. 16957 (April 23, 1976). Plan administrators are permitted to describe the benefits of the plan in positive language, leaving the employee to deduce the negatives implicit in the affirmative language. (IPIR Br. at 21 n*).

59. Section 203(b)(1)(F) provides:

> "(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> "(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date."

tion permits pension plans to disregard nonforfeitable years of service before the September 2, 1974, effective date of that statute if, as here, the employee would not have been entitled to benefits because of a break in continuous service under his pension plan, the district court can fashion relief to avoid a conflict with ERISA if plaintiff should prevail on the merits. Judge Kirkland has not, contrary to ERISA, held defendants' twenty-year continuous service rule invalid. His opinion merely holds that it and other essential matters had to be disclosed, and defendants will doubtless attempt to show at trial that plaintiff was aware of that and other key requirements.

Effect on Labor-Management Relations

Even if ERISA does not exempt pension plans from the securities acts, it is argued that a resultant devastating effect on labor-management relations in and of itself should require an exemption in the absence of specific inclusory language in the securities acts. But holding the anti-fraud provisions to be applicable here will not destroy labor-management relations as defendants and the *amici* who support their position insist, for the anti-fraud provisions only probe fraudulent conduct such as the making of false or misleading representations. They do not require any complex filings. Moreover, most pension plans have been specifically exempted from the registration requirements of the 1933 Act. 15 U. S. C. § 77c(a)(2)(A). Since a sale triggering the anti-fraud provisions would normally occur when an employee decides to accept or continue in a job, the holding below would not be disruptive of the collective bargaining process. Indeed, the application of the anti-fraud provisions of the securities laws should enhance federal labor policy by augmenting the unchallenged statutory right of workers to be fairly represented by their union (Local 705 Br. 14 n. 31; 29 U. S. C. § 185; *Vaca* v. *Sipes,* 386 U. S. 171). And as *amicus* Gray Panthers point out, such an application will further the purpose of Section 302(c)(5) of the Labor Management Relations Act (29 U. S. C. § 186(c)(5)) by letting each employee know to

what he is entitled under a union pension fund. 2 NLRB, Legislative History of Labor Management Relations Act of 1947, 1305 (1948). The only negative effect on unions *qua* unions will be in preventing them from defrauding their rank and file with impunity. See *Walsh* v. *Schlecht,* ___ U. S. ____, ____, 45 LW 4126, 4128.

In sum, Congress has nowhere provided that the anti-fraud provisions of the securities acts should not apply to pension funds. The Secretary of Labor's arguments that affirmance will undermine a union's authority as exclusive bargaining agent for its employees vis-à-vis the employer or will disrupt the bargaining process are specious. Of course a finding of liability implies nothing about the entirely separate and not uncomplicated question of the form of relief which is a matter for the trial court, and the construction of formulae giving the measure of damages is for the trial court in the first instance. *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375, 386; *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 495 F. 2d 228, 241 (2d Cir. 1974). Furthermore, as *amicus* Institute for Public Interest Representation has shown, current employees need not be disadvantaged because of the generous amortization and waiver provisions contained in Sections 302, 303 and 304 of ERISA (29 U. S. C. §§ 1082-1084). It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants.

The Parade of Horribles

The parade of horribles offered by defendants and the *amici* who support their position (including their predictions of $200 billion liabilities) results mainly from their zeal as advocates and should not distract a court from enforcing the Congressional policies contained in the anti-fraud provisions of the securities laws.[60] Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting

60. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, 351-352 (plurality opinion).

requirements of the 1934 Act to be applicable to these pension funds.[61] We do not require the filing of any document or establish judicial control over pension fund operations. There should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage because all of the material information will be readily available to the plan trustees since their actuaries needed all of the information in order to set up the plan in the first place.

Moreover, plan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing him injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws. *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F. 2d 1033, 1049-1051 (7th Cir. 1977). Thus if the plan documents sent to a plan beneficiary understandably dis-

61. Because of the longtime and consistent administrative practice, these pension funds might be deemed beyond the scope of the registration requirements even if they are not already exempted by 15 U. S. C. § 77c(a)(2)(A). The SEC maintains 96% of all pension plans are so exempted apparently because most funds, including Local 705's, are invested by the trust departments of major banks. (Hansen Ex. 1, App. 184a at 14-15):

> "There is only one affirmative condition—qualification under Section 401 of the Internal Revenue Code—that a pension plan must meet in order to qualify for this exemption. It has been estimated that 96% of pension plans satisfy this condition. See S. Rep. No. 92-1150, 92d Cong., 2d Sess. 110 (1972). There is also a negative condition; the exemption is lost if the plan invests an amount greater than the employer's contributions in securities of the employer." (SEC Br. at 59 n. 81).

Because the seller is the pension trust operating through the trustees, the amended complaint does not include Daniel's employers as defendants. Therefore, this opinion does not consider any possible obligations of employers under the 1933 and 1934 Acts with regard to pension plans.

close this information, a retiree who does not meet the vesting requirements will have no remedy under the securities acts, even if he subjectively did not comprehend the disclosed information. In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability.

ORDER AFFIRMED.

TONE, *Circuit Judge*, concurring. I am able to agree with much that Judge Cummings says in his scholarly opinion for the court, but certain doubts lead me to write separately.

For me, this is a close and difficult case. I am beset by the same doubts arising from the ordinary meaning of the words "security," "investment contract," and "sale" and from Congress' basic purpose in adopting the Securities Acts that must have influenced the several district judges who have reached conclusions inconsistent with ours. *Hurn* v. *Retirement Trust Fund, Etc.*, 424 F. Supp. 80 (C. D. Cal. 1976); *Wiens* v. *International Brotherhood of Teamsters*, BNA Securities and Law Report (No. 397, April 6, 1977, p. A-13) (C. D. Cal., 1977); *Robinson* v. *United Mine Workers of America Health and Retirement Funds*, Civ. No. 77-0698 (D. D. C. July 29, 1977) (as yet unreported). The series of transactions by which Daniel acquired his interest or expectancy, such as it was, do not fit neatly into the traditional concept of a sale of a security. In addition, it may well be, as Judge Gesell believes (see *Robinson, supra*), that the *Forman* case (*United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975)) and other recent Supreme Court decisions indicate "a pronounced disfavor with attempts to stretch the securities laws beyond their traditional scope." Nevertheless, considering the breadth of the definitions of "investment contract" and "sale" in the statutes themselves and the interpretation of those terms in cases we must still regard as authoritative, I believe the balance tips in favor of the plaintiff's position.

In reaching this conclusion, I have found little comfort in the opinion expressed by the SEC, as *amicus curiae*. Apparently for the first time ever, it now takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws. The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position. As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan might well be an investment contract, the element of sale was lacking.[1] Before that, not even the existence of a security was acknowledged. It is true that the Commission's attention seems to have been focused largely on registration requirements rather than the antifraud provisions,[2] but there appears to have been no intimation over the years that it viewed the antifraud provisions as applicable. The statement in the *Institutional Investor Study* that the Commission staff "has taken the position that the Securities Act [of 1933] does not apply"[3] seemed to refer to all the disclosure provisions of that Act, not merely its registration provisions. It should be added, however, that the SEC's former position appears to have initially been based in large part on the unduly restrictive view that the employer's contribution on behalf of the employee was a gift and that a necessary volitional element was lacking; and, so far as its public statements disclose, the Commission persisted in that position without any real reexamination of its basis.

Members of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before us. It is realistic,

1. 3 SEC *Institutional Investor Study* 996 (1971).

2. Between which a distinction can rationally be drawn. See *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969).

3. Cited at note 1, *supra*.

however, to believe that most members of Congress understood that the SEC is not infallible, that the Supreme Court has been known to disagree with that agency's interpretation of the securities acts, and that the applicability of those acts to various kinds of transactions, including non-contributory pension plans, has yet to be determined by the Supreme Court. It appears likely that Congress has chosen to leave the matter in that posture. I find no persuasive evidence to the contrary in the legislative history subsequent to the adoption of the securities laws.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Alfred Y. Kirkland

Cause No. 74 C 2865 Date March 1, 1976

Title of Cause—John Daniel, etc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, etc., et al.

Brief Statement of Motion—Motions by certain defendants to dismiss.

Enter Memorandum Opinion and Order. (Draft) Defendants' motions to dismiss the complaint are denied in their entirety. Kirkland, J.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

No. 74 C 2865

JOHN DANIEL, for himself and on behalf of all others similarly situated,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS OF AMERICA, a labor union organization; and LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS OF AMERICA, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and LOUIS PEICK, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated, The LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA PENSION FUND, a trust fund, by itself and as representative of all Teamster pension funds; FRANK KRATKY, by himself and as representative of the Local 705 Pension Fund and of all Teamsters pension funds and of all Trustees of all Teamsters pension funds and as representative of all Officers of all Teamster unions similarly situated; and BRUNO FILLIPINI, PETER JANOPOLOUS, FRANK BRIDGE, W. EUGENE MCCARRON, RALPH NIEDERS, SR. and M. W. SIEWERT, JR., by themselves and as representatives of the Local 705 Pension Fund and of all Teamster pension funds and of all Trustees of all Teamster pension funds,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on motions by certain defendants to dismiss the complaint. The action is in six counts and seeks relief under the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act"), the National Labor Relations Act ("NLRA") and pendent claims of common law fraud and deceit and breach of trust. Jurisdiction is invoked under 15 U. S. C. §§ 78a-78jj, 77a-77aa, 28 U. S. C. §§ 1337 and 185(a) and under principles of pendent jurisdiction.

Plaintiff is a resident of Illinois and a member of Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 705"). Defendants are International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT"), a labor union; Local 705; Louis Peick, a Trustee, and Officer of Local 705 Pension Fund; the Local 705 Pension Fund; and other Trustees of the Local 705 Pension Fund ("Trustees"). Moving defendants are IBT, Local 705 and Louis Peick. The Pension Fund and other named Trustees were added as defendants pending decision on these motions and no motions by those defendants are presently before the Court. The action is framed as a class action, both as to plaintiff and defendant classes.

The complaint alleges that plaintiff worked for Local 705 covered employers for a total of twenty-two and one-half years. This employment was uninterrupted with the exception of a several month absence beginning in December of 1960. This absence, resulting from an involuntary lay-off, was the basis for a decision by Trustees of the Local 705 Pension Fund to deny plaintiff his pension benefits.

Plaintiff alleges that this action by the Trustees, as well as defendants' maintenance and administration of the Pension Fund, is violative of the antifraud provision of the federal securities laws, and of certain requirements of NLRA and is in breach of defendants' common law trust and fiduciary duty.

Defendant IBT has filed a motion to dismiss only as to Counts I and II. Defendants Local 705 and Peick (collectively referred to as "local defendants") have raised additional challenges. The Court will consider their arguments in sequence.

COUNTS I and II

Counts I and II of the complaint seek relief for defendants' fraudulent and intentional misrepresentations and omissions with respect to the sale to members of the plaintiff class of interests in Teamster union pension funds, all in violation of Section 17(a) of the 1933 Act and Section 10(b) and Rule 10b-5 of the 1934 Act.

Local defendants argue that Counts I and II are barred by the statute of limitations. It is not disputed that the Seventh Circuit holding in *Parrent* v. *Midwest Rug Mills Inc.*, 455 F. 2d 123 (7th Cir. 1972) provides that the applicable statute of limitations for an action for fraud under these sections is the three year period provided in the Illinois Securities Act, Ill. Rev. Stat. ch. 121½ § 137.13(d) and that:

> Under Illinois Securities Law, a buyer has three years to sue "not only from the date the right first accrues, but from the date the sale is completed". (455 F. 2d at 128.)

Plaintiff, however, argues that notwithstanding the three year statute of limitations, the federal tolling doctrine will delay running of the limitations period until the fraud is discovered "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party". *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1945). It was added in *Parrent* that the courts will:

> read into the three-year limitation applied in the Rule 10-b count the 'equitable doctrine' that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud 'remains in ignorance of it without any fault or want of diligence or care on his part . . .' (455 F. 2d at 128.)

Defendants initially argue that plaintiff has admitted to actual knowledge, as evidenced by the fact that the complaint alleges that misrepresentations and omissions of material fact began as early as 1955 and have continued until the present time.

The Court does not find this argument persuasive. Plaintiff's allegations that misrepresentation began twenty years ago cannot be construed as an admission that plaintiff had knowledge of those misrepresentations at the time they were made. The crux of plaintiff's complaint is that he first learned of the fraud perpetrated upon him when he was denied his pension.

Defendants argue at length that plaintiff in fact had actual knowledge of the break in service rule and its application and consequences for many years. In support of their claim, they state that the eligibility rule was passed in early 1955 and communicated to the employee-participants, including plaintiff, by letter in April of that year. Relevant information was compiled in booklet form and sent to each participant in 1958 and 1969, years in which plaintiff was a participant. Likewise, the eligibility requirements were set out in letters of May 19, 1971 and June 11, 1971. Finally, since 1959 the trust agreement itself has been available for inspection at the Local 705 Pension Fund office or would have been sent to plaintiff's home upon his written request.

At the outset, plaintiff contends that defendants have incorrectly determined when the sale was completed, and have thus incorrectly applied the *Parrent* rule to the facts. Plaintiff argues that the "sale" was completed within the three year period preceding the complaint. In particular, he argues that there was a continuing fraudulent offer to plaintiff dated from 1955 to the time of his retirement on December 1, 1973. Alternatively, plaintiff argues that there was a sale for each pay period when plaintiff's employer made a contribution to the fund on his behalf and that many such contributions were made within the statutory period.

Taking all of defendants' arguments as true, the most that can be said is that plaintiff was put on notice that twenty years

of continuous service was required. These arguments go to only one of several misrepresentations alleged in the complaint.

Plaintiff has stated in an affidavit that he had no actual notice of the ongoing misrepresentation. The question, then, becomes whether he should have known of the fraud in the exercise of proper diligence or care on his part.

First, as plaintiff correctly observes, there is a fiduciary relationship between the parties. In such a situation there is a lesser degree of inquiry demanded of the trusting, yet defrauded plaintiff.

> The concept of due diligence is not imposed within the frame of a rigid standard. . . . A fraud . . . convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship . . . bears heavily on the issue of due diligence.

Azalea Meats, Inc. v. *Muscat*, 386 F. 2d 5, 9 (5th Cir. 1967). Accord, *Racine* v. *Essex Wire Corp.* (69-70 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 92,746 at 99,247 (N. D. Ill. 1970). The Court takes special note of the argument that the state of mind of the defrauded plaintiff had been anesthetized and put to rest by the "fraternal"—if not paternal—proclamations of defendants relative to their concern for plaintiff's welfare.

Second, the reasonableness of the degree of inquiry expected is properly gauged against plaintiff's level of education and sophistication. Plaintiff states in his affidavit that he has an eighth grade education. He further states that whatever information was provided by defendants was obfuscated by many pages of small print and couched in ambiguous or technical language.

Here in effect defendants ask for summary judgment on the question of whether plaintiff had actual knowledge or should reasonably have known of the fraud. It was correctly stated in *Azalea Meats, supra:*

> Inevitably the factual issue of due diligence involves . . . the state of mind of the person whose conduct is to be

> measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment. (386 F. 2d at 10.)

The Court concludes that a genuine issue of material fact exists with respect to this issue. Certainly, this Court cannot say that plaintiff can prove no set of facts in support of his claim that he did not have actual knowledge and that he remained in ignorance of the fraud without any fault on his part. This is particularly true in view of the potential vagaries of the disclosure material, the amount of material surrounding the alleged disclosures and the general level of education and sophistication of the plaintiff.

Defendants make much of the fact that, according to the terms of the trust agreement, plaintiff had an unqualified right to have the Trustees construe the service rule at any time. This argument does not meet arguments raised by plaintiff relative to his state of mind and the resulting reasonableness of his failure to seek such a ruling.

Because of the Court's holding relative to plaintiff's knowledge of the facts, the Court need not reach the question of whether plaintiff instituted his action within three years after the time that the sale was completed.

All defendants argue that this Court does not have subject matter jurisdiction with respect to Counts I and II of the complaint and that those counts do not state claims upon which relief can be granted under either the 1933 or 1934 Acts.

Plaintiff's theory is that, as a member of Local 705, he acquired an interest in the pension fund of that Local, which interest constituted a security; that defendants made misleading statements of material fact and omitted to disclose material facts regarding the length and continuity of service requirements of the Local 705 Pension Plan; and that he suffered loss and injury as a result of such misstatements and omissions. These misstatements are alleged to have violated Rule 10b-5 and Section 10(b)

of the 1934 Act, and § 17(a) of the 1933 Act, each of which prohibits fraudulent practices and inadequate disclosure of material facts in connection with the sale of securities.

Defendants' arguments may be briefly summarized as follows:

1. Congress has viewed the securities laws as inapplicable to employee pension plans and has enacted other legislation designed specifically to deal with such funds; and

2. The Securities and Exchange Commission ("SEC"), the agency charged with administration of the federal securities laws, has consistently ruled that no offer or sale of securities under the securities laws is involved in the establishment and operation of employee pension funds which, as here, are compulsory and non-contributory.

As pointed out by IBT, the overall purpose of the securities laws is to assure informed investment decisions by prospective purchasers of securities. This is accomplished by (a) requiring disclosures in registration statements and prospectuses where securities are offered to the public; (b) by periodic reports and proxy statements of publicly held companies; and (c) by anti-fraud provisions which broadly prohibit inadequate disclosure of material facts and other fraudulent practices in connection with sale of securities. Each of the two acts contains broad definitions of the terms "security", "sale" and "offer for sale".

Section 2(1) of the 1933 Act defines a security as follows:

> Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, *certificate of interest or participation in any profit-sharing agreement*, collateral-trust certificate, pre-organization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, or, in general, any interest or instrument commonly known as a "security" . . . (emphasis added.)

The definition found in Section 3(a)(10) of the 1934 Act is substantially the same.

Section 2(3) of the 1933 Act defines sale as follows:

> The term 'sale' or 'sell' shall include every contract of sale or *disposition* of a *security* or interest in a security, *for value*. The term 'offer to sell', 'offer for sale', or 'offer', shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value . . . . (emphasis added.)

Section 3(a)(14) of the 1934 Act contains a similar definition.

Defendants correctly observe that, apart from the general definitions set out above, the Acts, as originally enacted, offer no explicit answer to the question of whether the employee pension plans of the type referred to in the complaint involve an offer or sale of securities within the meaning of the federal securities laws. As originally enacted, neither Act contained any reference to such plans. Nor is any reference contained in their legislative history.

As a preliminary matter, the Court will consider the argument raised by defendants Local 705 and Peick that Section 17(a) of the Securities Act does not create a private cause of action. Defendants rely on *Welch Foods, Inc.* v. *Goldman, Sachs & Co.*, CCH Fed. Sec. L. Rep. ¶ 94, 806 (S. D. N. Y. 1974) and *Ferland* v. *Orange Groves of Florida, Id.*, ¶ 94,821 (M. D. Fla. 1974).

The Court agrees with plaintiff in his assertion that Section 17(a) impliedly provides for a private cause of action. There are several cases arising out of this district so holding, as well as a Seventh Circuit opinion. See *Surovitz* v. *Hilton Hotels Corp.*, 342 F. 2d 596 (7th Cir. 1975); reversed on other grounds, 383 U. S. 363 (1966). See also *Local 734 Trust* v. *Continental Illinois National Bank & Trust Co.* (73-74 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 94,565 at 95,963 (N. D. Ill. 1974). Those cases relied upon by defendants are distinguishable.

The first question to be considered is whether the Securities Acts are, by their own terms, applicable to employee pension plans. The Court is of the opinion that they are facially applicable, and nothing in the Acts' legislative history suggests that a contrary interpretation is required. Indeed, examination of legislative history and hearing testimony discloses both Congress' and the SEC's recognition of this fact.

In 1934 the Senate proposed amendments to the 1933 Act which would have exempted from registration certain offerings made solely to employees of an issuer. The amendment was rejected in conference for the stated reason that participants in such plans may be in as great need of such protection as other members of the public. See H. R. No. 1838, 73 Cong., 2d Sess., at 41 (1934).

In the hearings which accompanied proposed amendments to both Acts in 1941, SEC Commissioner Purcell observed with reference to the Congressional action of 1934:

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employee's plans which involve the sale of a security. Any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract". In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large.

Hearings on Proposed Amendments to Securities Act of 1933 and Securities Exchange Act of 1934 Before House Committee on Interstate and Foreign Commerce, 77 Cong. 1st Sess. 907, 908 (1941) ("1941 Hearings").

The Court concludes, therefore, that to the extent employee pension plans in fact involve the *sale* of *securities*, the Securities Acts are by their own terms applicable to such plans.

The Court must next determine whether, as defendants suggest, enactment of specialized pension legislation disclosed Congressional intent that the Securities Acts, including the antifraud

provisions, are inapplicable to pension plans, notwithstanding the fact that such plans may be securities within the meaning of those Acts.

Defendants devote many pages in their extensive briefs to discussion of the burgeoning field of pension legislation, including the Investment Company Act of 1940 ("1940 Act"), the 1958 Welfare and Pension Plans Disclosure Act ("1958 Act"), the Investment Companies Amendment Act of 1970 ("1970 Act") and the Employee Retirement Income Security Act of 1974 ("1974 Act"). They argue at great length that this massive body of legislation is indicative of Congress' belief that private pension plans were afforded no protection by the federal securities laws, and that such legislation filled a large gap in the law.

After examining defendants' arguments and the legislative history itself, the Court has ascribed a significance to this legislation which does not agree with defendants' view. At the outset it should be noted that, except in those cases where recognized securities were offered by an employer for voluntary purchase by employees, the SEC acted on the assumption, consistent with existing legal thought, that employee pension plans were generally "non-contributory" and "involuntary", and therefore resulted in no sale and no nexus to the securities laws.

It follows then, that the SEC's position with respect to applicability of the securities laws to pension plans reflected this assumption, which is here challenged by plaintiff. As explained by Commissioner Purcell during the 1941 Hearings:

> [E]ven where the plan involves securities, registration is not required for the many cases where the employees pay nothing for the securities, but receive an interest in the investment fund by way of bonus from their employer; for, of course, a gift is not a sale, and the Securities Act is concerned only with sales of securities.
>
> Similarly, compulsory plans do not require registration. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no

> sale involved. The purpose of the registration provisions of the Securities Act is to disclose to prospective investors the essential facts about securities which they are asked to buy, and if the employees are given no choice as to whether to buy or refuse to buy there hardly seems any point in the registration process. As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan. (1941 Hearings at 907, 908, 950.)

It is logical to conclude, then, that pension legislation was generated in part out of a conviction that the Securities laws did not protect pension plans because they did not involve sales, as well as recognition of the need for specialized treatment.

This latter factor is an important one. Assuming, *arguendo*, that pension plans are securities and come within the purview of the Securities laws, their unique characteristics nonetheless give rise to a need for special regulation. This alone explains the proliferation of pension legislation. Indeed, the very fact of their recognition as securities could account for the extensive and detailed requirements relative to disclosure and administration of these plans.

In the 1970 Act Congress provided that certain types of pension funds or profit sharing plans, described in Section 3(a) as securities, which meet the requirements of Section 401 of the Internal Revenue Code would be exempted from registration under Section 5 of the 1933 Act. The Act also provides for a similar exemption to registration under Section 3(a)(12) of the 1934 Act. In any event, as is clear from the statutory language, Congress recognized such pension funds as securities.

Examination of the legislative history surrounding these various enactments of pension legislation leads to the conclusion that these Acts were designed to compliment the securities laws rather than displace them. Enactment of this legislation is in no way inconsistent with the view that Congress regarded pension funds as unique forms of securities which were not adequately regulated by the securities laws.

As was made particularly clear in the Congressional Reports accompanying enactment of the 1974 Acts that Act was concerned with ongoing administration of pension funds, rather than any sales in connection therewith. Thus, both the Senate and House Reports expressed concern over the absence of effective federal legislation directed at assuring equitable and fair administration of all pension plans. Specifically, the lack of federal controls was seen with respect to protection of the employee's security in his pension rights, rather than prevention of fraud in the sales or acquisition of that interest. Consistent with this view, the 1974 Act imposed criminal sanctions for any attempt to interfere with any employee's attainment of rights under the Act. Similarly, as noted in these reports, the 1958 Act criminalized only malfeasance with respect to administration of such plans, including theft, embezzlement, bribery and kickback. See H. R. No. 93-533, 3 U. S. Code Cong. and Adm. News, 4639 (1974); S. R. No 93-127, 3 U. S. Code Cong. and Adm. News, 4838 (1974).

It is significant to note that this entire body of pension legislation is concerned with administration of such funds, so as to protect the interest of its participants, rather than regulation of circumstances of entry into the plan.

This Court holds that Congress has not demonstrated, through extensive pension legislation or otherwise, any intent to make securities laws inapplicable to employee pension funds. Accordingly, this Court finds that, to the extent any employee pension plan involves a sale of a security within the meaning of the federal securities laws, those laws, including their relevant antifraud provisions, will apply.

Further, assuming *arguendo* that defendants are correct in their assertion that pension legislation disclosed Congressional intent that pension plans such as the Local 705 Pension Plan not be procedurally regulated by the Securities Acts, it does not necessarily follow that those plans are beyond reach of the antifraud provisions.

Both the 1958 Act and the 1970 Act contain savings clauses providing for the continued application of all other relevant legislation. The 1958 Act provided:

> The provisons of this [Act] . . . shall not be held to exempt or relieve any person from any *liability, duty, penalty,* or *punishment* provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans . . . (29 U.S.C. § 309(b)). (Emphasis added.)

The provision in the 1970 Act is essentially the same.

Further, the House Report accompanying the 1970 Act contained this explicit comment:

> [this section] should exempt . . . bank . . . administered . . . pension plans from the registration and reporting requirements of the Federal Securities Act, but it does not exempt them from the antifraud provisions of those acts.

H. R. No. 91-1382, 91st Cong. 2d Sess. at 10 (1970). See also S. R. No. 91-184, 3 U. S. Code Cong. and Adm. News, 4897, 4907 (1970). The Reports suggest that such plans were exempted from registration so as to ease potential hardship on small banks.

Nonetheless, those considerations which might justify a plan's exemption from registration or even its exemption from the procedural regulatory provisions of the securities laws do not operate to prevent application of the antifraud provisions. As stated by one commentator:

> Since these antifraud provisions do not impose an undue burden on anyone, there is no reason why they should not remain as remedies available to employees for use in cases where fraud of the kind covered by these sections has been committed.

Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 Law and Contemporary Problems, 795, 814 (1964).

The Court having determined that the antifraud provisions of the Securities Acts are applicable to those pension plans which involve sales of securities, the Court must next ascertain whether plaintiff's acquisition of an interest in the Local 705 Pension Fund constituted a sale of a security within the meaning of those Acts. The operative antifraud provisions of both Acts require: (1) use of the jurisdictional means; (2) making of material misrepresentations, omission to state material facts or use of manipulative or fraudulent devices, in connection with: (3) the *sale*—of a *security*. For purposes of determining applicability of the antifraud provisions, use of the mails as the jurisdictional means and omission to state material facts are not in dispute. The Court turns first to the question of whether plaintiff's interest in the Local 705 Pension Fund was a security.

Section 2(1) of the 1933 Act defines security in pertinent part as:

> . . . any . . . certificate of interest or participation in any profit-sharing agreement, . . . [or] investment contract . . .

The definition found in Section 3(a)(10) of the 1934 Act is substantially the same.

In *SEC* v. *W. J. Howey, Co.*, 328 U. S. 293, 299 (1945), the Supreme Court observed that federal securities legislation:

> embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and varied schemes devised by those who seek the use of the money of others on the promise of profits. (328 U. S. at 299.)

Because the 1933 and 1934 "Acts were designed to protect the American public from speculative or fraudulent schemes . . . Congress defined the term 'security' broadly and the Supreme Court in turn has construed the definition liberally." *SEC* v. *Glenn W. Turner Enterprises, Inc.*, (72-73 Transfer Binder) CCH Fed. Sec. L. Rep. ¶ 93,748 at 93,271 (9th Cir. 1973).

Plaintiff argues that in applying this definition of security to characterize his interest in the Local 705 Pension Trust Fund, the Court must:

> be guided by the familiar canon of statutory construction that remedial legislation should be construded broadly to affectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure . . . In searching for the meaning and scope of the word "security" in the Act, form should be disregarded for substance and emphasis should be on economic reality.

Tcherepnin v. *Knight*, 389 U. S. 332, 336 (1967). See also *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963). Recognizing this need for a liberal construction of the word 'security', the courts have construed that word as bringing within the ambit of the Acts "many forms of transactions which, on their face, do not appear to be securities in the commercial sense of the word." Feldman & Rothschild, Executive Compensation & Federal Securities Legislation, 55 Mich. L. Rev. 1115, 1117 (1957).

Thus the courts have held such economic interests as self-improvement courses, *SEC* v. *Glenn W. Turner Enterprises, Inc., supra;* beaver farms, *Continental Marketing Corp.* v. *SEC*, 387 F. 2d 466 (10th Cir. 1967); whiskey sales contracts, *Penfield Co. of Cal.* v. *SEC*, 143 F. 2d 746 (9th Cir. 1944); pyramid sales schemes, *SEC* v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473 (5th Cir. 1974); variable annuities, *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65 (1959); and mineral leases, *Roe* v. *U. S.*, 287 F. 2d 435 (5th Cir. 1961) to be securities.

Plaintiff characterizes his interest in the Local 705 Pension Fund as an investment contract within the meaning of the Securities Acts, a proposition only inferentially challenged by local defendants and unchallenged by IBT. The Supreme Court in *SEC* v. *W. J. Howey Co., supra,* defined an investment contract to mean:

> A contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third

> party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interest in the physical assets employed in the enterprise. (328 U.S. at 288, 289.)

See *Koscot Interplanetary, Inc., supra.* Here plaintiff argues that the Local 705 Pension Fund contains all elements of the *Howey* rule, in that money is invested in a common enterprise, management of which is committed to a third party and from which income and profits are expected.

First, plaintiff characterizes the Local 705 Pension Fund which receives these contributions as the common enterprise. Plaintiff correctly observes that pension contributions are now uniformly recognized as part of employee wages. S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958). See also *Inland Steel* v. *NLRB*, 77 NLRB 2 (1948), 170 F. 2d 247 (7th Cir. 1948), cert. den. 336 U. S. 960 (1949). These bargained-for contributions represent a substantial economic portion of those wages and represent the employee's investment.

Second, the trustees have the sole power of control over the common enterprise and investment of all assets contained therein. See Amended Trust Agreement, Art. 4, Sections 1, 2 and 3.

Finally, profits are expected from the successful management of the funds in the form of retirement benefits. That such benefits are fixed does not eliminate the element of profits. Plaintiff analogizes this to the fixed interest rate on a bond or debenture. The total amount of expected payout for any member will exceed the aggregate of those contributions made on his behalf. This excess will constitute a profit in the form of capital gains, interest and dividends and other accumulated earnings realized from successful management of the trust. Also, there is no warranty that the trust will be able to fund the supposedly fixed benefits due to members of the plaintiff class, and the holders thus bear an element of risk in this investment of their wages. See *Silver Hills Country Club* v. *Sobieski*, 361 P. 2d 906 (Cal. 1961).

The conclusion that a beneficial interest in Local 705 Pension Fund is a security finds further support in public policy underlying the remedial nature of the federal securities laws which are aimed at prevention of frauds in the sales of securities and protection of investors. In light of this special remedial purpose, one commentator has characterized a security as an interest distinguished from the generality of interests:

> "so as to create a need for the special fraud procedures, protections, and remedies provided by the securities laws." Coffey, the Economic Realities of a "Security": Is there a More Meaningful Formula, 18 West. Res. L. Rev. 367, 373 (1967).

Plaintiff points to the magnitude of the pension funds, now estimated to exceed 150 billion dollars, and their economic importance to over 30 million Americans who rely on such plans for their financial security. According to one recent Senate study, as few as eight percent of those participants in pension plans with vesting requirements of eleven years or more will ever receive any pension benefits. Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92nd Cong. 2nd Sess., at 15,115-153 (1972).

Plaintiff argues, and the Court agrees, that there is a great need for the application of the special fraud provisions, protections and remedies of the Securities Acts to plans such as the Local 705 Pension Fund. This need is not met by either qualification under Section 401 of the Internal Revenue Code or by filings under the 1958 Act or other pension legislation. Disclosure under the Code "does not necessarily satisfy Securities Act disclosure standards which require that the facts must be disclosed in a form which is clearly understandable to the ordinary investor." Mundheim & Henderson, *supra* at 806. The primary purpose of the Code is not protection of the investor, but rather production of revenue and prevention of tax evasion.

Likewise, under the 1958 Act, the participant must take the initiative in seeking information to which that Act says he is entitled. That is because the Act is designed to regulate misuse of funds and disclosure rather than fraud. The Securities Acts, however, place the burden of disclosure on the seller of a security. This is in recognition of the fact that fraud, by its very nature is practiced upon the unknowing. An employee who is unaware of a fraud being perpetrated upon him is not benefited by a provision which requires disclosure only upon his request.

Accordingly, the Court holds that plaintiff's interest in the Local 705 Pension Fund is an investment contract within the meaning of the Securities Acts and further that this result is consistent with the remedial purpose of that body of legislation. That being so, the Court does not reach local defendants' argument that plaintiff's interest cannot be described as an interest in a profit-sharing plan.

Finally, the Court must determine whether plaintiff's acquisition of an interest in the Local 705 Pension Fund constituted a sale within the meaning of the securities law. Sale is defined in Section 2(3) of the 1933 Act as

> Every . . . disposition of a security or interest in a security, for value.

The definition found in Section 3(a)(14) of the 1934 Act is substantially the same.

It is apparently conceded that whether the transfer involved a gift, sale or otherwise, there was a disposition and that the only issue here is whether this disposition was for value.

Defendants argue that the complaint itself discloses that the Local 705 Pension Fund is both "involuntary" and "non-contributory", in that it is funded by employer contributions and that members of the Local come under this plan automatically by reason of their union membership and employment, and not by any choice on their part. Such plans, defendants argue, have been consistently found by the SEC to lack the "sale" element.

According to defendants the SEC has declined to assume that an employee who participates in a pension plan which is an incident of his employment, and in exchange for which he pays no additional consideration, and to which he makes no contributions, decides whether or not to work because of the nature and terms of the plan. The employee in this situation is not an investor. It is particularly true, they argue, that there is no choice of whether or not to participate where, as here, the pension plans are typically negotiated on an industry-wide basis in the local area and every covered employer in that industry in that area contributes to the same plan on the same basis for each employee who belongs to the union.

As has been earlier discussed in this opinion, the SEC has taken the position that with respect to those employee pension plans characterized as "involuntary" or "non-contributory", there is no sale within the meaning of the Securities Act. In cases of non-contributory plans, the SEC has found that employees did not receive their security interests for value, but rather as gifts. Alternatively, in cases of involuntary plans, the SEC took the position that employees made no investment decision. Since the purpose of the securities laws was to assure informed investment decisions by prospective purchasers of securities, the SEC concluded that if no investment decision is being made, these laws do no logically apply.

Plaintiff responds that in this case there was a disposition for value. He argues that the value element was satisfied by the giving of services or, alternatively, by the contribution of a portion of wages. Plaintiff asserts that in view of the vast amounts of money contributed by employers to employee pension plans—now estimated to exceed 150 billion dollars—the only responsible view is that such monies are given in return for value rendered.

Further, the Local 705 Pension Fund is an object of collective bargaining. Both Congress and the courts have adopted the view that employer contributions to employee pension plans constitute a part of the total wage structure. See S. Rep. No. 1440, *supra*, and *Inland Steel, supra*. Thus plaintiff's consideration includes not only services rendered but a portion of wages received.

These bargained for employer contributions on behalf of the members of the plaintiff class represent a substantial economic portion of the wages given to employees in consideration of services performed. As part of the employee's contribution, they constitute the employee's giving of value for his interest in the plan. The Court agrees with plaintiff that economically there is no distinction between the facts here and the situation whereby the employee first receives as part of his wages the employer contribution in cash and then pays such cash over to the pension fund.

This view that the emloyee has given value has already received support from the courts. In *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972) the Court held that plaintiff's performance of services satisfied the value requirements of a sale. The Court there stated:

> the broad design of the federal securities laws should not be frustrated by restrictive application of the purchase-sale requirements . . . [and] the wording of each definitional section warrants non-restrictive interpretation of the concept of "sale" . . . (342 F.Supp at 1289-90).

See also *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961).

The Court, therefore, is of the opinion that plaintiff gave value for his interest in the Local 705 Pension Fund. Further, the Court is of the opinion that, contrary to SEC policy and defendants' assertion, plaintiff's acquisition of an interest in that Pension Fund was voluntary.

The employees must vote on the package negotiated by the union which makes a division of increased increment of income between salary and pension benefits. The Court is persuaded that few members would ever vote for an allocation to a pension increase in lieu of a greater salary increase if they knew at the time of the vote that they would have an eight percent or smaller chance of ever realizing any benefit from the increased pension allocation. The final decision of such allocation to pension rather than salaries is with the employees and they thereby make the contribution from the total wage package.

This decision to accept or reject the package is, furthermore, a voluntary one. The fact that a majority vote may prevail does not negate the fact that this majority decision is but an aggregate of many individual decisions. Moreover, the fact that individuals of a contrary mind may be bound by the majority decision does not mean that such individuals lack voluntary participation in the plan.

To the extent that SEC policy results in a conclusion that there is no voluntary purchase, the Court finds that it comports neither to logic nor economic reality. Such a policy in effect singles out purchasers of one type of security, i.e. a pension fund interest, for special scrutiny by looking into their subjective state of mind to ascertain the "voluntariness" of the purchase, and therefore, the existence of an "investment decision." In no other circumstance does the SEC look behind the purchase for the state of mind of the investor, to determine whether in fact the purchaser "desired" to make the purchase. The investment decision is presumed from the act. Likewise, it must be presumed here.

The Court, consistent with the rule of *Tcherepnin* v. *Knight*, that form be disregarded for substance, finds that plaintiff gave value for his interest in the Local 705 Pension Fund, both in the form of services and a portion of his cash wages. This conclusion finds further support in the policy considerations alluded to in *Collins, supra*.

The Court makes no finding here beyond the narrow holding that the complaint alleges the sale of a security for purposes of application of the antifraud provisions of the Securities Acts, and that the complaint alleges violations of those provisions. The Court makes no finding with respect to applicability of any other sections of those Acts to employee pension plans such as the one here litigated.

COUNT VI

Local defendants next argue that Count VI should be dismissed because it is barred by the statute of limitations and because this Court lacks federal subject matter jurisdiction under Section 302(c)(5) and (e) of the NLRA.

As a preliminary matter, local defendants assert that Local 705 should be dismissed as to this count because Section 302 contemplates relief only against the Pension Fund. The Court rejects that argument as without support or merit.

Local defendants next claim that any action against the Trustees is barred by the applicable Illinois statute of limitations. Although the issue of whether a state statute of limitations should be applied in a federal court suit under Section 302(e) has not been decided, state limitation periods have been applied in federal court suits under Sections 301 and 303 of the NLRA. *UAW* v. *Hoosier Cardinal Corp.*, 383 U. S. 686 (1966); *Operating Engineers Union* v. *Fishbach & Moore, Inc.*, 350 F. 2d 936 (9th Cir. 1965).

In *Hoosier* the Supreme Court held that the issue of timeliness in a Section 301 suit should be determined as a matter of federal law, by reference to the appropriate state statute of limitations. The Court stated that:

> characterization of the action for purposes of selecting the appropriate state limitations provision is ultimately a question of federal law. But there is no reason to reject the characterization that state law would impose unless

> that characterization is unreasonable or otherwise inconsistent with national labor policy. (383 U. S. at 706.)

After analyzing the six month statute of limitations found in Section 10(b) of the NLRA relating to unfair labor practice charges, the Court concluded that the provision reflected the federal goal of relatively rapid disposition of labor disputes.

Defendants argue that the same goal of prompt disposition of disputes should apply in a Section 302 action. With that standard in mind, they attempt to characterize the nature of the action. Defendants urge that because of the importance of these pension funds to many people, any challenge to the fund's structure should be made at the earliest time.

The parties discuss in their briefs the appropriate characterization of this action, so as to determine the proper period of limitations. In the opinion of this Court, this action could be characterized either as a breach of trust action or one to enforce a statutory right. In either event the five year period of limitations found in Ill. Rev. Stat. Ch. 83, § 16 (1973) would apply, and this Court so holds. Notwithstanding that determination, regardless of how the action is characterized, it is not time-barred.

The essense of plaintiff's affidavit is that he had no actual knowledge of defendants' wrongful acts which are alleged in the complaint. For those reasons, more fully set out in the preceding discussion of the limitations question relative to Counts I and II, the Court holds that there is a genuine question of material fact as to whether plaintiff actually knew or should reasonably have known of the existence of facts giving rise to this cause of action.

Accordingly, defendants' motion to dismiss Count VI based on the statute of limitations is denied.

Local defendants next challenge this Court's jurisdiction to hear Count VI, which alleges a violation of Section 302(c)(5) of the NLRA requirement that all union pension funds shall be for the sole and exclusive benefit of the employees.

First, according to defendants, the interpretation and application of the "for the exclusive benefit of employees" provision is within the primary jurisdiction of the Internal Revenue Service which approved the plan and its amendments. Defendants argue that Local 705's service rule has been an integral part of the plan since its inception in 1955 and that it was considered and approved by the IRS in granting the Pension Fund's original qualification and exemption under Sections 401 and 501 of the Code. Section 401(a) of the Code, like Section 302(c)(5) of the NLRA contains a "for the exclusive benefit of" employees requirement. Therefore, argue defendants, Local 705 Pension Fund's exemption from income taxes immunizes its eligibility rule from suit under the NLRA via the doctrine of primary jurisdiction.

The Court dealt with and rejected a similar argument in the case of *Smith* v. *Peick*, No. 72 C 2968 (N. D. Ill., June 30, 1975). The Court rejects it here for like reasons as not warranting further discussion.

Second, defendants argue that Count VI does not state a claim for relief under Section 302(c)(5). It must be noted at the outset that this same argument was presented to this Court in *Insley* v. *Joyce*, 330 F. Supp. 1228 (N. D. Ill. 1972). In that case Judge Will held that a pension fund's eligibility requirements may violate Section 302(c)(5) of the NLRA as not being for the "sole and exclusive benefit of the employees," at least to the extent of surviving a motion to dismiss for lack of subject matter jurisdiction or failure to state a claim.

He reasoned that the ambiguous language of Section 302 and its ambiguous legislative history supported the conclusion that a "structural" violation of Section 302(c)(5) occurred where a pension plan excludes "a sizeable number of union members, with no reasonable purpose behind their exclusion . . ." Judge Will stated that the standard to be applied is whether the eligibility requirement is "arbitrary and capricious", a standard which "would appear to be litigable only in the Federal courts." 330 F. Supp. at 1233-34.

As an example of how such an eligibility requirement could violate the "exclusive benefit" provision of Sub-Section (c)(5), the Court hypothesized that the Local's pension fund's "break-in-service" rule:

> might primarily be designed to strengthen the union by encouraging employees to work only . . . [for contracting employers] and to penalize employees who work or who have worked for other truckers. . . . If the purpose and effects behind this provision are thus primarily to benefit the union and penalize employees, we clearly are presented with a trust fund that possesses the structural deficiency of not being solely for the benefit of employees. (330 F. Supp. at 1234.)

This Court adopted Judge Will's ruling in *Smith* v. *Peick, supra.*

Defendants argue that Judge Will was in error in that: (1) the legislative history makes it clear that Section 302(e) does not give federal courts jurisdiction over suits challenging trust fund eligibility provisions; (2) the decisional law does not support a finding that an eligibility provision constitutes a structural violation of Section 302; (3) the *Mine Workers Pension Fund* cases do not support the *Insley* holding; (4) the "sole and exclusive benefit of employees" provision is a traditional state law fiduciary concept; and (5) an eligibility provision which encourages longevity of service with contracting employers and thereby indirectly encourages union membership is not unlawful as a matter of law. Defendants further rely on *Cuff* v. *Gleason*, 515 F. 2d 127 (2nd Cir. 1975) as controlling authority.

The Court remains in agreement with Judge Will's ruling in *Insley* and this Court's ruling in *Smith* v. *Peick, supra.* The case of *Cuff* v. *Gleason, supra* does not require a contrary result. In *Cuff* the Second Circuit approved the language of the lower court which had held that:

> [Section] 302(c)(5) of the LMRA would not confer federal jurisdiction where an application of a trust pension plan rather than a collective bargaining agreement, (cite omitted) was involved *and the specific requirements of*

§ 302(c)(5) are met (cite omitted) (emphasis added) (515 F. 2d at 128).

That section specifically requires that the trust fund be "established . . . for the sole and exclusive benefit of the employees of such employer."

The issue in *Cuff* as defined by the Court itself was "whether the application of rules of a jointly-administered pension trust to an individual claim was arbitrary and capricious." 515 F. 2d at 128.

Here plaintiff challenges not the mis-application of a rule which is itself proper, but the legality of the rule itself. Here, as in *Insley*, "plaintiff has alleged and put into controversy an exclusionary eligibility requirement (viz., the . . . break in service rule) concerning the defendants' § 302 trust." 330 F. Supp. at 1233. See also *Lugo* v. *Employees Retirement Fund of the Illumination Products Industry*, 366 F. Supp. 99, 102 (E. D. N. Y. 1973).

To the extent that *Cuff* stands for the proposition that a violation of Section 302 occurs only at the time of establishment of a rule and does not continue for as long as that rule is enforced, this Court declines to follow it. This Court adopts Judge Will's reasoning pertaining to Congressional intent and legislative history as the better reasoned view.

Defendants' motions to dismiss the complaint are denied in their entirety.

Enter:

/s/ ALFRED Y. KIRKLAND,
Alfred Y. Kirkland,
Judge.

Dated: March 1, 1976.

JUDGMENT OF THE COURT OF APPEALS

OPINION BY JUDGE CUMMINGS
Judge Tone concurring

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 20, 1977

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. JAMESON, *Senior District Judge**

JOHN DANIEL, etc.,
Plaintiff-Appellee,

No. 76-1855 *vs.*

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, a labor union organization, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-2865

Alfred Y. Kirkland, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

* The Honorable William J. Jameson, Senior District Judge of the District of Montana, is sitting by designation.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

STATUTES INVOLVED.

This case involves § 3(a)(10) and § 10(b) of the Securities and Exchange Act of 1934, 15 USC § 78c(a)(10) and § 78j (b); Rule 10b-5 of the Securities and Exchange Commission, 17 C. F. R. 240.10(b)-5; and § 2(1), § 2(3), and § 17(a) of the Securities Act of 1933, 15 USC § 77b(1), § 77b(3) and § 77(q).

Section 3(a)(10) of the Securities and Exchange Act of 1934 provides:

> When used in this chapter, unless the context otherwise requires—
>
> (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 10(b) of the Securities and Exchange Act of 1934 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of

> interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 2(1) of the Securities Act of 1933 provides:

> When used ino this subchapter, unless the context otherwise requires—
>
> (1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in

general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(3) of the Securities Act of 1933 provides as pertinent:

> The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. * * *

Section 3(a)(2) of the Securities Act of 1933 provides:

> (a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:
>
> * * * * * *
>
> (2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of

> section 103(c) of Title 26 (determined as if paragraphs (4) (A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security; or any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26. The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank"

means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940.

Section 17(a) of the Securities Act of 1933 provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 27(b) of the Investment Companies Amendments Act of 1970 provides:

EXEMPTIONS

Sec. 27.

(b) Section 3(a)(2) of such Act (15 U. S. C. 77c(a)(2)) is amended to read as follows:

"(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the

Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; or any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, other than any plan described in clause (A) or (B) of this paragraph (i) under which an amount in excess of the employer's contribution for any period is allocated to the purchase of securities issued by the employer or any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code. The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. For the purposes of this para-

graph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term 'bank' means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term 'bank' has the same meaning as in the Investment Company Act of 1940."

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Supreme Court, U. S.
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DEC 8 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

V.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

V.

JOHN DANIEL,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA
By RICHARD D. GODOWN
General Counsel
WILLIAM E. BLASIER
Assistant General Counsel
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

V.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

V.

JOHN DANIEL,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorneys for the Petitioners has been obtained. The consent of the Attorney for the Respondent was requested but no reply was received.

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of over 12,500 manufacturing and related concerns, eighty percent of which have 500 or fewer employees, located throughout the United States. The NAM, therefore, represents a substantial number of the nation's industrial employers who employ, in the aggregate, over 16 million employees or roughly eighty-five percent of all employees employed in manufacturing nationwide.

A large number of the NAM's members have one or more retirement plans covering all or part of their work forces. Similarly, many of these plans are a by-product of the collective bargaining process. Because the decision below holds employee interests in such plans to be securities and thus subject to the antifraud provisions of the Securities Act of 1933 (15 U.S.C. § 77a, *et seq.*) and the Securities Exchange Act of 1934 (15 U.S.C. § 78a, *et seq.*) [hereinafter referred to collectively as the securities laws], and further because such plans are already extensively regulated by, *inter alia*, the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) [hereinafter referred to as ERISA], many of the NAM's members will be directly affected by the decision in this case.

This case presents an issue of first impression concerning the applicability of the antifraud provisions of the securities laws to employee interests in retirement plans. The decision of the Seventh Circuit Court of Appeals instantaneously creates an enormous new class of potential securities law antifraud plaintiffs consisting of virtually all past and present participants in private retirement plans, and thereby exposes retirement trust funds and other parties to enormous, heretofore unanticipated,

potential liabilities. In addition to liability which may attach as a result of successful claims under the antifraud provisions, pension trust fund assets, as well as those of various other parties who, as a result of the decision below, are now subject to suit will be further eroded by the costs attendant to compliance with the affirmative disclosure requirements of the antifraud provisions, and the expenses which will naturally flow from the need to defend against even the most frivolous of claims for relief.

Moreover, the decision below has generated widespread uncertainty among those intimately involved in the formulation and administration of private plans with regard to their legal status and obligations under the securities laws. This confusion is exacerbated not only by decisions reached in other lower courts which conflict with the instant decision, but also by the fact that the decision below effectively negates certain policy decisions made by Congress and manifested in the various provisions of ERISA.

Recognizing that the provision of retirement security is completely voluntary, and because many pension plans are currently suffering severe financial hardship, it is not unreasonable to predict that the already high plan termination rate attributable, at least in part, to the enactment of ERISA will be accelerated by the holding below. Further, the decision below represents a significant disincentive to the adoption of new plans and the expansion of existing plans, and thus directly conflicts with the sound public policy favoring the continued growth and expansion of the nation's private retirement system.

Inasmuch as fair and adequate retirement income security enhances productivity through heightened morale, contributes to harmony in labor-management relations, and generally facilitates the realization of desirable social ends, the NAM has a legitimate interest in the proper resolution of the instant litigation. The views of NAM, its experience with the critical issues involved herein, and its general business expertise may be of

assistance to this Court.

Accordingly the NAM urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

SUMMARY OF ARGUMENT

The holding below that an employee's mandatory noncontributory interest in a collectively bargained private retirement plan is a security which is acquired in a sale and is therefore subject to the major antifraud provisions of the securities laws raises important questions of first impression with regard to the proper scope of said laws. Because this decision gives rise to substantial costs and massive, heretofore unanticipated, potential liabilities and further has created widespread uncertainty with regard to the legal obligations of those involved in all aspects of private retirement plans, the continued viability and existence of the nation's private retirement system is seriously jeopardized. Accordingly, review by this Court to resolve the important issues raised herein is both warranted and necessary.

The lower court's finding of an investment contract, and thus a security, stems from its misapplication of the investment contract test which has emerged from this Court's decisions. The court's analysis is fataly flawed in that it ignores both common sense and the practical realities of the collective bargaining process, and distorts employment relationships beyond recognition. Thus, only by viewing the instant transaction completely out of its natural context is the lower court able to contruct an investment framework within which to force mandatory noncontributory employee interests in private pension plans.

Nor is the lower court's finding of a security supported by the legislative history of the securities laws. Rather, those portions of the legislative history relied upon below highlight Congress' failure to address the problems raised by the case at bar. Further, its interpretation of various portions of the legislative

history gives rise to numerous questions which in themselves seriously undermine the heavy reliance placed on the legislative history by the lower court.

Assuming, *arguendo*, that pension interests of the type involved herein are securities, the court erred in finding the sale thereof in the instant context. The exercise of a voluntary choice related to the substance of the investment is a necessary prerequisite to the finding of a sale. No such voluntary choice exists in connection with mandatory noncontributory pension plan interests. The lower court thus errs in its strained attempts to find such a voluntary exercise in employment oriented, as opposed to investment related, decisions.

Policy considerations militate heavily against the soundness of the decision below. Because the lower court's holding instantaneously creates an enormous, largely uncontrollable, new class of plaintiff's under the antifraud provisions of the securities laws whose claims for relief will likely depend heavily upon hazy evidence of historical fact, the decision below flies directly in the face of past efforts by this Court to circumscribe the otherwise broad scope of the antifraud provisions. Potentially massive retroactive liabilities and expensive efforts to both defend against even the most frivolous of claims and to comply prospectively with the securities laws can be expected to result from the decision below and produce an enormous draining off of assets. This could completely frustrate the retirement expectations of plan participants who have complied with the requirements of their own plans. Similarly, the undefined nature of antifraud disclosure under the securities laws raises serious practical problems with regard to the content, form and timing of future disclosures. Finally, not only does the decision below effectively negate policy decisions made by Congress in other pension legislation, but any efforts to comply therewith by employers whose employees are represented by unions may well lead to unlawful disruptions of collective bargaining relationships and processes. Accordingly, the decision below should not be allowed to stand.

REASONS FOR GRANTING THE WRIT

The Court Below Erroneously Interpreted The Securities Laws By Making Them Applicable To An Employee's Interest In A Mandatory, Noncontributory Pension Plan Thereby Raising An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court

The decision below* holds: (1) that an employee's mandatory, noncontributory interest[1] in a collectively bargained defined benefit pension plan is an "investment contract", and thus a "security" within the meaning of the Securities Act of 1933, (15 U.S.C. § 77a, *et seq.*) [hereinafter "1933 Act"] and the Securities Exchange Act of 1934, (15 U.S.C. § 78a, *et seq.*) [hereinafter "1934 Act"]; (2) that a "sale" thereof for "value" takes place within the meaning of said Acts; and (3) that Section 17(a) of the 1933 Act (15 U.S.C. § 77q(a)), and Section 10b of the 1934 Act (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder, (17 C.F.R. § 240.10b-5), the major antifraud provisions of the securities laws, therefore apply to the transactions involved herein.

The decision below raises important questions of first impression with regard to both the proper scope of the securities laws and the extent to which the application thereof conflicts with, and thereby undermines, the nation's labor policy. If allowed to stand, the decision below could threaten the existence of many retirement plans as a result of massive, heretofore unanticipated, potential liabilities. Pension funds could also be seriously eroded by the costs attendant to compliance with, and litigation arising from, the regulatory requirements of yet another federal agency in an area extensively regulated under

* The decision below is reported at 561 F. 2d 1223 and is reprinted in full in the appendix to the instant Petitions for Writ of Certiorari. All references to the decision shall therefore be by citation to this appendix [hereinafter "App."].

[1] While used throughout our discussion, the term "interest" is used reluctantly. It is clear from the facts of this case that the plaintiff never acquired a vested interest, security or otherwise, in the subject pension plan and therefore never possessed a right to any benefits thereunder. Thus, his action herein is calculated to, in effect, create an enforceable interest where one has heretofore never existed.

existing federal law.[2] Similarly, substantial confusion has already resulted among those involved in all aspects of pension plan formation and administration with regard to their legal status and obligations under this decision, a confusion exacerbated by contrary results reached in other cases.[3] Accordingly, we submit that resolution by this Court of the significant issues raised herein is both warranted and necessary.

a. The Court Below Misapplied the Test For Determining the Existence of an Investment Contract, and Thus a Security

The test for determining the existence of an investment contract within the purview of the securities laws originated in *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), was later fully articulated in *SEC v. W.J. Howey*, 328 U.S. 293 (1946), and was recently reaffirmed in *United Housing Foundation Inc. v. Forman*, 421 U.S. 837 (1975). In these and other cases[4] this Court has considered the existence of an investment contract in varying factual contexts. These decisions make clear that individual components of a given transaction cannot be viewed in isolation. Rather, form must give way to substance, economic reality must be examined, and the transaction must be viewed in the context within which it arises to determine whether it is one of "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299; *Forman*, 421 U.S. at 849; *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

[2] The nation's private retirement system is currently subject to extensive regulation by the Department of Labor, the Internal Revenue Service, and the Pension Benefits Guarantee Corporation. *See generally* ERISA, 29 U.S.C. § 1001, *et seq.*

[3] Three District Courts have reached conclusions contrary to those reached below. *Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 424 F. Supp. 80 (D.C.D. Cal. 1976); *Robinson v. United Mine Workers of America Health and Retirement Funds*, 435 F. Supp. 245 (D.D.C. 1977); *Weins v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, [1977] Fed. Sec. L. Rep. (CCH) ¶ 96,005 (D.C.D. Cal. March 28, 1977).

[4] *E.g., Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. United Benefit Life Insurance Company*, 387 U.S. 202 (1967).

The principal flaw in the lower court's application of the various elements of the investment contract test to the instant transaction is that its analysis necessarily assumes that a pension plan interest exists independently of the collective bargaining relationship from which it springs. Simply put, the court's narrow focus ignores the employment context within which the transaction exists. Once viewed in its proper context, however, factors fatal to the existence of an investment contract become readily apparent.

Here, unlike in the usual investment contract situation, the ultimate realization of benefits from the pension plan (*i.e.* the "investor's fortunes") is not critically dependent *solely* upon the efforts of others. Nor is this realization necessarily tied to that of other plan participants. Rather, the individual pension plan participant plays a significant role himself in determining whether he will ever receive retirement income. Thus, for example the investment success or failure of the pension trust fund, while certainly important, is largely academic if the employer is unable to continue making its contributions to the fund. The employer's ability to fund the plan in turn critically depends upon the continuing and consistent dedication, skill, and efficiency of each individual employee. Just as the trust fund is dependent upon the employer for its existence, so is the employer dependent upon employees for its continued economic viability and its consequent ability to fund the plan.

Similarly, the very fact that the pension plan is inextricably intertwined with the employment relationship dictates that here, in contradistinction to investments generally, the ultimate realization of benefits is subject to risks which are wholely unrelated to the investment success or failure of the fund itself and over which the individual participant has exclusive and complete control. Thus, an employee may never realize benefits from the plan if he quits his job, or if he loses his job as a result of misconduct or substandard performance. This vital interplay between the employment relationship and the pen-

sion interest, largely ignored by the court below, seriously undermines the finding of an investment contract for it further illustrates the significant control each plan participant has over his own receipt of future benefits.

Finally, those cases in which this Court has found an investment contract are marked by the presence of a deliberate decision on the part of an investor to part with his own money. Similarly, in those cases the predominant, if not the sole inducement for such action was the seller's favorable characterization of the investment attributes of the transaction.[5] In sharp contrast the transaction involved here is entry into or continuation of an employment relationship[6]. To find as the court did below that an employee makes an investment decision when he accepts employment, ratifies a collective bargaining agreement, or determines to continue in his job, perforce suggests that an expectation of profits from money invested through the pension plan is the predominant inducement for these deci-

[5] In *C.M. Joiner*, the investment character of the oil well drilling undertaking was widely advertised, 320 U.S. at 346; "[t]he exploration enterprise was woven into [the] leaseholds, in both an economic and legal sense [such that] the undertaking to drill a well [ran] through the entire transaction as the thread on which everybody's beads were strung." *Id.* at 348. Furthermore, it was clear that the economic interest in the well drilling undertaking was what brought into being the instruments being sold and which gave them "most of their value and *all of their lure*." *Id.* at 349, (emphasis added). In *Howey*, the investors were offered "an *opportunity* to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by [the seller]." 328 U.S. at 299. The investors were "attracted *solely* by the prospects of a return on their investment" and the transfer of land which accompanied the transaction was "purely incidental". *Id.* at 300 (emphasis added). In *Tcherepnin*, 389 U.S. at 333-4, the withdrawable capital shares were the entire substance of the transaction there involved and, as in *Joiner*, they were portrayed to potential purchases as desirable investments. See n. 8 *infra*, for a brief discussion of *SEC v. United Benefit Life Insurance Co., supra*.

[6] Significantly, to the extent that the lower court relies for any support on the fact that the decision to continue employment manifests an investment decision, it should be noted that the participant's status in this circumstance is no better than that of a shareholder who determines not to sell because of allged misrepresentations. As such, he has no standing to object under Section 10b of the 1934 Act or Rule 10b-5. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S.723, 737-8 (1975).

sions. In other words, the lower court assumes that all of the myraid other factors which enter into a collective bargaining agreement or which bear on an employment decision (*e.g.* the nature of the job, wages, job security, or vacation time) are purely incidental to the pension plan interest. While an economy which affords one the luxury of making employment decisions on the sole basis of fringe benefits such as pension plans is perhaps desirable, it does not exist now and the court's analysis simply ignores this manifest reality.

In sum, to reach its result the court below has plucked the instant pension interest from its employment context and subjected it to fragmented analysis based on superficially appealing analogies. Common sense alone compels the conclusion that pension interests are incidental to, rather than determinative of, employment. Indeed, the SEC has itself so recognized.[7] To force such transactions into an investment framework simply ignores reality by examining pension interests in a vacuum as if they somehow have vitality independent of the relationships and processes from which they are born.[8]

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[7] In a memorandum to a Senate Subcommittee considering various proposals concerning the later enacted Welfare and Pension Plan Disclosure Act of 1958, the SEC stated:

> "many of these plans are the fruits of collective bargaining. *Accordingly, these plans are inseparably intertwined with labor management relations.* Abuses in this area then have their main effect upon an economic area in which the Commission does not possess expertise. (Emphasis added).

Hearings before the Subcomm. on Welfare and Pension Plans Legislation of the Senate Comm. on Labor and Public Welfare, 85th Cong., 1st Sess. 119 (1957).

[8] Neither *SEC v. Variable Annuity Life Insurance Company*, 350 U.S. 65 (1959) [hereinafter "*VALIC*"], nor *SEC v. United Benefit Life Insurance Company, supra*, weaken our conclusion that transactions must be viewed in their entirey with full recognition of the context in which they arise. In *VALIC*, the Court was not directly concerned with the presence or absence of an investment contract. Rather, the inquiry there was whether or not the security involved qualified for exemption from the registration requirements of the 1933 Act as an insurance contract. Thus, the Court assumed the existence of a security and attempted to distinguishing between different types of

b. The Legislative History Does Not Support the Lower Court's Finding of a Security.

The court below draws support for its conclusion that interests such as those here involved are securities from various portions of the legislative history supporting the securities laws. Looking primarily to a 1934 Senate amendment to the 1933 Act which was passed but then rejected in conference, and to changes in Sections 3(a)(2) of the 1933 Act and 3(a)(12) of the 1934 Act contained in the Investment Company Amendments Act of 1970, 84 Stat. 1413, the court concludes that Congress recognized mandatory, noncontributory employee interests to be "securities" within the purview of the securities laws. A careful reading of the portions relied upon, however, does not support such a conclusion.

The objective of the 1934 amendment, as stated by the lower court (App. 25), was to exempt from the registration requirements of the 1933 Act:

> an offering made solely *to employees of an issuer* (emphasis added) or of its affiliates in connection with *a bona fide plan for the payment of extra compensation* (emphasis by court) or stock investment plan for the exclusive benefit of such employees. 78 Cong. Rec. 8708 (1934).

One need look no farther than the above language, however, to conclude that interests of the type involved herein were not the target of this amendment.

Where the pension plan is operated throught a trust arrange-

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securities. *See generally Tcherepnin v. Knight*, 389 U.S. at 343-4. In *United Benefit*, before finding that the accumulation provisions of the contract involved therein constituted an investment contract, the Court first concluded that the "Flexible Fund" contract included two seperate and distinct promises whose operation was seperated at a fixed point in time. 387 U.S. at 207. Thus, there the two different features of the contract were found to have vitality independent of each other. *Id.* at 209. Furthermore, in neither *VALIC* nor *United Benefit* is the absence of a voluntary decision exclusively induced by the prospect of profit indicated.

ment[9], it is the trust itself which would be the "issuer" in an investment sense.[10] Similarly, the interest acquired by an employee is in the trust fund rather than in his employer's business. Thus, because the plan participant is not employed by the trust fund, the offering thereto of interests in the fund itself is not an offering made by an issuer to its employees.[11] Furthermore, the later comments of SEC Commissioner Purcell on the rejection of this amendment clearly suggest that only those plans wherein employees were given the opportunity to participate (*i.e.* voluntary plans) were affected.[12]

Nor do the 1970 amendments relied on by the court below further the inquiry into whether mandatory, noncontributory pension interests are securities. The court's finding in these amendments of a Congressional belief that such interests are securities stems, we submit, from the court's failure to distinguish between the relationship of the employees to the pension trust fund, and the fund itself as an investment medium.[13] We believe that the 1970 amendments focus on the latter while this case deals with the former. However, rather than repeat here the extensive and complex legislative history which we believe supports our conclusion, we simply note that the court's in-

[9] The pension trust in this case, as in all cases where a collective bargaining relationship is involved, was established pursuant to and maintained within the framework of Section 302(c) of the National Labor Relations Act of 1935, 29 U.S.C. §141, *et seq.*; 29 U.S.C. §186(c).

[10] 15 U.S.C. §77b(4); 15 U.S.C. §78c(a)(8); I L. Loss, Securities Regulation, 506-507 (2nd Ed. 1961); Mundheim and Henderson, *Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans*, 29 Law and Contemp. Problems 795, 803, 813-814 (1964) [hereinafter "Mundheim and Henderson"].

[11] *See* H.R. Rep. No. 1838, 73rd Cong., 2d Sess. 41 (1934), wherein it is indicated that a basis for rejecting this proposed amendment was the "need [of plan participants for the] protection afforded by the availability of information concerning *the issuer for which they work . . .*". (Emphasis added).

[12] *Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities and Exchange Act of 1934 before the House Comm. on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 895-6 (1941), [hereinafter "1941 Hearings"].

[13] *See generally* Mundheim and Henderson at 837.

terpretation raises several troublesome questions which undermine the significance attached to the amendments by the court.

The court reasons that the 1970 enactment amending Section 3(a)(2) of the 1933 Act (15 U.S.C. §77c(a)(2)) exempts employee interests in pension plans from the registration requirements of the 1933 Act[14] and thereby recognizes such interests to have been "securities" in the first instance. The court rejects the argument that these amendments do not focus on the employee's interest in the underlying pension plan by pointing to the "single or" language which precedes "collective trust fund maintained by a bank . . .". However, the "single or" language was not included in a concurrent amendment to the definition of "exempted securities" contained in Section 3(a)(12) of the 1934 Act (15 U.S.C. § 78c(a)(12)). H. Conf. Rep. No. 91-6131, 91st Cong., 2d Sess. 24-25 *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 1648, 1675-7.[15] There-

[14] The 1970 enactment added, *inter alia*, the following language to the "exempted securities" provision of the 1933 Act (15 U.S.C. §77c(a)(2)):

> any interest or participation in *a single or* collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26. (Emphasis added).

[15] The court passes quickly over this anomaly by giving an explanation which suggests an interest conclusion (App. 28, n. 34). The court attributes this absence to the Commission's more limited interpretative and quazi-

fore, if the amendment to the 1933 Act encompasses an employee's interest in the underlying plan as the court suggests, and if such interests are indeed securities, then it would appear that the full range of regulatory requirements contained in the 1934 Act would become applicable since such interests would not then fall within the definition of "exempted securities under the 1934 Act.[16]

The court's interpretation thus raises serious questions with regard to whether the locations where these "securities" are "sold" to employees (*i.e.* the union halls and/or employer personnel offices) must either register or seek exemption from the requirement to register as an "exchange", (*see, e.g.*, 15 U.S.C. §§ 78c(a)(1), 78e, 78f); whether the nation's corporate personnel directors and union officials qualify as brokers or dealers and are thus subject to extensive regulation under the 1934 Act, (*see, e.g.*, 15 U.S.C. §§ *78c(a)(4), 78c(a)(5), 78o; 17 C.F.R. § 240.10b-1, et seq.*);[17] and whether prior to the occurrence of a "sale" of such interests (*i.e.* prior to the hiring of new employees, the taking of ratification votes on agreements which contain changes affecting the pension plan, or prior to an employee's decision not to leave his job) the "security" must be registered under the 1934 Act, (15 U.S.C. §§ 78*l*, 78*l*(g)). We think it unlikely that Congress intended to trigger inquiries such as the foregoing with its 1970 amendments.[18] Nevertheless, the court below has now opened the door to widespread uncertainty by those who must deal with pension plans on all levels concerning their legal status and obligations under the securities laws.[19]

Finally, the legislative history supporting the 1970 amendments shows that Congress was not willing to permanently exempt interests or participations in "H.R.10" plans "because of their fairly complex nature as an equity investment and because of the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field". H.R. Rep. No. 91-1382, 91st Cong., 2d Sess., 441 (1970); Staff of Senate Committee on Banking and Currency, 91st Cong., 2d Sess.,

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legislative powers under the 1933 Act in contrast to its plenary authority to exempt securities under the 1934 Act. Thus, we are asked to accept the questionable proposition that in simultaneously amending both pertinent provisions of the 1933 and 1934 Acts, Congress statutorily manifested its asserted intent in the 1933 Act, but was content to leave the realization of that same intent to administrative fiat under the 1934 Act.

[16] While it could be generally argued that the absence of a secondary market for employee interests in pension plans renders the 1934 Act, as a practical matter, inapplicable, the court below precluded such a conclusion by finding that "[e]ach year Daniel paid more value into the fund and from time to time plan amendments were effected which Daniel claims contributed to his being defrauded, [and that] [t]his is the conceptual predicate for finding a secondary distribution under Section 10b of the 1934 Act." (App. 41, n. 46).

[17] Significantly, since 1958 unions, union officials, and employers have been subject to extensive reporting requirements under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.*, (1958). *See generally* 29 U.S.C. §§ 431-433. Employers were also subject to extensive additional reporting requirements under the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §301, *et seq.*, (1958), *repealed* Section 111 of ERISA, 29 U.S.C. § 1031 (1974). Thus, it is unlikely that in 1970 Congress sought to impose additional complicated registration and regulatory requirements akin to those applicable to brokers and dealers under the 1934 Act without any explanation whatsoever. *See generally* 15 U.S.C. § 78o.

[18] Needless to say, if we are correct in our belief that the 1970 amendments do not speak to the employee's interest in the underlying pension plan, but the court's conclusion that such interests are "securities" is upheld, then all of the requirements of the 1933 Act (*e.g.* registration under Section 5, 15 U.S.C. §77e) would apply absent an administrative ememption.

[19] Ironically, the 1970 amendments recognize the very distinction between employer contributions and employee contributions which the court below characterizes as "undue literalism" (App. 35). Since the net effect of the decision below is to transform what would otherwise be employer contributions into employee contributions, an interesting question is raised with regard to the resulting impact of this decision on the 1970 exemption. For example, since in the lower court's view there are no longer any "employer contributions", any amount expended by the fund to purchase securities issued by the employer would be "amount[s] in excess of the employer's contribution . . . allocated to purchase securities (other than interests or participations in the trust or separate account itself) issued by the employer . . . ". Thus, the result would appear to be that registration will now be required for all plans where contributions are held in a single trust fund maintained for a single employer, or in a separate account maintained by an insurance company, notwithstanding the clear intent of this provision to require the registration of such plans only where more than the employer's contributions are so used.

Analysis of S.34 at 1, 16 (Comm. Print 1969). In light of Congress' obvious concern for the "unsophisticated" self-employed purchaser of an "H.R.10" plan, its permanent exemption of employee interests in pension plans from the major disclosure provision of the 1933 Act, if the lower court's interpretation is correct, suggests the anomalous conclusion that the individual employee is more sophisticated in dealing with securities and thus did not need the protection of registration disclosure. We think it more reasonable to conclude that in amending the exemption provisions of the securities laws Congress was not focusing on individual employee interests, but rather on the activities of the pension fund itself in the capital markets.

c. The Lower Court Erred in Finding the Sale of a Security

Assuming, *arguendo*, that the lower court correctly found the participant's interest in the pension plan to be a security, the court clearly erred in finding that a sale thereof takes place in the instant context. Putting aside the questions of "disposition" and "value"[20], the court's erroneous finding of a sale derives from its dubious conclusion that volition is not required for a sale to take place, and is then compounded by its strained efforts to find, in the alternative, that volition is present here on the basis of occurrences and processes which are so remote from the substance of any supposed investment as to be virtually meaningless in an investment context.

Little need be said concerning the court's initial premise that volition is not a necessary prerequisite for a sale since it is based on little more than the absence of such an express requirement in the statutory definitions of sale. To attach any significance to this absence is to exalt form over substance and to indulge in precisely the type of unduly literal analysis decried by this Court in *United Housing Foundation, Inc. v. Forman,*

[20] Both the 1933 and 1934 Acts define "sale" in terms of the disposition of a security. 15 U.S.C. § 77b(3); 15 U.S.C. § 78c(a)(14). The 1933 Act additionally requires that the sale be for "value". 15 U.S.C. §77b(3).

supra. Rather, volition is the very essence of a security transaction[21] and has been specifically recognized as such by the SEC in the pension plan context.[22]

The court's strained efforts to alternatively find a voluntary choice are equally unpersuasive. One of the principal attributes of a noncontributory, mandatory pension plan is that the employee's coverage thereunder is automatic. The individual plan participant has no specific choice with regard to whether or not he will be covered by the plan and, as a practical matter, has little or no direct control over the terms and conditions of the plan, the level of benefits that will be paid, or the level of contributions that will be made by his employer.[23] In what sense then does the employee take any voluntary action which can be conceptualized as manifesting an investment decision?

For its answer the court looks beyond the substantive boundaries of the supposed investment to infer an investment

[21] Our conclusion that the exercise of an individual voluntary choice related directly to the substance of the investment is a necessary prerequisite to the existence of a sale is not affected by the cases relied on below (App. 36). In *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967), the question was not the buyer's standing to complain, but rather that of the "forced seller". Significantly, there the "forced seller" did have an individual choice to either abide by the merger or cash in his stock. Similarly, in both *Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795 (2d Cir. 1974), cert. denied,* 414 U.S. 908 (1973), and *International Controls Corp. v. Vesco* 490 F.2d 1334 (2d Cir. 1974), *cert. denied,* 417 U.S. 932 (1974), a voluntary choice relating to the substance of the investment existed, but its exercise was controlled. These situations are dramatically different from the case at bar wherein the absence of a choice *ab initio* is inherent in the transaction itself rather than artificially imposed by collateral circumstances such as ownership of controlling interests.

[22] See n. 28, *infra*. Significantly, the SEC's change in position is apparently based not on the absence of volition as a requirement of sale, but rather on its efforts to find the requisite volition in other quarters. (App. 37-38).

[23] Generally, these are decisions made by the plan trustees or by the employer and the union during negotiations. To the extent that these considerations are negotiated and dealt with in the collective bargaining process, it is the union, as the employees' legally recognized exclusive representative which has wide discretionary authority over such determinations. *See generally Vaca v. Sipes,* 386 U.S. 171 (1967).

decision from the union members' choice to either ratify collective bargaining agreements which contain the pension plan and subsequent agreements governing the level of employer contributions, or to seek the dismissal of union officers or union decertification. (App. 35-36). The court finds additional volition in the employees' decision to retain his job. *Id.* However, the requisite volition can certainly not lie in any type of ratification procedure[24] for this would result in the creation of an arbitrary distinction between plans covering unions that have ratification procedures and those that do not.[25] The only remaining possibilities are the decision to accept employment and the decision to continue employment. While these may qualify as individual voluntary choices, they do not necessarily have anything to do with the supposed investment and simply defy conceptualization as the type of decisions which Congress sought to facilitate when it ". . . substitute [d] a policy of full disclosure for the philosophy of *caveat emptor.*" *Santa Fe Industries, Inc. v. Green,* 45 U.S.L.W. 4317, 4321 (1977); *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 186 (1963).

[24] In its discussion, the court draws a rather unusual analogy, the meaning of which is not entirely clear, to corporate mergers. (App. 36). To the extent, however, that the court is suggesting that individual volition exists despite the fact that the decision reached by the collective is contrary to that individual's wishes, the analogy is inapt. SEC Rule 133, 17 C.F.R. § 230.133, *rescinded* 37 Fed. Reg. 23636 (1972), the basis for the Commission's "no sale" position in the merger context was rescinded in recognition of the fact that each shareholder did indeed have an individual choice. Thus, in rescinding the rule, the Commission stated: "In voting, each consenting stockholder is expressing his voluntary and indivudal acceptance of the new security, *and generally the disapproving stockholder is deferring his decision as to whether to accept the new security or, if he exercises his dissenters rights, a cash payment.*" SEC Securities Act Release No. 5246 at 3 (1972) (emphasis added). There is no analogy to the dissenter's right of appraisal in the instant context. If the employee does not meet the eligibility requirements, he forfeits his benefits. He cannot simply cash in his unvested benefits.

[25] Unions are not required to seek member ratification unless their own constitutions or by-laws so require. *See, e.g., International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien,* 339 U.S. 454 (1950); *NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958); *Cleveland Orchestra Committee v. Cleveland Federation of Musicians,* 303 F.2d 229 (6th Cir. 1962).

d. Policy Considerations Weigh Heavily Against the Soundness of the Result Reached Below

In *Blue Chip Stamps v. Manor Drug Stores, Inc.* 421 U.S. at 737-749, this Court recognized the significant role played by sound policy considerations in defining the contours of private action under the antifraud provisions of the securities laws. Of principal concern to the Court were the undesirable consequences of rendering a decision which would create a largely uncontrollable expansion of the class of potential plaintiffs under the antifraud provisions. Notwithstanding the fact that potential investors who had suffered actual damage would be denied redress by its ruling, the Court was persuaded that the possibility of vexatious litigation counseled against opening the courts to claims for relief by those who had neither purchased nor sold a security.[26] In this the Court was primarily concerned with the potential settlement value of "strike suits" and the likelihood that a contrary ruling would "throw open to the trier of facts many rather hazy issues of historical fact the proof of which depend[s] almost entirely on oral testimony." 421 U.S. at 743.

These same considerations, as well as others, seriously challenge the soundness of the decision below. For example, the decision below instantaneously creates a cause of action in favor of virtually every past and present private plan participant.[27] Plans of the type involved herein have for years been

[26] This decision is but one in a series of recent decisions wherein this Court has attempted to circumscribe the otherwise broad scope of the securities laws. *See, e.g., Santa Fe Industries, Inc. v. Green, supra; Ernst & Ernst v. Hochfelder,* 435 U.S. 185 (1976); *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975). *See generally* Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings,* 65 Geo. L.J. 891 (1977).

[27] This new class of plantiffs is not limited to participants in collectively bargained, mandatory, noncontributory plans. Under the reasoning employed by the court below, distinctions between different types of plans no longer exist for purposes of the securities laws.

operated without reference to the securities laws because, until this decision, "no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws." *Robinson v. United Mine Workers of America Health and Retirement Fund,* 435 F. Supp. 245, 247 (D.D.C. 1977) (footnote omitted).[28] Thus, it is reasonable to assume that few if any employers, unions, or plan administrators have made disclosures sufficient to meet antifraud standards. To borrow the lower court's own figures then, roughly 30 million current and an indeterminant number of past plan participants can now sue for breach of the antifraud provisions.[29] (App. 24) Additionally, affording a legal remedy to those who have failed to meet the eligibility requirements will inevitably open the door to much litigation the primary focus of which will be "hazy evidence of historical fact" concerning the source and content of representations made years earlier to plan participants. Thus, both of the fears expressed

[28] Through the dubious medium of an *amicus* brief filed below, the SEC seeks to reverse its early position that "no sale" occurs in connection with mandatory, noncontributory plans. Opinion of the Assistant General Counsel of SEC (1941), ['41-'44 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 75,195 *reprinted in* [1977] Fed. Sec. L. Rep. (CCH) ¶2105.53; Testimony of Commissioner Purcell, 1941 Hearings at 896-897; Mundheim and Henderson at 807-812. While the Commission vigorously asserts in this case that the "no sale" rationale was applied only in the registration context and has never been, and should not now be, extended to the antifraud provisions, for aught that appears (App. 52), the Commission has never actively applied the antifraud provisions to such plans. Nor, given the underpinnings of its rationale (*e.g.* the absence of value and/or volition), would anyone ever reasonably suspect that the antifraud provisions applied.

[29] The creation of this enormous new class of plaintiffs portends massive, heretofore unexpected, potential liability for employers, unions, and pension trust funds alike resulting from successful claims under the securities laws as well as for legal fees and other costs attendant to both successful and unsuccessful suits. Additional costs will, of course, be incurred to affirmatively comply with the disclosure requirements now found to be applicable. In the final analysis, however, those who will suffer the most harm are the plan participants who have met or will meet their eligibility requirements only to find that their retirement funds have been severely depleted by the "costs" of the decision below.

by this Court in *Blue Chip Stamp* may well become a reality if the decision below is not overturned.

Massive retroactive liability and the inherent unfairness of evaluating transactions completed years earlier against present-day standards are not, however, the only serious practical consequences of the decision below. Prospective compliance with the antifraud provisions and the disruptive impact thereof on labor-management relations also give rise to serious concerns. Chief among these is the fact that the decision below effectively renders superfluous various provisions of Title I of ERISA, (29 U.S.C. §§1001-1144), and reverses certain clear policy decisions which were made by Congress and manifested in ERISA.

With regard to reporting and disclosure, ERISA represents a conscious focusing of Congressional attention on the informational needs of employees *qua* pension plan participants Thus, in §§ 101(a), and 102(a)(1) of ERISA, Congress required distribution to plan participants of summary plan descriptions which "shall be written in a manner calculated to be understood by the average plan participant and which shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. §§ 1021, 1022. Similarly, Congress determined what information was "material" in this context and specified in §102(b), (29 U.S.C. § 1022(b)), precisely what information summary plan descriptions must contain.[30] Since the court below concluded that ERISA's provisions do not preempt, but rather complement, the disclosure requirements of the securities laws[31] (App. 42), and because the antifraud

[30] Additional extensive reporting and disclosure requirements are provided for by ERISA. *See, e.g.*, §§102, 103, 104, 105, and 106.

[31] In this conclusion, the court below clearly misunderstood the significance of the Welfare and Pension Plan Disclosure Act of 1958 and ERISA to the issues raised in this case. Their significance does not lie in literal notions of implicit or express preemption, (App. 42-48), but rather in the fact that their legislative histories clearly demonstrate Congress' belief

provisions' affirmative obligations to disclose all "material" information are unquestionably broader than ERISA's, the securities law's antifraud disclosure provisions necessarily subsume ERISA's requirements *vis a vis* disclosure to plan participants. Thus, ERISA's provisions become superfluous and the question of disclosure to participants reduces itself to little more than one of timing. Since disclosure under the securities laws is to be made prior to the occurrence of a "sale" to facilitate the making of an informed investment decision, the holding below that the "sale" occurs, *inter alia*, when an employee decides to accept a job tacitly reverses Congress' determination that adequate protection is provided by disclosure within 90 days *after* the employee becomes a plan participant. 29 U.S.C. §1024(b)(1)(A). Significantly, an employee may not even become a participant for as much as one year from the date of initial employment. *Compare* 29 U.S.C. §1002(7) with §§ 1052(a)(1)(A)(i) and (ii).[32]

By affording a legal remedy to past plan participants who have failed to meet the eligibility requirements of their plans, the court below effectively reverses another Congressional policy determination manifested in ERISA. Any retroactive grant of pension benefits, either directly or disguised in the form of damages[33] for breach of the antifraud provisions, would clearly

that it was filling a regulatory void based, at least in part, on its perception that the securities laws did not apply to the employees' participation in the pension plan. *See, e.g.*, S. Rep. No. 1440, 85th Cong., 2d Sess. *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4137, 4145, 4153, 4156; H.R. Rep. 2283, 85th Cong., 2d Sess. *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4181, 4183; H.R. Rep. 93-533, 93d Cong., 2d Sess. 3-5, 7-11 *reprinted in* [1974]U.S. CODE CONG. & AD. NEWS 4639, 4641-3, 4645-9; S. Rep. No. 93-127, 93d Cong., 2d Sess. 3-8 *reprinted in* [1974]U.S. CODE CONG. & AD. NEWS 4838, 4840-4, 4847.

[32]The lower court concluded that "there is no provision of Title I [of ERISA] which generally prohibits the making of false or misleading representations to an employee concerning the pension fund." App. 46, n. 57. Any suggestion, however, that a plan administrator may lie to plan participants is totally specious. *See, e.g.*, 29 U.S.C. §§ 1021, 1022, 1131-33.

[33] The standard measure of damages under the securities laws is the difference between the fair value of that received and the fair value of what

contravene § 203(b)(1)(f) of ERISA (29 U.S.C. § 1053(b)(1)(f)) which expressly allows plans to disregard pre-ERISA years of service "which would have been disregarded under the rules of the pension plan with regard to breaks in service, as in effect on the applicable date." In other words, Congress' determination that pre-ERISA unvested liabilities need not be funded is neutralized by the decision below.

Additionally, the amorphous nature of disclosure under the antifraud provisions of the securities laws gives rise to widespread uncertainty with regard to the manner and timing of disclosure. It is clear that these provisions impose an affirmative obligation to disclose all "material" information. *Affiliated UTE Citizens* v. *United States*, 406 U.S. 128, 153 (1972). But the materiality of specific facts is determined on a case-by-case basis, *see, e.g., SEC v. Shapiro*, 494 F.2d 1301, 1306 (2d Cir. 1974), against a legal standard, *see generally TSC Industries, Inc., v. Northway, Inc.*, 426 U.S. 438 (1976), the meaning of which will raise more questions in the minds of those unaccustomed to dealing with the securities law than it answers. For example, the "risks" to which the ultimate realization of benefits are exposed reach far beyond the investment success or failure of the trust fund itself. An employee may never realize benefits from the plan because, *inter alia*, of death, early resignation, lay-off, protracted strike, or the inability of the employer to continue making contributions. Must each circumstance which has a possible bearing on the likely occur-

would have been received absent the fraudulent conduct. *Affiliated UTE Citizens v. United States*, 406 U.S. 128, 155 (1972). Thus, where benefits are totally forfeited the damages recoverable would appear to be the payment of full benefits or, at the very least, the sum total of contributions made by the employer on the employee's behalf, assuming such is determinable. However, because the decision below necessarily suggests that employment decisions are made on the basis of fringe benefits, liability in the form of consequential damages for such things as lost job opportunities and moving expenses incurred to accept a pension plan induced job may also attach. *See generally* A. Jacobs, *The Measure of Damages In Rule 10b-5 Cases*, 65 Geo. L.J. 1093 (1977). Such a result underscores the patent inapplicability of security law principles in the pension plan context.

rence of one or all of these events be disclosed? Does it make a difference that some of these "risks" involve circumstances exclusively within the employee's control? The decision below requires that such questions now be asked and properly answered under pain of massive antifraud liability.[34]

Once one determines what must be disclosed, the form and timing of disclosure again become critical. To be sure, those potentially liable cannot rely on oral disclosures given the liability which may result several years hence. Rather, detailed disclosure documents will have to be prepared and distributed to present and potential employees and other disclosures closely monitored, all at great cost to the pension trust funds and to the other parties. Further, because the court concluded that the operative "sale" normally takes place "when an employee decides . . . to continue employment in a job" (App. 48), employers, unions, and/or trust administrators must now gaze into the future to determine when an employee is about to decide not to continue in his job so that proper disclosures can be made *before* the "sale" is complete. Surely Congress could not have intended to impose such absurd burdens.

For employers whose retirement plans are collectively bargained, the problems of complying with largely undefined antifraud disclosure requirements are exacerbated by certain legal limitations inherent in the collective bargaining process. The decision below now leaves such employers with a "Hobson's Choice". Because of their potential liability under the securi-

[34] While the types of disclosure which will now have to be made are less than clear, the complaint herein provides a useful guide with regard to what the reasonable employee *qua* investor might consider "material". According to Mr. Daniel, and the lower court as well, the actuarial assumptions upon which the pension plan was based and the actuarial likelihood that he would ever realize his benefits should have been disclosed. But, as their names imply, such data are nothing more than assumptions based in part on the past experiences of group populations. As such they tell little or nothing with regard to what the experience of a specific individual will be, particularly when that individual alone controls many of the variables. Thus, to a large extent disclosure of such data may in and of itself be inherently misleading. Under the decision below, disclosure of such information will be required nonetheless.

ties laws[35], they can ill afford to sit back and rely on the accuracy of representations made by the union to its members concerning the bargained pension plan. Rather, prudence will dictate that employer representatives be present whenever the union makes any assertions concerning the plan to its members, and that they actively intervene to correct any false impressions suggested. However, any such action exposes the employer to potential liability under the National Labor Relations Act for interfering with internal union processes and undermining the union's status as the exclusive employee representative. *See, e.g.*, §8(a)(2) of the National Labor Relations Act (29 U.S.C. §158(a)(2); *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). Unionized employers are thus placed in the untenable position of facing liability under the securities laws for inaction, and liability under the labor laws for action. While such a choice might otherwise cause an employer to simply discontinue its plans, or at least reduce benefits to help compensate for disclosure costs, the unionized employer is further restricted because such matters are mandatory subjects of bargaining, *Inland Steel Co. v. NLRB*, 170 F.2d 247 (8th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), with regard to which the employer can make no unilateral changes. *See generally Fibreboard Products Corp. v. NLRB*, 379 U.S. 203 (1964).

Those who will bear perhaps the greatest burden of the decision below are past, present, and future pension plan participants. The costs of this decision will seriously undermine the financial viability of many pension funds. Indeed, a startling number of pension plans have already terminated as a result of the burdensome requirements imposed by ERISA.[36] Recogniz-

[35] The question of employer liability was specifically avoided by the court below (App. 50). However, there are legal theories which, under the facts of a specific case, may give rise to such culpability. *See, e.g.*, SEC Securities Act Release No. 5226 (1972) *reprinted in* [1977] Fed. Sec. L. Rep. (CCH) ¶2785; Mundheim and Henderson at 813.

[36] Of the relatively limited number of plans covered by the Pension Benefits Guarantee Corporation (*see generally* 29 U.S.C. §1321) roughly 7,300

ing that employers are under no legal obligation to provide retirement programs, and also that viable alternatives exist which eliminate the employer's involvement and leave the employees more or less to their own devices, the impact of a decision such as that below will, at the very least, discourage the establishment of new retirement plans, and could conceivably toll the end of the nation's voluntary private retirement system altogether. Nothing could be more antithetical to common sense and sound public policy.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by Petitioners, this Court is respectfully requested to grant the Petitions for a Writ of Certiorari.

Respectfully submitted,

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single employer plans, an increase of sixty-five percent over 1975, terminated in 1976 alone. Analysis of Single Employer Defined Benefit Plan Terminations, Publication No. PBGC 505, at 1-2 (1976). Thirty-five percent of these terminations were reported as having been caused at least in part by ERISA. *Id.* With regard to multi-employer plans, recent data show that two percent of all such plans, covering roughly five percent of all participants in such plans, are affected by extreme financial hardship such that a high potential for plan termination within the next five years is indicated. 196 Daily Lab. Rep. (BNA) A-3 to A-4 (October 7, 1977). An additional ten percent of such plans covering fifteen percent of all the participants therein are having significant financial difficulties and show a potential for termination although not necessarily within the next five years. Id.

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Nos. 77-753
77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753
77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ERISA Industry Committee (ERIC) respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief

in this case as *amicus curiae* in support of the petitions for certiorari. In support of this motion, ERIC shows as follows:

1. This motion is necessitated by the refusal of the respondent to consent to the filing of a brief by ERIC as *amicus curiae.*

2. The ERISA Industry Committee (ERIC) is a nonprofit corporation, composed of 80 United States corporations, engaged in a wide cross section of American business in such industries as automobile manufacturing, electrical manufacturing, retailing, steel, photographic equipment, metals, insurance, banking, telephone, pharmaceuticals, chemicals, petroleum, airlines, rubber, as well as various service industries and utilities. These corporations have for years maintained one or more retirement plans for the benefit of their employees, many of which plans have been negotiated with unions. In all, these 80 corporations maintain a total of over 900 separate employee retirement plans covering nearly 7,000,000 employees, which is more than 20 percent of all American employees covered by private retirement plans. Through ERIC, these companies coordinate their views and provide practical information and recommendations to government on how the private pension system functions, and on the impact of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 (ERISA) on pension plan participants and plan sponsors. This includes rendering assistance to courts in their deliberations on significant employee retirement plan issues of broad concern to employers, including the filing of a brief *amicus curiae* with the Seventh Circuit in the case now before this Court.

3. As decided by the Court of Appeals, this case stands for the novel proposition that an employee's participation in a retirement plan which covers him automatically and at no cost to him is subject to the antifraud provisions of the Securities Acts of 1933 and 1934. As a consequence, the failure to provide an employee with certain information never before thought to be material has and will render unions, employers, plans and plan administrators liable for massive money damages. Although the Seventh Circuit's decision involves only a claim against the plaintiff's union and its retirement fund, that decision does raise the prospect of similar liability for employers such as those represented in ERIC.

4. Because no employer, union, trustee, plan administrator or, indeed, the Congress or SEC, has ever understood that the antifraud provisions apply, the Seventh Circuit's decision raises the prospect of such persons becoming subject to the payment of billions of dollars and may encourage extensive vexatious litigation under the Securities Acts. Further, the decision may severely disrupt collective bargaining in a manner counter to our nation's labor policy and will create significant administrative problems for retirement plan administrators. In addition, because no employer is involved as a party in this case, the interests of employers concerned with the administration of retirement plans may well be unrepresented in this Court's consideration of the petitions for certiorari unless our request to file the accompanying brief is granted.

WHEREFORE, it is respectfully moved and requested that the ERISA Industry Committee (ERIC) be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753
77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
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Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE PETITIONS FOR CERTIORARI

The ERISA Industry Committee (ERIC) hereby submits this brief in support of the petitions filed in Nos. 77-753 and 77-754 for writs of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 20, 1977.

INTEREST OF THE *AMICUS CURIAE*

A statement describing ERIC and its interest in this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

REASONS FOR GRANTING THE WRITS

INTRODUCTION

The importance of the Seventh Circuit's decision in this case and the need for prompt review by this Court cannot be overstated. The decision of the Seventh Circuit has received unprecedented press coverage. It has already been discussed in congressional hearings and has been the subject of congressional comment. The prestigious American Law Institute and the American Bar Association Committee on Continuing Professional Education have scheduled a two-day course of study on the implications of the Circuit's "landmark opinion" on retirement and employee benefit plans. Attorney experts in the field of retirement plans are already discussing in print the problems created by the decision. Two reported federal district court decisions have examined the District Court's decision affirmed by the Seventh Circuit in this case and have disagreed with it (*Robinson* v. *UMW Health and Retirement Funds*, 435 F. Supp. 245 (D. D.C. 1977); *Weins* v. *International Brotherhood of Teamsters*, 132 Pens. Rep. (BNA) D-5 (C.D. Cal. March 28, 1977)). Another district court held contrary to the Seventh Circuit prior to its decision below (*Hurn* v. *Retirement Fund of the Plumbing, Heating & Piping Industry of Southern California*, 424 F. Supp. 80 (C.D. Cal. 1976)). An-

other unreported district court decision has flatly disagreed with the Seventh Circuit (*Cinnamon* v. *Brooks*, No. CV-77-204 LTL (C.D. Cal. 1977), cited in *Daniel* v. *International Brotherhood of Teamsters*, Petitioner's Brief for Certiorari, No. 77-753 ("Petitioner's Brief") at Appendix A (Nov. 25, 1977)). At least 17 court actions have been started based in whole or in part on the decisions below (Petitioner's Brief, *supra*). The SEC has already obtained a consent court decree against pension and welfare funds based in part on the decisions below and one district court has agreed with the Seventh Circuit (*see* note 11, *infra*).

These events surrounding and following the Seventh Circuit's decision add weight and meaning to each of the five points made below in support of our request that this Court grant the requested writs.

A. The Seventh Circuit Erred In Its Holding That The "Antifraud" Provisions Of The Securities Acts Of 1933 And 1934 Apply To An Employee's Acquisition And Retention Of Rights In A Private Retirement Plan And, In So Doing, Has Created Confusion On An Important Question Of Law That Should Be Promptly Decided By This Court.

Daniel, a retired truck driver who was a member of Teamsters Local 705 for more than 22 years, was denied a pension in 1973 when he retired because of illness. The basis for the denial was that Daniel had failed to meet a plan requirement of 20 years' continuous service because he had been involuntarily laid off for three months at the end of 1960. Daniel, in addition to other causes of action not before this Court, has complained that he was misled and defrauded by his union's failure to make clear what cir-

cumstances would preclude him from receiving a benefit and by his union's failure to disclose the actuarial likelihood of his receiving a pension. Daniel contended that if he could prove these allegations at trial, he would be entitled to relief under the antifraud provisions of the Securities Acts on the theory that his union failed to disclose material information to him with respect to his participation in the plan. The District Court and the Seventh Circuit agreed. The Seventh Circuit stated that an employee's interest in a noncontributory, compulsory retirement plan [1] involved the "sale" of a "security" for purposes of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. Accordingly, it held that Daniel was entitled to a trial on his claim under the Securities Acts.

In reaching its conclusion, the Seventh Circuit held that (1) by commencing employment with an employer who offers a retirement plan; (2) by voting with his fellow workers to accept a collective bargaining agreement negotiated by his union representative and containing a retirement plan; or (3) by continuing to work for his employer, an employee accepts an offer of sale of a security and, accordingly, acquires a right to full disclosure of all material information concerning that plan. The Seventh Circuit found that the latter information must at least include the actuarial assumptions upon which an em-

[1] A plan is "noncontributory" in the sense that the employer pays all moneys into the fund—the employee contributes nothing. A plan is "compulsory" in the sense that employees may not choose whether or not to be covered—they are covered and contributions are made on their behalf automatically because they are employed.

ployee's benefits are computed. Further, if all such information is not provided to the employee, he has a cause of action for money damages, which damages may include the payment of retirement benefits—the remedy sought by Mr. Daniel.[2]

The Seventh Circuit's decision has created confusion in the minds of those who sponsor, bargain and administer retirement plans, for the decision is at odds with congressional understanding of the law and is in direct conflict with district court decisions on the issue.

Congressional understanding of the law seems clear. Thus, Congress, following the lead of the SEC, has understood for over 30 years that the Securities Acts do not apply to the acquisition or retention of an employee's interest in a compulsory, noncontributory retirement plan.[3]

[2] Although this case involves only a claim against the plaintiff's union and the retirement trust funds, the decision at least raises the prospect of similar liability for employers. Thus, it is at least possible that an employer's liability may be based upon the theory that he aided and abetted in the sale of the security (the retirement plan) (*In re Caesars Palace Securities Litigation*, 360 F. Supp. 366 (S.D.N.Y. 1973); or may be based upon analogous theories (*e.g., Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (liability, as a party to a collective bargaining agreement)). The Seventh Circuit, however, found it unnecessary to consider the issue of employer liability (*Daniel*, No. 76-1855, slip op. at 50 n. 61).

[3] Early in the history of the Securities Acts, the SEC determined that they were not applicable to an involuntary, noncontributory retirement plan for, in the words of SEC Commissioner Purcell:

> As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike

Not only has this been Congress' understanding, but it also acted accordingly by promulgating the Employee Retirement Income Security Act of 1974

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the company's investment plan. (*Daniel*, 410 F. Supp. 541, 548 (N.D. Ill. 1976), *quoting* Hearings on Proposed Amendments to Securities Act of 1933 and Securities Exchange Act of 1934 Before House Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess. ("Hearings") at 907, 908. *See also, First Union, Inc.*, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,597 (1971).

Further, Congress has understood this to be the law. Thus, Congressman Wolverton, one of the 1933 Act draftsmen, stated in 1941:

> Then you ought to know the truth of what I am saying. Supervision of pension plans, and so forth, were never considered to come under the Securities Act. (Hearings at 888. *See also*, Congressman Wolverton's comments at 894, 913, 980 and 981).

In 1972, an Interim Senate Report stated:

> Pension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 . . . , unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. (Interim Report of Activities of Private Welfare and Pension Plan Study, 1971, S. Report No. 92-634, 92d Cong., 2d Sess. at 96 (Feb. 22, 1972)).

And in 1976, Congressman Dent stated:

> Other parts of ERISA require careful review at this time. A recent Federal court decision raises the specter that yet another Federal agency, the Securities and Exchange Commission, will become involved in the regulation of employee benefit plans, a result clearly unintended when we enacted ERISA. Certainly Congress must be prepared to act if in fact this case is not reversed on appeal. [1976] 174 Daily Lab. Rep. (BNA) at A-6.

("ERISA"), 29 U.S.C. § 1001, *et seq.* A major purpose of ERISA is to deal with precisely the kind of inequities which faced employees like Mr. Daniel and led to his lawsuit.[4] However, at the same time, Congress carefully balanced the need to protect employee retirement expectations against the need to not so overburden employers with costs and administrative red tape as to dissuade them from starting or continuing retirement plans.[5]

However, the Seventh Circuit has now decreed that the antifraud provisions require disclosure of information, without alerting retirement plan sponsors and administrators as to when the disclosures must be made or specifically what must be disclosed.[6] Further, if as yet unknown material facts are not disclosed at as yet unknown times, lawsuits and potentially massive liability face unions, employers, administrators and plans.

The dilemma now facing employers, sponsors, unions and administrators is simply stated: "Do we

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[4] *E.g.*, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes, 1976) ("ERISA Leg. Hist."), Vol. I at 90-92, 1267; Vol. II at 1599, 3474; Vol. III at 3584, 4282-83, 4656-57).

[5] *E.g.*, ERISA Leg. Hist., Vol. II at 1776; Vol. III at 4800. Indeed, in striking that balance, Congress made a specific decision that preenactment service breaks, such as Mr. Daniel's, would be left unaffected and would remain as valid reasons for denying retirement benefits (29 U.S.C. § 1053(b)(1)(F)).

[6] "Material" information must be disclosed, and what is "material" must be determined on a case-by-case basis. (*E.g.*, *SEC* v. *Shapiro*, 494 F.2d 1301, 1306 (2d Cir. 1974)).

follow Congress' approach set forth in ERISA and continue to attempt to meet the specific disclosure requirements of that Act, or do we spend the time and money necessary to prepare and distribute a constant flood of new information to employees as required by the Seventh Circuit?" Or, more troublesome, "do we heed the Seventh Circuit and terminate our retirement plans, or fail to start new ones, in order to protect ourselves from lawsuits and financial ruin?"

The confusion and dilemma is heightened by four district court decisions which have disagreed with the Seventh Circuit's analysis and have held that the Securities Acts of 1933 and 1934 do not apply to an employee's participation in a compulsory, noncontributory retirement plan. Three of those decisions were handed down after the District Court opinion, which was affirmed by the Seventh Circuit, but predated the Circuit's decision (*Hurn, supra; Robinson, supra; Weins, supra*). The last followed the Seventh Circuit's decision (*Cinnamon, supra*). (*See also* note 11, *infra* for one court which has apparently agreed with the Seventh Circuit).

This conflict and resulting confusion creates substantial problems for companies, like those represented in ERIC, that maintain nationwide retirement plans, for different disclosure rules now apply in different jurisdictions. It is this confusion that we ask this Court to now resolve by granting the requested writs.

B. The Seventh Circuit's Decision Creates Potential Liability That Could Destroy Private Retirement Plans.

As earlier stated, the Seventh Circuit has required that retirement plan participants be advised of at least the actuarial basis upon which their benefits are computed. Further, failure to provide that information now supports a lawsuit for damages, most likely in the form of retirement benefits not technically earned under a plan, but nonetheless payable because of the failure to disclose. However, ERIC is aware of no employer or retirement plan that has ever disclosed such actuarial assumptions because no one ever believed them to be relevant or particularly useful to plan participants. Indeed, until the District Court's decision below, "no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws." *Robinson, supra* at 247 (footnote omitted). Accordingly, the practical consequence of the Seventh Circuit's decision is that every retirement plan participant in the country has been denied material information and thus has a claim to a vested retirement benefit even though he or she has not met the requirements of his or her plan for a benefit. And this result applies even as to participants who are covered by the most reasonable plans containing the most reasonable eligibility requirements.

As such, tremendous unanticipated liability in the billions of dollars may await plans, unions, employers and administrators as the sellers of pension benefits.[7]

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[7] It is unclear whether the Seventh Circuit would award benefits or merely a payment to a plan participant of contributions made on his behalf. Even in the latter case, presumably involving lesser liability, one can assume significant liability. Thus, by way of example, in 1970 the average annual

The prospect of such liability may well cause some employers to end retirement benefits for their workers and some to give up any idea of instituting retirement programs. That statement is consistent with the judgment of Congress. Thus, in the Senate's floor debate on the ERISA Conference Report, Senator Nelson stated:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers. (ERISA Leg. Hist., Vol. III at 4800).[8]

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employer contribution on behalf of an employee was $400 (Institute of Life Insurance, Pension Facts 1975 at 30) so that potential liability to 20 million workers who may not receive retirement benefits because of the eligibility requirements of their plans (only about 1/3 of the 30,000,000 covered employees may receive benefits (ERISA Leg. Hist., Vol. I at 203, Vol. II at 1599)) exists in the amount of $8 billion ($8,000,000,000) for each year of contribution, or at least $56 billion since 1970.

[8] Further, Senator Williams responded in early ERISA debate to Senator Hartke's efforts to impose stringent and costly requirements upon pension and benefit plans, by stating:

> Mr. President, until the Senator does impose upon employers the mandate to have pension plans, I would think that all of the provisions that the Senator would offer, put together, would just kill off any attitude on the part of the employers who do not have any pension plans to come on in. (*Id.*, Vol. II at 1776).

These concerns have proven to be accurate. For example, the House Small Business Committee recently published the results of a questionnaire sent to small businesses who intended to terminate existing retirement plans. Those results indicated that 92 percent of those businesses were motivated, at least in part, to terminate plans because of the increased costs mandated by ERISA. ([1977] 160 Pens. Rep. (BNA) at A-2—A-3, R-11—R-13). Clearly, if ERISA is causing terminations, the Seventh Circuit's decision which poses the threat of massive liability and increased costs will not only accelerate terminations but will drastically curtail the development of new plans.

As troublesome as such liability may be to employers, it may have even worse consequences for unions which generally do not have the financial resources necessary to avoid complete financial ruin. Prudent unions may no longer negotiate with management over retirement benefits. A district court recently reviewed an attempt to render unions liable for failure to police job site safety and stated:

> Union funds are derived from its members and only the largest unions may be potentially able to absorb the type of loss involved in this case. While unions may seek insurance coverage, the cost must be borne by the membership. Unions do not have finite limits of liability as do employers under workmen's compensation, nor can unions pass along such a loss to the public as

may an employer. Moreover, the result is readily apparent, if unions could be held liable in cases such as this—there would be no negotiation on safety matters. To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy. (*House* v. *Mine Safety Appliances Co.*, 417 F. Supp. 939, 946-47 (D. Idaho 1976) (footnotes omitted)).[9]

In sum, the threat of massive liability occasioned by the Seventh Circuit's application of the Securities Acts to private retirement plans threatens not only the financial security of funds, unions and employers, but also establishes a substantial deterrent to the institution and growth of private retirement plans. Accordingly, it is particularly critical that this Court grant the requested writs and settle the issue before plans are terminated, decisions are made to withhold new plans, or plans are bankrupted by massive money claims.

C. The Seventh Circuit's Decision Threatens Extensive Litigation.

Certainly, the potential for increased litigation in the field of pensions has been heightened by the Seventh Circuit's decision, a potential which again may

[9] The Sixth Circuit has concluded in an analogous situation.

> Such . . . would simply deter unions from engaging in the unfettered give and take negotiation which lies at the heart of the collective bargaining agreement . . . . Such result would not serve the interest of . . . [employees] and would retard rather than advance the goals of the National Labor policy. (*Bryant* v. *International Union, UMW of America*, 467 F.2d 1, 5, 6 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (footnotes omitted)).

threaten the financial stability of plans, unions and employers and which may further deter the growth of our nation's system of private pension plans.

In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), this Court recognized that it was unwise to expand the class of persons who could commence suit under the antifraud provisions of the Securities Acts. Thus, for example, this Court concluded that if a plaintiff could survive a motion to dismiss, he could use discovery to take up the time of other people and, in conjunction with claims for massive relief, thereby increase his chance of a favorable settlement even if his claim was largely groundless.

These concerns are especially relevant to the application of the Securities Acts to retirement plans, for no one has ever thought it necessary to disclose information such as a plan's actuarial assumptions to employees prior to their participation in a pension plan. Accordingly, it is reasonable to anticipate that extensive litigation will follow fast on the heels of *Daniel*. Even if the chances of success by a plaintiff are slim, extensive litigation expenses will confront defendant employers, unions and retirement plan administrators. If such suits are commenced as class actions, as was Mr. Daniel's suit,[10] the potential liability realistically raises the specter of bankruptcy for employers, unions and retirement funds, thus increasing the motivation to settle even the seemingly most groundless claim.

[10] Mr. Daniel commenced his suit against the International Teamsters Union, all local Teamster unions, all trustees of all Teamster pension funds and all the officers of all Teamster unions, and did so on behalf of every Teamster member in the country who has participated in a Teamster pension fund.

In sum, the threat of extensive litigation with its attended costs and possible unrealistic settlements will be with us until this Court settles the issue now before it.[11]

D. The Seventh Circuit's Decision Adds Excessive Additional Administrative Burdens.

One of the major concerns of the Congress in enacting ERISA was that the additional administra-

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[11] The need for quick action by this Court is highlighted by the vast publicity this case has received in the press (*e.g.*, Washington Star, Nov. 8, 1977, at B-7, col. 5; N.Y. Times, Aug. 23, 1977, at 49, col. 4; Wall St. J., Aug. 23, 1977, at 8, col. 2; N.Y.L.J., Sept. 27, 1976, at 25, col. 1; Pensions & Investments, April 11, 1977, at 1, col. 1); and in congressional hearings (*e.g.*, [1977] 184 Daily Lab. Rep. (BNA) at X-2—X-3). Further, the American Law Institute and the American Bar Association Committee on Continuing Professional Education have scheduled a two-day course of study entitled "ERISA and the Federal Securities Laws" for the purpose of studying the "landmark opinion of the Seventh Circuit in *Daniel* . . . ." (ALI-ABA CLE Rev., Nov. 18, 1977, at 1, col. 2). Attorney experts in the field of retirement plans are already discussing in print the problems created by the Circuit's decision (*e.g.*, Alef and Short, *Problems Created by CA-7 Decision that Pension Plan Participation is a Security*, J. of Taxation 282 (Nov. 1977)). At least 17 court suits have been started based in whole or in part on the decisions below (Petitioner's Brief at Appendix A). Even more compelling is the report that the SEC has already obtained a consent court decree (without legal argument or contest) based in part upon the Seventh Circuit's decision (Pensions & Investments, Oct. 24, 1977, at 1, col. 1). Further, we have just been advised that one district court has agreed with the Seventh Circuit's opinion (*Schlansky* v. *United Merchants and Manufacturers, Inc.*, Civ. No. 76-5799 (S.D.N.Y. 1977)), cited in Petitioner's Brief at Appendix A.

tive burdens required by that Act (particularly the extensive reports and disclosures required) might act as a disincentive to the start-up or continuation of retirement plans. Indeed, those concerns were well founded, for an Interim Report on Pension Forms by Senator Nelson [12] has concluded that many small private pension plans have been forced out of existence in part because of the burdensome paperwork occasioned by ERISA's reporting and disclosure requirements ([1976] 194 Daily Lab. Rep. (BNA) at 1, A-5—A-6, X-1—X-4). To that burden the Seventh Circuit has now added the disclosures required by the anti-fraud provisions of the Securities Acts. And more distressing is the fact that in this latter case, no one knows exactly what to disclose or when.

One of the means by which Congress sought to deal with the administrative burdens that might result from ERISA's enactment was to provide for broad federal preemption of all state laws regulating employee benefit plans.[13] In this manner, Congress

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[12] Senator Nelson is the Chairman of the Senate Small Business Committee and Senate Finance Subcommittee on Private Pension Plans.

[13] ERISA Section 514(a) (29 U.S.C. § 1144(a)) provides:

> [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) and not exempt under Section 1003(b) of this title.

Further, in introducing the Conference Report on ERISA, Senator Harrison Williams, Jr. (D-NJ), Chairman of the then Senate Committee on Labor and Public Welfare, explained (ERISA Leg. Hist., Vol. III at 4745-46):

sought to relieve employer burdens by at least removing state regulation of retirement plans and their attendant, and often conflicting, reporting, disclosure and other requirements. However, the Seventh Circuit has now plowed a deep hole through that granted relief, providing further disincentives to the start-up and continuation of private retirement plans.

Section 18 of the Securities Act of 1933[14] and Section 28(a) of the Securities Exchange Act of 1934[15] specifically save the jurisdiction of the states

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It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

[14] 15 U.S.C. § 77r: Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

[15] 15 U.S.C. § 78bb(a): The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

to regulate any securities and Section 514(b)(2)(A) of ERISA specifically disallows federal preemption of state laws regulating securities.[16] The Seventh Circuit has now stated that an interest in a retirement plan is a "security," so that the various state Blue Sky laws may now separately regulate the form and substance of all disclosures to retirement plan participants. Thus, what was thought to be a limited exception to ERISA's requirement of federal preemption has instead become an exception which basically eliminates preemption in the area of disclosures to retirement plan participants.

Once again, before plans are terminated or moneys are expended from retirement funds in an effort to meet the various still unknown requirements of the Securities Acts and the state Blue Sky laws, we urge this Court to grant the requested writs and resolve the uncertainty created by the Seventh Circuit's decision.

E. The Seventh Circuit's Decision Threatens Collective Bargaining Over Retirement Plans And Is Counter To Our National Labor Policy.

The Seventh Circuit seems to have determined that a contract ratification vote by union employees is at least one of the occasions when antifraud disclosures must be made if that contract provides for retirement plan coverage. If an employer bargains retirement plan participation for his employees, he will

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[16] 29 U.S.C. § 1144(b)(2)(A): Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

have to insure that full and fair disclosures are made in order to protect against future ruinous liability and extensive litigation. Accordingly, the careful employer may have to attend any meeting set for ratification and participate to the extent necessary to present any omitted facts and correct any misleading statements. However, the employer's participation will violate Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2)), and render the entire collective bargaining agreement null and void. (*See, e.g., Mon River Towing, Inc.* v. *N.L.R.B.*, 421 F.2d 1, 8 (3d Cir. 1969); *Nassau and Suffolk Contractors' Ass'n.*, 118 NLRB 174 (1957); *Amalgamated Meat Cutters & Butcher Workmen of North America* v. *N.L.R.B.*, 276 F.2d 34 (1st Cir. 1960)).

In addition, if the Seventh Circuit's analysis is correct, the employer present at such meeting may need to discuss with the assembled employees whether they should receive additional cash wages instead of retirement benefits and, if so, how much. But such direct bargaining with employees would also violate the National Labor Relations Act. (*E.g., N.L.R.B.* v. *General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, *reh. denied*, 397 U.S. 1059 (1970)).

Finally, the Seventh Circuit's decision could lead unions and employers to decline bargaining concerning retirement plans. If employers were left to determine without bargaining whether and what retirement plan to institute, they would not be faced with the disclosure problems at an employee ratification vote and unions might avoid liability altogether. However, by encouraging such action, the Seventh Circuit has acted counter to our national labor policy.[17]

In sum, the Seventh Circuit's decision does not mesh well with our national labor policy and, indeed, may soon result in actions by employers and unions which will not serve the best interests of employees generally, or pension plan participants specifically.

CONCLUSION

For the reasons discussed above, it is most important that this Court grant the writs and decide whether employee participation interests in compulsory, noncontributory retirement plans are covered by the Securities Acts of 1933 and 1934.

Although no one can fully predict what will happen if the Seventh Circuit's decision is allowed to stand, there is, we submit, good reason to believe that the prospect of massive liability, extensive and costly litigation, additional overburdening administrative requirements and disrupted labor relations may lead unions and employers alike to the conclusion that existing retirement plans should be terminated or that new plans should not be started. Further, liability, litigation and increased administrative costs may threaten the financial stability of plans, and will at the least require an unnecessary diversion of moneys from retirement funds until the issue of whether the Securities Acts should be applicable to retirement plan interests is ultimately decided. Certainly, none of these consequences of a failure by this Court to decide the issue would serve the interests of employers,

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[17] *See* note 9, *supra* and accompanying text.

unions, or retirement plan administrators. Just as certainly, they would ill serve the interests of employees.

Based on the foregoing, we respectfully submit that the petitions for writs of certiorari should be granted to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITIONS

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IN THE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file

the attached brief as *amicus curiae* in support of the petitions for a writ of certiorari. Petitioners have consented to the filing of such brief; respondent has not.

The decision below held for the first time that under the Federal securities laws an employee's right to receive retirement benefits from a pension plan to which he does not contribute is a "security" which the employee "purchases" through becoming and remaining employed.

Interest of the American Bankers Association

The membership of the American Bankers Association consists of approximately 13,375 banks and trust companies—88% of the commercial banks in the United States. Banks in the Association hold or manage nearly $90 billion of assets in more than 120,000 employee benefit plans. Association members also maintain employee benefit plans for their own one million employees.

Neither the parties to this action nor the *amici curiae* below have presented the views of professional fiduciaries about application of the securities laws to pension plans, although banks manage over 65% of all private noninsured pension funds in the United States[1] (including most of the assets in the Local 705 Pension Trust Fund involved here[2]).

The parties typically involved in a pension plan are (1) the employees covered by the plan, who may be represented by a union; (2) their employer; (3) the individuals who administer the plan; and (4) the fiduciary that holds and manages the plan's assets. Only some of these persons are parties to this action. Plaintiff is an employee with a particular grievance. Defendants are the employee's union, in its capacity as plan sponsor, and the labor-management Board of Trustees that

[1] 1975 Survey of Private Noninsured Pension Funds, 35 SEC Statistical Bulletin 552, 553 (Nov. 1976).

[2] Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, reproduced as Exhibit 1 after page 184a of the Appendix of the Appellants in the Court of Appeals; see *Daniel v. International Bhd. of Teamsters,* 561 F.2d 1223, 1240 n.35 (7th Cir. 1977).

administered the plan.[3] The general views of employers and unions were presented in the Court of Appeals by two *amici curiae,* the ERISA Regulations Industry Committee and the National Coordinating Committee for Multiemployer Plans. In addition, two regulatory agencies, the Department of Labor and the Securities and Exchange Commission, presented their (conflicting) positions. But no one has spoken for the fiduciaries of the nation's pension funds or for the beneficiaries of such funds on the momentous issues that they confront because of the decision below.

The American Bankers Association is uniquely situated to assist this Court in determining whether to review the decision of the Court of Appeals. The Association's members are professional fiduciaries, who are among those most seriously affected by the decision below. They are expert in the financial and administrative aspects of pension fund management and are intimately acquainted with the problems presented by the extensive existing regulation of pension plans. The American Bankers Association participated in the congressional hearings and other deliberations that led to enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Association is also conversant with earlier laws relating to pension plans, including the Internal Revenue Code, the Wage-Hour Law and the Welfare and Pension Plans Disclosure Act of 1958 (the predecessor of ERISA, now largely repealed).

The attached brief in support of the petitions for a writ of certiorari discusses the following points, which demonstrate the importance of reviewing the decision below:

[3] The Local 705 Pension Trust Fund was administered by a Board of Trustees composed equally of union and employer representatives, pursuant to section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1970). These individuals should be distinguished from the professional bank trustees that managed approximately $54 million of the $97 million of assets held in trust for the Local 705 pension plan. Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, reproduced as Exhibit 1 after page 184a of the Appendix of the Appellants in the Court of Appeals; see *Daniel v. International Bhd. of Teamsters,* 561 F.2d 1223, 1240 n.35 (7th Cir. 1977).

—Regulation of pension plans under the securities laws is impractical. The resulting administrative burden, expense and risk of unlimited liability will result in the abandonment or curtailment of many existing plans and will discourage the establishment of new plans.

—The decision below has created great uncertainty among those responsible for employee pension plans and their assets.

—Compliance by pension plans with the securities laws as interpreted by the Court of Appeals is inappropriate in view of the comprehensive regulatory system already in effect under ERISA.

—Application of the securities laws to pension plans distorts the purpose of those laws and conflicts with economic reality.

The American Bankers Association seeks leave to present these considerations, which have not previously been presented in this action from the perspective of the fiduciaries that manage pension funds.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae* in support of the petitions for a writ of certiorari.

Dated: December 8, 1977

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IN THE

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OCTOBER TERM, 1977

No. 77-____

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

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JOHN DANIEL,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONS

The American Bankers Association submits this brief as *amicus curiae* to urge that this Court grant the petitions for a writ of certiorari to review the unprecedented decision of the Court of Appeals, which held that for purposes of the Federal

securities laws an employee's right to receive retirement benefits under a pension plan is a "security" which the employee "purchases" through becoming and remaining employed, even though he himself makes no contributions and is automatically covered by the plan. That holding is a significant departure from the most recent decisions of this Court. Because the decision has important and immediate consequences for pension funds, their participants and their managers, it has generated widespread uncertainty and confusion in an already troubled field of great concern to millions of people.

The interest of the American Bankers Association as *amicus curiae* is set forth in the foregoing motion for leave to file this brief.

ARGUMENT

I.

Application of the securities laws to pension plans would adversely affect the pension benefits of millions of employees.

The decision below imposes upon pension plans, as if they were the issuers of stocks or bonds, and upon employers, as if they were underwriters, the vague and inappropriate requirements of the "antifraud" provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.[1] Those provisions make it unlawful to use fraudulent schemes in selling securities or to make false or misleading statements or omissions in connection with the sale of securities. The lower court deemed the rights of an employee under a pension plan to be a "security" for this purpose, and his employment to be a "purchase" of that security, even though he was automatically covered by the plan upon employment and made no contribution of his own funds.

[1] Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1970); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970).

Compliance with the antifraud provisions of the Federal securities laws would subject pension plans to new and complex requirements over and above the broad disclosure scheme already imposed by the Employee Retirement Income Security Act of 1974 ("ERISA").

A primary purpose of ERISA was to require disclosure to employees of all pertinent information about employee benefit plans and to provide appropriate sanctions to ensure such disclosure.[2] ERISA was needed legislation, supported by the American Bankers Association. One of its less salutary results, however, has been a heavily increased burden of paperwork and governmental regulation, onerous enough and costly enough to bring about the abandonment of many plans and the curtailment of others.[3] A survey by the Staff of the House Committee on Small Business of 1,661 businesses that reported termination of pension plans during the period from June 1976 through April 1977 showed that ERISA had a "substantial" effect on the decision to terminate in more than two out of three cases. Over 90% of the businesses surveyed had 50 or fewer employees.[4] How many other cases went unreported is unknown.

As shown by this experience under ERISA, the additional layer of regulation brought to bear on pension plans by the decision of the Court of Appeals in this case will predictably accelerate elimination of benefit improvements and abandonment of private pension plans. Yet the resultant loss of benefits would be unjustified, because the additional regulation is unnecessary.

The Court of Appeals hypothesized that "the anti-fraud provisions do not establish an affirmative disclosure system

[2] ERISA § 2(b), 29 U.S.C. § 1001(b) (Supp. V 1975). ERISA was also designed to set minimum standards for the terms of pension plans and to establish standards of conduct for plan fiduciaries.

[3] See, *e.g.*, Bankers Trust Company, ERISA Related Changes in Corporate Pension Plans 1 (1976); Remarks of Representative Dent, 174 Daily Lab. Rep. (BNA) at A-7 (Sept. 7, 1976).

[4] Staff of House Comm. on Small Business, 95th Cong., 1st Sess., ERISA Questionnaire Results (Comm. Print 1977).

requiring the filing of documents"[5] and optimistically predicted that "[t]here should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage. . . ."[6] However, the holding below is specifically premised on the finding that the antifraud provisions require disclosure that differs in both form and substance from what the court termed the "plethora of information"[7] required to be disclosed under ERISA.

If, as the lower court held, a pension plan is really an investment contract and "resembles a mutual fund,"[8] it may reasonably be thought that in offering each employee an opportunity to "invest" in such a contract the issuer (*i.e.*, the plan) and the underwriter (*i.e.*, the employer) should furnish each prospect (*i.e.*, the employee) with the kind of information that would be needed by a prospective investor in a mutual fund. If the Securities and Exchange Commission's prospectus requirements for mutual funds are a guide, the necessary disclosures would include, among other things, detailed information about the investment policies of the pension plan, including specific information with respect to borrowing or lending money; investing in real estate or other specialized forms of investment; concentration of investments in particular industries or areas; the percentage of assets which may be invested in the securities of any one issuer; the proportion of assets which may be invested in each type of security proposed to be acquired; and the rate of portfolio turnover.[9] Also required would be descriptions of any material legal proceedings to which the plan was a party.[10]

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[5] *Daniel v. International Bhd. of Teamsters,* 561 F.2d 1223, 1247 (7th Cir. 1977).

[6] *Id.* at 1250.

[7] *Id.* at 1248.

[8] *Id.* at 1236.

[9] See Securities and Exchange Commission Forms S-5, Item 1(a), and N-8b-1, Items 4 and 5.

[10] See Securities and Exchange Commission Forms S-5, Item 1(a), and N-8B-1, Item 9.

As these policies and facts changed from time to time, it would presumably be necessary to disseminate corrected and updated information to all of the same people who had received it originally.

But even this information would apparently be inadequate in connection with the "purchase" of a "security" that was also a right to a pension. The Court of Appeals specifically said the antifraud provisions require that a prospective participant in a pension plan be given information about "the actuarial probability . . . that a member actually will receive pension benefits"[11]—that is, the odds on his getting a pension. Such information would be impossible to provide as to each individual employee, since actuarial probabilities are based upon statistical assumptions about group mortality, average rate of personnel turnover, projected salary levels and future interest rates. The generalized information supporting those assumptions could be given but would necessarily consist of a mass of data and formulae comprehensible only to actuaries.

The Court of Appeals believed that most pension plans would not be burdened by the disclosure requirements of the securities laws, because interests in corporate pension plans "maintained" by banks are specifically exempted from the *registration* requirements of the Securities Act of 1933[12] and most pension plans use bank trustees. However, this causes great concern to bank trustees. Their duties as fiduciaries require the most careful attention to legal requirements in the administration of pension funds. As a practical matter, irrespective of exemption from registration, a prudent fiduciary seeking to assure compliance with the antifraud provisions would have to make disclosures that would be the practical equivalent of compliance with the prospectus requirements of the securities laws. To do less, or to make no written record of

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[11] *Daniel v. International Bhd. of Teamsters,* 561 F.2d 1223, 1229 (7th Cir. 1977).

[12] Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2) (1970).

what had been disclosed, would be to risk liability for damages in an action under the antifraud provisions.

Yet ERISA, specifically designed to afford employees all *relevant* information about pension plans in which they may participate, does not require that prospective participants be given information of the kind described above. Its disclosure requirements focus instead on such matters as how an employee may qualify to participate in the plan, when he will become eligible for benefits, how benefits are determined, what events may lead to loss of benefits and how he may enforce his rights if denied. On the other hand, ERISA does require that much technical and investment information be included in periodic reports to the Government (where it is, of course, available to other interested parties). This approach under ERISA obviously reflects a congressional judgment that information of the sort deemed important to investors under the securities laws (much less the kind of actuarial gambler's-odds the Court of Appeals would require) has limited utility to prospective plan participants and is certainly not essential to their understanding of their rights.

These examples of differences between the kind of information that is useful for plan participants and thus required by ERISA and the kind of information that is appropriate for investors gives only a hint of the difficulties engendered by the decision below. The Court of Appeals did not attempt to catalogue all of the additional disclosure requirements imposed by the antifraud provisions. Instead, the burden and risk of anticipating such requirements has been placed squarely upon those responsible for employee benefit plans.

The potential impact of the decision below is illustrated by the broad construction the Securities and Exchange Commission is already putting on it. For example, the Commission interprets the decision as compelling advance disclosure of all facts bearing on the question whether a pension fund is being

managed solely "for the benefit of the beneficiaries".[13] Under this expansive interpretation (which is questionable even if the decision of the Court of Appeals in the present case is accepted) the antifraud provisions would require a fiduciary to disclose to employees, in advance and in detail, exactly what investments the trustee intends to make for the trust fund and who the other parties to all transactions have been or may be. The difficulty of such disclosure is apparent.

The difficulty is compounded by the Court of Appeals' findings that the "primary distribution" of interests in a pension plan takes place when the pension plan is first established,[14] and that an employee makes a "further acquisition of interests in the pension fund" each time he "decides to retain his job,"[15] each time he performs services that result in payments into the fund and each time union members vote to accept or ratify collective bargaining agreements affecting the pension plan. Accordingly, the decision of the Court of Appeals would require disclosure to *prospective* employees of all material facts and circumstances that might affect the amount and the ultimate payment of their pensions. As noted above, under familiar securities law concepts the documents setting forth this information would have to be updated and distributed repeatedly. The additional burden of these requirements is obvious.

It is easy, of course, to say that disclosure can only be helpful, and the more information the better. But this takes no account of the cost, in time and money, of the disclosure process, in relation to the value of the information to those who

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[13] See Complaint, *SEC v. Shenker*, No. 77-1787, Count IV (D.D.C., filed Oct. 7, 1977). The idea espoused by the Commission that actions under its rules are an appropriate means for arbitrating conflicts between employers and employees under pension plans is contrary to views previously expressed by this Court about the intended reach of the securities laws. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-80 (1977); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858-60 (1975).

[14] *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1246 n.46 (7th Cir. 1977).

[15] *Id.* at 1243.

receive it. It is safe to predict that the additional work by executives, lawyers, actuaries and accountants that would be required for compliance with the securities laws as interpreted by the Court of Appeals would materially increase the administrative expenses of employers maintaining plans. Management fees would also have to be raised to cover the additional responsibilities of fiduciaries. The increased costs could not be absorbed by banks, whose profit margins on trust business are generally low or nonexistent.[16]

Perhaps the most drastic consequence of the lower court's decision is the risk of open-ended liability created by retroactive application of the securities laws to pension plans whose sponsors and fund managers never imagined that they might be subject to those laws. Although the Court of Appeals did not specifically address the measure of plaintiff's damages, plaintiff seeks payment of the entire amount of the pension benefit to which he claims to be entitled. Thus, in addition to potential liability for damages caused by current disclosure that may be found deficient in the future, pension plans face potential liability for benefits claimed by employees who are no longer covered by pension plans but who complain about past deficiencies in disclosure.

It is doubtful that bank fiduciaries will be willing to bear the risk of such liabilities unless provision can be made for insurance or adequate reserves, either of which would increase the charges against (and decrease the benefits from) pension plans. Moreover, it is unlikely that insurance will be available, since private insurance carriers have proven unwilling to cover the risks of liability under ERISA at any reasonable cost.

The increased burden, cost and risk of administering pension plans if they are held subject to the antifraud provisions of the securities laws will contribute to the abandonment of many plans and the curtailment of benefits from others, thereby

[16] See, *e.g.*, Federal Reserve Bank, 1976 Functional Cost Analysis 16.

harming the employees whom the Court of Appeals has strained to protect. Before such unfortunate results occur, this Court should grant review of the decision below.

II.

The prospect that pension plans may be subject to the securities laws has created great confusion and uncertainty among employers, plan trustees and investment managers.

The disclosure requirements of ERISA, though complicated and pervasive, are based on specific statutory provisions, which were enacted after extensive legislative hearings and close analysis of the needs of employees and the burdens imposed on employers, plan trustees and investment managers.

By contrast, the decision of the Court of Appeals by a single stroke subjects the highly technical area of pension plans to an equally technical body of nonstatutory authority developed in the context of a completely different industry. The decision is without precedent; it adopts *in toto* a position taken by the Securities and Exchange Commission, "[a]pparently for the first time ever," in its brief as *amicus curiae* in the court below.[17] The decision is also at odds with decisions by district courts in other circuits, which had expressly declined to follow the decision of the district court in this case.[18]

Small wonder, then, that the decision of the Court of Appeals has created confusion and uncertainty. Persons responsible for pension plans no longer have any assurance that compliance with ERISA and other statutes known to be applicable will fulfill their legal obligations, and they cannot judge whether the rule in the Seventh Circuit will prevail

[17] *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1251 (7th Cir. 1977) (Tone, J., concurring).

[18] *Robinson v. UMW Health & Retirement Funds*, 435 F. Supp. 245 (D.D.C. 1977); *Wiens v. International Bhd. of Teamsters*, [1977] Fed. Sec. L. Rep. (CCH) ¶ 96,005 (C.D. Cal. Mar. 28, 1977); *Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Indus.*, 424 F. Supp. 80 (C.D. Cal. 1976).

elsewhere. No guidance is available for resolution of conflicts between ERISA and the antifraud provisions. The lower court's statement that "the district court can fashion relief to avoid a conflict with ERISA if plaintiff should prevail on the merits"[19] gives little comfort to plan trustees and administrators, who must make arrangements in advance to comply with Federal law. The ill defined scope of the antifraud provisions of the securities laws as they might be applied to pension plans merely aggravates the situation.

Review by this Court is seriously needed to settle the important questions raised by the decision below.

III.

Regulation of pension plans as issuers of securities is unnecessary for the protection of employees.

ERISA has created a comprehensive system for controlling the terms of private pension plans, regulating the financing of benefits and requiring comprehensible disclosure to employees. The disclosure requirements create a duty on the part of plan administrators to provide each employee upon entry into the plan with a clear description of his plan benefits, the eligibility requirements and the circumstances under which benefits may be denied. After becoming participants, employees must receive yearly reports of the financial experience of the plan.

Department of Labor regulations supplement these statutory requirements by adding to the information regarded as necessary for employees to understand and enforce their rights. The regulations also require the filing of detailed data about plan terms and financial conditions (including, for plans with more than 100 participants, certified financial statements and actuarial evaluations). Each employee must be informed of his right to obtain copies of documents on file.

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[19] *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1249 (7th Cir. 1977).

The disclosure requirements of ERISA are matched by broad public and private enforcement provisions. The Internal Revenue Service exercises continuing tax sanctions, and the Department of Labor has direct enforcement powers. In addition, ERISA gives plan participants private rights of action to obtain injunctive or other equitable relief to redress violations of the statute, including the wrongful denial of benefits. Employees must be informed of their rights to sue.

The ERISA system is augmented by other forms of regulation. As one example, banks, which serve as fiduciaries of most pension funds, are subject not only to ERISA's express rules on the conduct of plan fiduciaries, but also to extensive regulation of their trust administration practices by Federal and state supervisory agencies, providing an additional level of protection for the beneficiaries of bank-managed trust funds.

The Securities and Exchange Commission, as *amicus curiae* below, attached great importance to the fact that under the securities laws the required information must be given to an employee before he becomes a plan participant or even before he is hired, whereas ERISA materials are given shortly after an employee becomes a plan participant. Actually, this time difference is of no significance. An employee covered by a compulsory plan has no power to change its terms, and to say he might decline to become employed, or might quit, is unrealistic. In view of the extensive regulation to which pension plans and their managers are already subject, and the private rights of action under ERISA, there is no need to create a new cause of action for plan participants under the antifraud provisions of the securities laws.

The acts complained of by plaintiff antedated ERISA, but he is not without other remedies if he has been unjustly denied pension benefits. His own complaint included a cause of action under the National Labor Relations Act, which the district court upheld against a motion to dismiss. Aggrieved pension plan participants have also gained relief in other cases through

application of common law principles of misrepresentation and fiduciary duty.[20]

The decision below does not create any new legal standards needed to protect the pension rights of employees (although it does impose a multitude of unnecessary burdens). ERISA already requires disclosure, fiduciary responsibility and fairness. The decision below merely creates a new cause of action, thereby issuing a general invitation to employees to use the courts to assert claims under the Federal securities laws if they can find no grounds for action under the statutory and administrative rules to which private pension plans are already subject.[21]

IV.

Regulation of pension rights as "securities" is an inappropriate distortion of the purpose and regulatory scheme of the securities laws.

The securities laws were designed to protect the interests of investors in the country's capital markets from "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946). The term "securities" is broadly defined to prevent evasion of regulation through artful

[20] See, *e.g.*, *Maness v. Williams*, 513 F.2d 1264 (8th Cir. 1975); *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537 (2d Cir. 1962).

[21] This Court has emphasized that rights of action under the securities laws should not be "implied" unless there is an actual "*necessity* for supplemental private remedies without which congressional protection of shareholders would be defeated." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (1977) (emphasis in original). Likewise, this Court has held that implied remedies under SEC Rule 10b-5 are inappropriate in cases where they "would overlap and quite possibly interfere with" other bodies of directly applicable law. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977).

terminology or legal structuring designed to mask the substance of an investment relationship in an obscure form, but the focus of regulation is on "the sale of securities," as so defined, "to raise capital for profit-making purposes. . . ." *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975). In classifying an employee's rights under a noncontributory pension plan as a security, the decision below distorts this focus because of a fundamental misapprehension about what a pension plan really is.

The core of any pension plan is the promise of an employer that an employee will receive retirement payments. A trust is established as a means of funding in advance (and safeguarding from the risks of the employer's business) the employer's obligation to pay compensation to its employees after retirement.[22] Since the employer continues to make contributions until the trust assets are actuarially adequate to pay the employees' pensions, making up along the way any investment losses incurred by the trust (and getting the benefit of any investment gains in excess of the actuarial prediction), the trust is actually an investment by the employer, not by the covered employees.[23]

To say that an employee has an "interest" in the trust merely recognizes the importance of the employer's undertaking to fulfill its pension obligations. The purpose of laws regulating the financing of pension obligations, illustrated by ERISA, is to assure that the employer's agreement to pay

[22] The fact that plaintiff was a member of a plan established by his union, rather than by his employer alone, may have obscured this point in the mind of the Court of Appeals, since the decision below avoids any consideration of "possible obligations of employers under the 1933 and 1934 Acts with regard to pension plans." *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1250 n.61 (7th Cir. 1977). This statement is inconsistent with the lower court's emphasis on the purported significance of pension rights in an employee's decision to become employed and illustrates the distortion of economic reality required to bring pension plans within the ambit of the securities laws.

[23] There is no doubt that the securities laws apply to the investment by the trust of its own funds.

compensation to a former employee during his retirement is not illusory and that the funding of obligations under that agreement is adequate.

The thrust of the securities laws, by contrast, is toward disclosure to potential investors of information pertinent to a voluntary investment decision. This approach is neither appropriate nor necessary to ensure the proper discharge of an employer's undertaking to pay pensions. As this Court has said more than once, the extension of existing Federal regulation to new areas is a matter best left to Congress.

CONCLUSION

It is respectfully urged, on behalf of professional pension fiduciaries, that this Court grant the petitions for a writ of certiorari.

Dated: December 8, 1977

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IN THE

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OCTOBER TERM, 1977

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JOHN DANIEL, *Respondent.*

No. 77-754

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v.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae*. Petitioners have consented to the filing of this brief; respondent has not.

INTEREST OF THE NCCMP

Multiemployer plans were formed in construction and other transient trades or industries where workers are employed too briefly in any one job to earn benefits in any given employer's plan. Such plans are created and funded by collective bargaining agreements and receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization, formed after enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of government regulations under ERISA and other laws affecting multiemployer plans. Fifty trade unions and multiemployer pension and welfare funds (but not the particular pension and welfare funds involved in this case) are affiliated with the NCCMP, and its plans are fairly representative of all the nation's multiemployer plans, covering in the aggregate 7.5 million employees. While the decision below has far-reaching consequences for pension plans generally, the consequences are particularly adverse for multiemployer plans, for the reasons set forth in the accompanying brief.

The accompanying brief supports the petitions for writ of certiorari, but the NCCMP in no way approves of arbitrary, harsh and restrictive continuity of service provisions. Such provisions are not common in other multiemployer plans. Nonetheless, the holding below that an employee covered by an involuntary, noncontributory pension plan "purchases securities" by commencing and continuing employment has far-reaching consequences, for it makes every pension plan subject to the requirements of the securities laws. This result obtains whatever the outcome in the district court after a trial on the merits of Mr. Daniel's claims.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP's brief does not address the issue whether participants in noncontributory, involuntary pension plans are "purchasers of securities" within the meaning of the securities acts. The NCCMP instead focuses on important points which it believes have not been adequately presented elsewhere: (a) the particular and immediate impact of the lower court's decision on collectively-bargained multiemployer plans; and (b) the essentially legislative function which courts perform in extending private rights of action under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, and the consideration courts must therefore give to the public policy issues at stake. The accompanying brief addresses what the NCCMP conceives to be the vital considerations of public policy which the lower court should have taken into account before conferring such private rights of action upon the new class of claimants created by its decision.

The NCCMP therefore moves for leave to file the accompanying brief as *amicus curiae*.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to review the holding below[1] that the relationship between a worker and a noncontributory, involuntary pension plan is one of purchaser and seller of securities, thereby subjecting all such pension plans to the federal securities laws.

I. INTEREST OF NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth *infra* (pp. 17-19), the NCCMP believes that the lower court's decision may have particularly significant effects upon multiemployer plans. It is concerned over damage awards resulting from the lower court's ruling, which would, in effect, retroactively expand the number of workers eligible for pension benefits. It is also concerned over the administrative and litigation costs and damage awards that will be incurred if securities laws requirements are added to existing requirements administered by the Departments of Labor and the Treasury.[2] All these costs will ultimately be borne by those now covered by multiemployer plans and will be reflected in smaller pension

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[1] *Daniel* v. *International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977).

[2] The dual administration of ERISA (by the Departments of Labor and the Treasury) has already been a source of conflict and confusion, resulting, *inter alia*, in legislative proposals to divide jurisdiction into discrete areas, or to put all administrative responsibility into a single government agency. *See, e.g.*, S. 901, 95th Cong., 1st Sess. (1977); H.R. 4340, 95th Cong., 1st Sess. (1977), *summarized*, Pens. Plan Guide (CCH) ¶ 23,268 (1977). Treble administration (including the Securities and Exchange Commission) can only exacerbate an already difficult situation.

payments to them, or even in curtailment of pension plan coverage.

II. REASONS FOR GRANTING THE WRIT

The lower court has tried to correct what it perceived to be an egregious wrong committed against Mr. Daniel.[3] The court did not reach the claims he asserted under common law and federal labor law, but ruled that all workers covered by involuntary, noncontributory pension plans are "purchasers of securities," and are, therefore, entitled to sue the funds under Rule 10b-5. The court has thus exposed all collectively-bargained pension funds to damage suits for breach of their duty of disclosure under the securities acts—a duty no one ever supposed they had.[4] The court's decision confirms the ancient wisdom that "hard cases make bad law." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

A. The Decision Below Should be Reviewed Because Its Adverse Effects Are Immediate

The decision below has already generated uncertainties on the part of plan administrators and contributing employers. These uncertainties will adversely affect participants and beneficiaries and will persist so long as the lower court's holding on the application of the securities acts stands.

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[3] The restrictive continuity of service requirements applied to Mr. Daniel are not commonly found in other multiemployer plans.

[4] In *Robinson* v. *United Mine Workers Health & Retirement Funds*, 435 F. Supp. 245, 247 (D.D.C. 1977), Judge Gesell said:

> "The securities laws in question, designed to safeguard the integrity of investment decisions have been in operation for over forty years. Yet until the 1975 decision in *Daniel* (which pre-

The lower court held (561 F.2d at 1229) that pension funds must, "when offering a defined pension plan to a [union] member . . . disclose the actuarial probability . . . that a member actually will receive pension benefits." Such disclosure would be an essentially hopeless task and the NCCMP knows of no pension plan which has ever attempted it.

The likelihood that a given employee will receive pension benefits not only turns on such factors as the vitality of the industry (especially in multiemployer plans) and the health of the individual employer, but also depends in large measure upon whether that employee chooses to remain employed in the industry or go elsewhere. Thus, while actuarial assumptions concerning "turnover" of employees may be useful in calculating the future liabilities of a pension plan and the contribution rate necessary to fund such liabilities, individual "turnover" is subject to a number of factors, some of which are solely within the knowledge and control of the individual plan participant. Aggregate actuarial data will thus be misleading rather than informative with respect to the probability that an individual plan participant will remain in the plan long enough to qualify for a benefit.[5] Under the lower court's decision, however, a person who failed to meet the eligibility requirements of virtually any pension plan in the country could demonstrate a failure to dis-

dated *Forman*) no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws." (Footnote omitted).

[5] *See* F. Cummings, *The Daniel Case—Disclosure or mandatory oddmaking*, Pension World, November 1977, at 37. Mr. Cummings describes the party making the disclosure required by the Seventh Circuit as "a new kind of oddsmaker—a 'vesting bookie'. . . ." *Id.*

close this "actuarial probability." and seek relief under Rule 10b-5.[6]

Furthermore, the lower court's decision will not be limited to failures to disclose the actuarial probability of receiving a benefit. Any alleged failure to disclose or any misstatement concerning eligibility requirements, size and timing of benefits, investment policies or any other matter that bears on the value of the

[6] The SEC suggested in its *amicus* brief to the court below (pp. 5, 58) that pension funds will be affected by the decision below only if they engaged in actual fraud. It is true that *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), established that a defendant did not violate Rule 10b-5 unless he acted with "scienter," a "mental state embracing intent to deceive, manipulate, or defraud," *id.* at 193 n. 12. In its pretrial brief in *SEC* v. *National Student Marketing Corp.*, Civ. Action No. 225-72 (D.D.C.), dated December 6, 1976, however, the SEC contended that even in private damage cases, under *Hockfelder*, " 'scienter' may be proven without evidence of specific intent to deecive but by evidence of 'gross negligence' or other knowing conduct." SEC Brief at 165. Citing *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976); *Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982 (7th Cir. 1976); and *McLean* v. *Alexander*, 420 F.Supp. 1057 (D. Del. 1976), the SEC contended that this modified negligence standard has been the lower courts' response to the *Hochfelder* definition of the culpability necessary to establish a violation of Rule 10b-5. SEC Brief at 165. *See also, e.g., Franke* v. *Midwestern Oklahoma Development Authority*, 428 F. Supp. 719, 725 (D. Okla. 1976). Furthermore, the SEC contends that it need not prove scienter at all in injunctive actions, SEC Brief at 164-65. Yet an injunction might include rescissionary and collateral relief in the nature of money damages, *see, e.g., SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

Moreover, the language of the lower court's holding suggests that inquiry into "scienter" is unnecessary and liability follows simply from the failure "to disclose adequate information . . . including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." 561 F.2d at 1249 (footnote omitted).

worker's "investment" will, under the court's decision, provide grist for the Rule 10b-5 class action mill.[7]

In these circumstances, administrators and employers are understandably concerned over their funds' potential liability [8] under the ruling of the lower court. Indeed, the NCCMP has been advised that some employers and plan administrators, concerned over the implications of the decision below, have already declined to approve new benefits or increases in existing benefits.[9] Furthermore, concerns about potential liability and additional costs and regulation brought about by the applicability of the securities laws [10] are likely to result in a significant curtailment in the provision

[7] In *SEC* v. *Shenker*, Civ. Action No. 77-1787 (D.D.C. 1977), the SEC significantly expanded its view of the application of the antifraud provisions to employee benefit plans, by moving from the concept of disclosure about terms and conditions of participation in a plan to the investment policies and fiduciary conduct of plan officials—welfare plan officials as well as those of a pension plan.

[8] Whether the aggregate liability of all plans would prove to be as enormous as many fear, plan administrators and employers must take all possibilities into account.

[9] In one case currently being litigated, a contributing employer contends that the plan's alleged failure to make the disclosures required by the decision below vitiates his obligations under the collective bargaining agreement and entitles him to a refund of all contributions previously made. *Western Washington Laborers-Employers Health & Security Trust Fund* v. *Universal Utility Contractors, Inc.*, Civ. No. C77-710M (W. D. Wash.).

[10] While this brief is principally addressed to the costs and burdens associated with the antifraud provisions of the securities acts, it is by no means clear that the registration requirements of those laws would not also be applicable. As the petitions of the Teamsters International (pp. 14-16) and of Local 705 (pp. 22-31) point out, the lower court's reasoning as to the alleged inapplicability of the registration provisions is unpersuasive. The court relied largely on a 1970 amendment to the Securities Act of 1933 which exempted

of pension benefits,[11] which it must be noted, neither ERISA nor any other federal law requires employers to provide.

B. The Lower Court's Decision Is Inconsistent With This Court's Holdings Limiting Private Rights Of Action Under Rule 10b-5

The NCCMP does not here address the principal issue dealt with by the certiorari petitions, *i.e.*, the lower court's holding that an interest in an involuntary, noncontributory pension plan is a "security" and that employment of union members covered by such a plan constitutes the "sale" of this security. We believe, for the reasons set forth in the petitions and supporting *amici* briefs, that such a holding cannot be squared with this Court's decision in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975).

from registration any interest in a "trust fund maintained by a bank or in a separate account maintained by an insurance company," where such interest is issued in connection with a stock bonus, pension or profit sharing plan. Even if this provision does exempt other pension plans from registration (which we doubt), it has little relevance to multiemployer plans because the assets of such plans are frequently not managed by banks or by insurance companies.

[11] According to a Pension Benefit Guaranty Corporation ("PBGC") study, "Analysis of Single Employer Defined Benefit Plan Terminations, 1976," PBGC Publication No. 505, approximately ten percent of the plans covered by Title IV of ERISA (relating to plan termination insurance and contingent employer liability) terminated in the two calendar years following its enactment. *Id.* at 2. Of those plans terminating in 1976, 20 percent cited ERISA as the reason for termination, and another 15 percent cited ERISA as one of several reasons. *Id.* at 2. The House Small Business Committee recently surveyed the plans that notified the PBGC between June, 1976 and April, 1977 of an intent to terminate. Of those responding, 87.3 percent indicated that ERISA had some effect on the decision. *See* Pension Rep. (BNA) R-11 et seq. (Oct. 24, 1977).

Even accepting, however, the lower court's conclusion that an employee makes an "investment decision" simply by taking a job, it does not follow that this newly-ordained "purchaser of a security" may sue under Rule 10b-5.

The private right of action under Rule 10b-5 is a creature of the judiciary, not of Congress.[12] This Court said in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 477 (1977):

> "Congress did not expressly provide a private cause of action for violations of § 10(b). Although we have recognized an implied cause of action under that section in some circumstances, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* [404 U.S.] at 13 n. 9, we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act. *Piper* v. *Chris-Craft Industries, Inc.,* [430 U.S.] at 41. *Cf. J.I. Case Co.* v. *Borak,* 377 U.S. 426, 431-433 (1964)."

Extension of the private right of action under Rule 10b-5 to new classes of claimants therefore turns on (i) whether such extension is necessary to fulfill Congress' purposes in passing the securities acts; and (ii) a judicial balancing of the "policy considerations" involved, *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 737, 749 (1975).

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[12] As this Court has recently made clear, federal courts should not automatically imply private rights of action under statutes that specify violations but provide no express private remedies. *Cort* v. *Ash,* 422 U.S. 66 (1975).

1. A worker's taking a job with an employer covered by a collectively-bargained pension fund is not an event that reasonably relates to the aims of the securities acts

As the language of Section 10(b) of the 1934 Act and Rule 10b-5 suggest,[13] those provisions were designed to prevent manipulation of prices on the securities markets and fraudulent devices to enrich promoters at the expense of investors. There are no markets for the pension fund "securities" here involved, and neither the motives of the "sellers" (be they funds, employers, or unions) nor the circumstances under which the "sales" take place (*i.e.,* the hiring of workers) bear the slightest resemblance to those involved in the market-rigging, promotional schemes at which Section 10(b) and Rule 10b-5 were aimed. *Santa*

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[13] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rates and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Fe Industries, Inc. v. *Green, supra,* 430 U.S. at 476; *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 849. Thus, it can hardly be said that granting rights to sue under Rule 10b-5 to workers covered by involuntary, noncontributory pension plans is necessary to fulfillment of Congress' purpose in passing the securities acts. *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 (1977).

2. On public policy grounds, private rights of action under Rule 10b-5 should not be permitted against involuntary, noncontributory collectively-bargained pension funds

The policy considerations involved in this case, some of which are identical with those on which this Court relied in *Blue Chip Stamps, supra,* for refusing to extend private rights of action under Rule 10b-5 to offerees of securities, compel a like conclusion here.

a. Extension of such private rights would lead to vexatious litigation

The Court noted in *Blue Chip* that Rule 10b-5 litigation presents a significant "danger of vexatiousness different in degree and in kind than that which accompanies litigation in general" and noted "the possibility 'that unduly expansive imposition of civil liability will lead to large judgments payable in the last analysis by innocent investors for the benefit of speculators and their lawyers,'" 421 U.S. at 739, quoting Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Surphur Co.,* 401 F.2d 833, 867 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969), 404 U.S. 1005 (1971).

Here, there is no less a likelihood that large lawsuits will be inspired by the lower court's holding that Rule 10b-5 may be invoked against collectively bargained

pension funds. Millions of workers have suddenly been transformed into holders of "securities" in those funds, some of whom, like Daniel, "purchased" those "securities" over 20 years ago. The circumstances under which these "securities" were "sold" to persons who may now lay claim to disappointed pension expectations will make such persons and the plans in which they participated fair game for class action specialists. It is the plan participants and beneficiaries, however, who must ultimately bear the costs of that litigation, since pension trusts exist solely for their benefit.

This Court also noted in *Blue Chip* that extending the private right of action under Rule 10b-5 to defrauded offerees of securities would confront courts and juries with "many rather hazy issues of historical fact, the proof of which [would] depend almost entirely on oral testimony." 421 U.S. at 743. The nature of this proof, the court indicated, might subject defendants to a kind of legalized blackmail, forcing settlements even in groundless cases. Such dangers are equally apparent here. Retroactive application of a "failure to disclose" rule (back to 1955 in Daniel's case [14]) necessarily involves "hazy issues of historical fact," the resolution of which depends on oral testimony as to what the worker was told when first employed. Indeed, the lower court's conclusion that a "sale" was involved relies, in part, on Daniel's affidavit

> "that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension." 561 F.2d at 1243.

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[14] *See* 561 F.2d at 1227.

The court also found that,

> "[w]hen an employee decides to retain his job his decision results in his continuing to give value in the future in his further acquisition of interests in the pension fund." *Id.*

Proof that these actions involved "investment decisions" will almost always depend on the claimant's oral testimony concerning his state of mind years ago. As this Court said with respect to similar "state of mind" proof in *Blue Chip:*

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." 421 U.S. at 746 (footnote omitted).

b. Extension of such private rights of action would destroy the balance Congress struck in ERISA between remedying past inequities as to some workers and reduction of future benefits to others

ERISA was enacted after a thorough investigation and study of problems in the pension plan area. Congress considered the extent to which it should provide retroactive relief to persons who had failed to meet harsh eligibility requirements in the past. It was mindful, however, that correction of such inequities would involve charges to be borne by the funds, and therefore had to be balanced against the inequity of defeating the legitimate pension expectations of other workers. The compromises incorporated in ERISA now threaten to be vitiated by Rule 10b-5 suits which in effect seek the very retroactive relief that Congress determined should not be granted.

The balancing of competing equities which Congress fashioned is illustrated by the exceptions Congress provided to the general rule that *all* service with the participating employer, whether before or after the enactment of ERISA, must be credited for vesting purposes. For example, service prior to January 1, 1970, need not be counted unless an employee has at least three years of service after December 31, 1970.[15] A plan may also disregard service before the effective date of ERISA if such service would otherwise have been disregarded under the rules of the plan with regard to breaks in service.[16]

These exceptions were deliberately enacted "[t]o keep the operation of the minimum vesting requirement reasonable and to avoid imposing undue burdens

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[15] ERISA § 203(b)(1)(E); I.R.C. § 411(a)(4)(E). The cited provisions do not permit disregard of service which the pre-ERISA plan terms required be counted.

[16] ERISA § 203(b)(1)(F); I.R.C. § 411(a)(4)(F).

on plans . . . ."[17] With respect to workers such as Mr. Daniel, Congress' determination to balance the competing interests involved is set forth in unmistakable terms:

> "[I]t does not appear to be desirable to provide for retroactive vesting for employees who have already terminated their service with the employer, since this would create a substantial unexpected cost for the plan (thereby possibly jeopardizing the size of benefits for employees still covered under the plan). . . ."[18]

Allowing private suits under Rule 10b-5 would thus upset the balance which Congress so carefully struck in ERISA. Furthermore, that balance in ERISA proceeds from Congress' understanding that the securities laws were inapplicable (*see* Teamsters International Petition at 33-41), an understanding which is now "part of the arch on which the new structure rests," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963). This is another sound policy reason why the Court should reject the lower court's extension of private rights of action under Rule 10b-5.

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[17] House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 20 (1974). *See also* House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 20 (1974); 120 Cong. Rec. 4297 (1974) (remarks of Mr. Ullman).

[18] House Ways and Means Committee Report on H.R. 12481, H. Rep. No. 93-779, 93d Cong. 2d Sess. 56 (1974); House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Rep. No. 93-779, 93d Cong. 2d Sess. 56 (1974); House Ways and Cong., 2d Sess. 57 (1974). *See also* 120 Cong. Rec. 19199 (1974) (remarks of Mr. Ullman).

c. Extension of such private rights of action would require disclosure inconsistent with the type of disclosure which Congress, in passing ERISA, deemed appropriate.

The ERISA disclosure requirements[19] are a direct response to testimony by one worker after another that he had been unaware of the provisions and rules. Even when plan documents and explanatory materials had been provided, they were generally incomprehensible to plan participants. As one worker testified,

> "You see, all of these pensions are done up by corporation lawyers and against people, say working people with a high school education, and as everybody knows, there's no competition."[20]

Another worker said,

> "Senator, I have here books on the pension plan that ain't worth a quarter because I can't understand it. I don't know anything about it, and I defy any trustee of our plan to explain this to me. . . ."[21]

Congress therefore required that the document summarizing and describing the plan "be written in a manner calculated to be understood by the average

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[19] ERISA sections 101 through 110 and 1031 through 1034 detail the disclosure and reporting required of pension plans. In some cases, this disclosure takes place directly to plan participants, in other cases, to the Department of Labor or the Treasury Department. For the most part, however, those reports made to government agencies rather than plan participants are themselves public information. ERISA § 106(a). Lengthy disclosure and reporting regulations have been promulgated by the Labor Department. *See* 29 C.F.R. §§ 2520.102-1 *et seq.* and §§ 2520.103-1 *et seq.*

[20] *See* 120 Cong. Rec. 29934 (1974) (remarks of Sen. Williams).

[21] *See id.*

plan participant. . . ." ERISA section 102(a)(1). It would require an amazing feat of draftsmanship, however, to make disclosures which would comply with ERISA section 102(a)(1) and yet suffice to avoid Rule 10b-5 liability. As corporate counsel are well aware, assurance against liability under Rule 10b-5 requires disclosure of all information which might reasonably be deemed "material" in light of this Court's opinion in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).[22] This is the type of disclosure, however, that workers complained about,[23] and that Congress determined to prevent in ERISA.

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[22] There are no definitive guidelines in the antifraud area of the securities laws. Rule 10b-5 itself is written in broad, general terms. The SEC has not utilized rulemaking power to clarify its requirements, *cf. SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting) (Holding Company Act), but has instead relied on case-by-case adjudication, where courts have interpreted the requirements of the rule "flexibly," *e.g., Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973), "broadly," *e.g., Garner* v. *Pearson*, 374 F. Supp. 591, 595 (M.D. Fla. 1974), and "liberally," *e.g., Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609, 637 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976). The establishment of definitive guidelines is contrary to the policy of the SEC. In responding to a request from Senators Williams and Javits as to what disclosure the SEC believed is required of pension plans under the lower court's decision, the Chairman of the SEC responded, *inter alia*, "[T]he efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required. . . ." Memorandum submitted under cover letter of December 7, 1977 to Honorable Harrison A. Williams, Chairman, Committee on Human Resources, United States Senate, by Harold M. Williams, Chairman, SEC.

[23] Even the more sophisticated investor in the traditional securities markets may find such disclosure too complex or lengthy to understand. However, there are analysts and investment counselors to whom such documents are understandable and meaningful. One who purchases securities on a broker's recommendation or on the advice of an investment analyst or newspaper columnist may well have benefitted from such disclosure. There are no parties analogous to analysts and investment counselors in the pension plan context.

C. The Decision Below Particularly Jeopardizes The Benefits Of Workers Covered By Multiemployer Plans

The potential for liability (including retroactive liability) under the lower court's decision and the additional layer of administrative regulation it imposes are likely not only to cause a reduction of benefits in some plans but may also cause some employers to withdraw altogether from pension plans in which they participate. As previously noted (p. 6-7), the complexity of regulation and the increased costs imposed on pension plans by ERISA have already caused a large number of plans to terminate.

The NCCMP fears that the adverse affects of the holding below will be especially significant in multiemployer plans because the plan termination and contingent employer liability provisions of ERISA presently allow employers contributing to multiemployer plans to withdraw from participation more easily than those contributing to single employer plans. An employer's withdrawal from a single-employer plan normally results in plan termination, imposing substantial ERISA-related liability on the employer. In contrast, an employer's withdrawal from a multiemployer plan, (by "bargaining out"—*i.e.*, not agreeing in the next collective bargaining agreement to continue contributions to the plan) will generally not cause a plan termination,[24] and the employer may well escape all lia-

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[24] In most cases, ERISA does not even require such withdrawal to be reported. When a "substantial employer" (an employer accounting for 10% or more of the plan's contributions over two consecutive years out of the three years preceding withdrawal (ERISA § 4001(a)(2)) withdraws from a plan, the plan administrator must notify the PBGC. ERISA § 4063(a)(1). (It is not yet clear whether the simultaneous or concerted withdrawal of two or more employers, accounting for 10 percent or more of the plan's contributions

bility under ERISA.[25] Indeed, the termination of a multiemployer plan will generally impose no ERISA liability on contributing employers where the benefits of multiemployer plan participants are not insured under Title IV of ERISA.[26]

The ease with which employers may withdraw from multiemployer plans is of particular significance in considering the impact of extending Rule 10b-5 rights of action, given the unique role of these plans and the difficulties which have beset their creation and maintenance. Economic conditions in those industries which have multiemployer plans were generally not favorable to their formation. While unions have managed to secure the creation of such plans through collective

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only in the aggregate, constitutes the "withdrawal of a substantial employer.") The withdrawing employer must post a bond or pay an amount into escrow as surety against contingent liability in a later plan termination, but if no termination occurs in the five years following withdrawal, the withdrawing employer has no ultimate liability. ERISA § 4063(c)(2). If the withdrawal causes a "reportable event" under ERISA § 4043(b), the administrator must report such event to the PBGC, ERISA § 4043(a).

[25] A termination in the five years following withdrawal will generally impose liability, but such liability will decrease to zero over this five year period.

[26] PBGC Opinion No. 75-9 states: "Under Sec. 4082(c) of the Act, the Corporation generally does not pay benefits of multiemployer plan participants guaranteed under Title IV; and thus there is no employer liability with respect to multiemployer plans which terminate prior to January 1, 1978." ERISA allows the PBGC to provide insurance under certain conditions prior to the date where such insurance is mandatory. ERISA §§ 4082(c)(2)(3) and (4). The date such insurance becomes mandatory is presently January 1, 1978. ERISA § 4082(c). However, a bill extending this date to July 1, 1979 has been passed by Congress. *See* Pension Rep. (BNA) A-3 (Dec. 12, 1977).

bargaining, those plans have had to be carefully nurtured.[27] The plans are still attempting to adjust to the complex regulatory environment created by ERISA. The added burden of compliance with the securities laws, never contemplated, may well be too much for their fragile underpinnings. Thus, the decision below threatens the very existence of multiemployer plans—the only vehicle that exists in many industries for providing pension and welfare benefits to workers and their dependents.

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[27] A recent study by the PBGC found that "approximately one-eighth of all multiemployer plans, covering one-fifth of participants in such plans, are experiencing significant financial hardship which may result in plan termination." "Potential Multiemployer Plan Liabilities Under Title IV of ERISA," reproduced in Pens. Plan Guide (CCH) ¶ 23,036 (1977).

CONCLUSION

For the foregoing reasons, the NCCMP urges that the Court grant the petitions for writ of certiorari.

Respectfully submitted,

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MOTION FILED
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Nos. 77-753 & 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in

support of the petitions for certiorari in these cases.[1] Counsel for the petitioners have consented to the filing of this brief, but counsel for the respondent has declined so to consent, making the filing of this motion necessary.

INTEREST OF THE AFL-CIO

1. The AFL-CIO is a federation of 102 labor organizations representing approximately 13,500,000 employees throughout the United States. Its constituent labor organizations are the exclusive bargaining representatives for employees engaged in every facet of industry, commerce and government.

2. Mindful that motions for leave to file a brief *amicus curiae* in support of petitions for certiorari are not favored under Rule 42(1), the AFL-CIO has filed such motions only rarely—the last occasion was at the 1966 Term of this Court. We have foreborn to do so even when our affiliates have been petitioners in cases of great importance to them, and which, in our view, fully merited this Court's attention. The present case, however, is truly extraordinary in its sudden reversal of prior understandings of the law, and its consequent unsettling of existing relationships.

3. For over forty years, labor organizations affiliated with the AFL-CIO have responsibly exercised their obligations as exclusive collective bargaining representatives. They have secured pension coverage for many millions of employees who have received pension benefits, and for many millions who are presently working with the expectation of receiving benefits when they retire. In thousands

[1] The petitions which seek review of the decision and order in *Daniel* v. *International Brotherhood of Teamsters, et al*, 561 F.2d 1223 (C.A. 7, 1977) were filed on November 25, 1977. The clerk has given respondent leave to file his brief in opposition by January 16, 1978.

of instances bargaining has resulted in the creation and maintenance of pension trusts which are jointly administered by unions and employers pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5). The unions' performance of their responsibilities as fiduciaries on behalf of plan participants in such trusts will be immeasurably complicated, and will expose them to litigation expenses and possible financial liability under the securities laws, if the Court of Appeals' decision herein is permitted to stand.[2]

4. The petitions for certiorari and briefs *amicus curiae* which have been filed describe in sufficient detail the immediate adverse impact of the decision below on almost all those who are involved in the financing and administering of non-contributory private pension plans. It is not our desire to reiterate the concerns expressed in those submissions. We believe, however, that not enough has been said, except by necessary implication, about the effects of the decision below on employees who are covered by pension plans, and for whose principal benefit those plans are established and maintained. The court below evidently believed that its interpretation of the securities laws furthered the interests of these employees. The essence of the brief which we seek leave to file is to show that this is not so; the true interests of these employees is better served by adhering to the materially different disclosure rules established by Congress—whose concern for the individual employees is as great as that of the Court of Appeals, and whose constitutional authority to provide for their welfare is undeniably greater.

[2] Although it affirmed the denial of a motion to dismiss an action against the union defendants in this case as well as against a pension fund trustee (who is sued as representative of the other trustees), the court below did not consider the basis, if any, of union liability, assuming that the securities laws apply.

ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

It seems to us to be sufficient reason for this Court to decide the question presented by these petitions that the Court of Appeals, under the beguiling rubric of "[r]eading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA" (Pet. App. 46),[3] has drastically restructured the design recently and painstakingly adopted by Congress. But as that point has been adequately discussed by others, the appended brief makes a single additional major point: The decision below admittedly creates a competition for the benefits which pension funds are able to pay between those who have qualified to be beneficiaries under their plan's rules and those who, though otherwise ineligible, are now given claims under the securities laws (Pet. App. 49).

CONCLUSION

For the foregoing reasons, this motion by the AFL-CIO for leave to file a brief as *amicus curiae* should be granted.

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[3] Pet. App. refers to the Appendix filed with the Petitions for Certiorari.

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In the Supreme Court of the United States

October Term, 1977

Nos. 77-753 & 77-754

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Louis Peick,

Petitioners,

v.

John Daniel,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully urges the Court, for the reasons set forth below, to grant the petitions for writs of certiorari in these cases to review the decision of the United States Court of Appeals for the Seventh Circuit.

Interest of the Amicus Curiae

The foregoing motion requesting the Court's leave to file this brief sets forth the basis of the AFL-CIO's interest in this case.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW WOULD UNDERMINE THE LEGITIMATE EXPECTATIONS OF PENSION PLAN PARTICIPANTS.

The opinion of the Court of Appeals evidences that the court was greatly moved by the plight of the plaintiff in this case who was disqualified from pension benefits by the break-in-service rule of his pension plan. (Pet. App. 1-7). But the rule of law which the court declared will not only provide a cause of action to Daniel and other individuals who are adversely affected by the almost unique eligibility requirements of the Local 705 plan, but will effectively undermine all eligibility requirements, no matter how reasonable; the decision thereby provides a windfall to participants who have not satisfied the plan's eligibility rules to the prejudice of those who are entitled to benefits. As we shall show, this result follows directly from the disclosure requirement which the court declared, and is tacitly acknowledged in the court's opinion.

The Court of Appeals held that:

> "Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." (Pet. App. 46-47.)[1]

[1] "Pet. App." refers to the Appendix filed with the Petitions for Certiorari. See also Pet. App. 8: "The effect of the [District Court's] opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F. Supp. at 551), that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts."

It has been stressed, in other submissions in this Court, that this holding exposes all pension funds to liability under the securities laws because apparently no one has ever made such disclosure.[2] But insufficient attention has been given to the nature of the claims to which this rule will lead: *Every pension plan participant who is denied benefits for any reason when he retires or withdraws from a pension plan will be able to state a non-dismissable claim against the fund.* For, even if the individual knew about the particular eligibility requirement which he failed to satisfy, he will not have been told the actuarial probability that he would fail to receive benefits for *some* reason, and under the Court of Appeals' decision this gives him a claim if he failed to receive benefits for *any* reason.

Respondent's own situation illustrates our point: The court below did not merely hold that he stated a claim because he alleged that the union failed to disclose the break-in-service rule which was the basis for his disqualification. A holding so limited would have precluded claims by the vast majority of individuals who receive no benefits because basic plan eligibility rules have almost universally been made known to participants, and, indeed, under ERISA *must* be disclosed. Rather the ruling of the

[2] The Court of Appeals left to "the process of litigating elucidation," *Machinists* v. *Gonzales*, 356 U.S. 617, 619, the question of what other disclosures are required, and what past failures to disclose will now be actionable. In this respect prior decisions under the securities laws provide little, if any, guidance because the information material to a pension plan participant is so unlike that which is of concern to an investor in one of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H.R. Rep. No. 85, 73d Cong., 1st Sess, 11 (1933), quoted in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 847, 848. It is small comfort that the class-action bar stands ready, willing and able to provide the litigation which may produce elucidation; the lesson is sure to be expensive for the pension funds, win or lose.

court below would allow Daniel to recover even if it is established at trial that he knew of the break-in-service requirement, because he had not been told that there was an 8% probability (based on the aggregate of all participants in the plan) that he would ultimately qualify. The same result would obtain for individuals who fail to meet some less unusual requirement: For example, one who left the industry after eight years because he was discharged, or voluntarily, would state a cause of action because, although he knew that he must have twenty-years service credit, he had not been told what the chances are that he would not reach that goal, and thus would not receive a benefit.

The omission of the probability that he will not receive a pension is equally material (or immaterial) to an individual's decision to accept or retain employment, whatever may ultimately be the reason that he retires or otherwise leaves the plan without getting a pension. And since all plans have been "guilty" of the same omission, all are equally vulnerable to suit from plan participants who for any reason did not receive a benefit, including individuals who left the plan at any time in the past (within the limitations period) without applying for, or having any reason to believe that they were entitled to, benefits. While few such individuals would be entitled to a pension—the relief that respondent seeks—the Court of Appeals "investor" construct would apparently enable the plaintiff to seek a rescission of his "investment"—that is, an award of the moneys paid into the fund because of their labor.[3] But even a judgment requring the payment of those moneys to any significant proportion of the plan's former participants (and

[3] The Court of Appeals did not pass on "the entirely separate and not uncomplicated question of the form of relief" created by its liability theory, stating that "the construction of formulae giving the measure of damages is for the trial court in the first instance." (Pet. App. 49.)

to others whose claim subsequently arises because some event occurs which makes clear that they will not receive benefits under the plan), would undermine the plan's financial stability. It will have that effect precisely because it will undermine the universal actuarial assumption that moneys will be received, and available for paying benefits, on the basis of hours worked by employees who will never receive a pension.[4]

The Court of Appeals perforce acknowledged that its ruling would provide a recovery for individuals who are ineligible under the plan's terms, but it discounted the impact on employees who would ultimately be qualified. For the court said:

> "It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants." (Pet. App. 49.)

In other words, the decision below reorders the priorities among plan participants: The interests of those who are performing and will have satisfied all the conditions for obtaining a pension are to be "balance[d]" by district courts with the "needs of plaintiff", and presumably the "needs" of others, who like plaintiff, performed covered employment without being informed of the "actuarial probability" that they would not receive a pension, and in fact received none.

But the Congress has not assigned the tasks of setting pension priorities to the courts according to their own views of what is equitable. The legislature has determined that these priorities should be set by private parties through the collective bargaining process. Those parties are, of course, subject to the restraints of the *labor* laws, includ-

[4] While plans differ in their assumptions, because of the nature of employment in the industry, past experience, etc., all plans anticipate that a substantial number of covered employees will never be entitled to any benefits.

ing the duty of fair representation, §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. 186(c)(5), and most importantly, ERISA, which, *inter alia*, sets limits on the eligibility requirements that can be imposed and does so without providing for retroactive vesting for those who had failed to qualify before the Act passed.

CONCLUSION

For the above-stated reasons the petitions for writs of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 18 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED NOVEMBER 25, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

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Docket Entries

DATE	PROCEEDINGS
10- 3-74	Filed complaint and 3 copies.
10- 3-74	Filed Designation.
10- 3-74	Filed Affidavit under General Rule 39.
10- 3-74	Filed Contingency Fee Agreement.
10- 4-74	Issued summons and 3 copies with 3 copies as to Teamsters Local No. 705, Teamsters International, D. C., and Louis Peick.
10-16-74	Filed Marshal's return on summons returned served as to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local 705 and Louis Peick (2 Services).
10-22-74	Filed Marshal's return on summons returned served as to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
10-25-74	Filed stipulation to extend time.
10-29-74	Enter order dated 10-25-74:—Enter order to extend time from October 29, 1974 through November 14, 1974 within which defendants Local 705 I. B. of T. and Louis E. Peick May plead to the complaint per stipulation. Austin, J. Mailed notices 10-29-74.
11-11-74	Enter order dated November 8, 1974; pursuant to General Order entered December 20, 1966, cause set for pretrial conference on January 31, 1975 at 9:30 a.m. in chambers, Room 2588. AUSTIN, J. Mailed notices 11-11-74.
11-14-74	Filed stipulation.

Docket Entries

DATE	PROCEEDINGS
11-14-74	Enter order dated 11-14-74:—Enter order on stipulation of all parties to extend time from November 14, 1974 through November 22, 1974 in which all defendants may answer or otherwise plead to the complaint, granted. Lynch, J. Mailed notices 11-14-74.
11-22-74	Filed notice and motion of defendants to dismiss.
11-25-74	Enter order dated 11-22-74:—Motion of defendants Local 705 I.B. of T. and Louis F. Peick to dismiss the complaint taken under advisement. Leave to said defendants to file supporting brief in 10 days. Leave to plaintiff to file responsive brief in 10 days thereafter and leave to defendants to file reply in 5 days thereafter. Austin, J. Mailed notices 11-25-74.
11-29-74	Filed appearance of defendant with that of Bernard Weisberg as attorney.
11-29-74	Filed Affidavit under General Rule 39.
11-29-74	Filed stipulation of counsel.
11-29-74	Filed answer to complaint.
12- 2-74	Enter order dated 11-29-74: Enter order that the motion of defendant International Brotherhood of Teamsters for leave to file instanter its answer to the complaint, pursuant to stipulation of the parties, is granted. Lynch, J. Mailed notices 12-2-74.
12- 6-74	Filed Brief in support of defendant's motion to dismiss filed by Defendants Local 705 and Louis F. Peick.

Docket Entries

DATE	PROCEEDINGS
12- 6-74	Filed defendants notice of motion with motion for leave to file brief exceeding fifteen pages.
12- 9-74	Enter order dated December 6, 1974: Motion for leave to file Brief exceeding fifteen pages granted. Time of plaintiff to file responsive brief extended an additional 20 days and leave to defendants to reply in 5 days thereafter. Austin, J. Mailed notices 12-9-74.
12-20-74	Filed plaintiff's Notice of Motion, Stipulation and Motion to extend time for filing memorandum.
12-23-74	Enter order dated 12-20-74: Motion and stipulation to extend time for filing memorandum opposing motion to dismiss of Teamsters Local and for leave to file enlarged memorandum and other relief to and including January 20, 1975. Austin, J. Mailed Notices 12-23-74.
1-20-75	Filed Defendant's Notice.
1-20-75	Filed Motion of defendant International Brotherhood of Teamsters to Dismiss Counts I and II.
1-20-75	Filed Plaintiff's Notice of Motion and Motion to extend time for filing brief.
1-22-75	Enter order dated January 20, 1975: Leave to plaintiff to file memorandum in opposition to motion of Local 705 to dismiss on or before January 31, 1975 and the time of Local 705 to reply extended to February 6, 1975. Pre-stipulation leave to defendant International Brotherhood to file memorandum in support of motion to dismiss in 14 days. Leave to defendant Inter-

DATE	PROCEEDINGS
	national Brotherhood to file motion to dismiss counts I and II of complaint instanter. Cause continued to February 24, 1975 for status report. (DRAFT) AUSTIN, J. Mailed notices 1-22-75.
1-22-75	Enter order dated January 21, 1975: Pre-trial conference scheduled for January 31, 1975 is cancelled. AUSTIN, J. Mailed notices 1-22-75.
1-30-75	Filed plaintiff's notice of motion.
1-30-75	Filed plaintiff's motion to file his amendment to complaint by adding an additional count VI to the complaint.
1-30-75	Filed stipulation.
1-30-75	Filed plaintiff's motion to extend time for plaintiff to file his brief in opposition to defendant Local 705 motion and memorandum to dismiss complaint.
1-30-75	Filed stipulation.
1-30-75	Filed amend[ment] to complaint.
2- 3-75	Enter order dated 1-30-75; Per stipulation leave to plaintiff to file amendment to complaint instanter. Per stipulation leave to file plaintiff's brief in opposition to motion of defendant Local 705 to dismiss on or before February 7, 1975; Leave to plaintiff to file motion to dismiss defendant International Teamsters Union without prejudice and hearing thereon continued to February 24, 1975.—Austin, J. Mailed notices 1-31-75.
2- 4-75	Filed Notice of motion for leave to file brief.

DATE	PROCEEDINGS
2- 4-75	Filed Memorandum of International Brotherhood of Teamsters in support of its motion to dismiss counts I and II of the complaint.
2- 5-75	Enter order dated 2-4-75: Motion for leave to defendant to file brief in excess of 15 pages granted. Leave to plaintiff to file responsive brief in 10 days and leave to defendant to reply in 7 days thereafter. Cause removed from status call for February 24, 1975 and continued to March 5, 1975 for a status report.—AUSTIN, J.
1-30-75	Filed motion of plaintiff to voluntarily dismiss defendant International teamsters from this action without prejudice and supporting brief.
1-30-75	Filed stipulation of the parties local 705 & defendant Peick.
2- 7-75	Filed plaintiffs notice of motion.
2- 7-75	Filed plaintiffs motion to extend time to file his brief in opposition to defendant Local 705 motion and memorandum to dismiss complaint and for leave to file corrected amendment to complaint.
2- 7-75	Filed Stipulation re extension of time and memorandum to file brief.
2- 7-75	Filed plaintiffs corrected amendment to complaint.
2-10-75	Enter order dated February 7, 1975: Pursuant to stipulation time of plaintiff to file memorandum in opposition of motion to dismiss extended to February 10, 1975, and leave granted to plaintiff to file brief in excess of 15 pages. Austin, J. Mailed notices 2/10/75.

Docket Entries

DATE	PROCEEDINGS
2-10-75	Enter order dated February 7, 1975: Motion to extend time to file brief and to file corrected amendment to complaint instanter, granted. Austin, J. Mailed notices 2/10/75.
2-10-75	Filed affidavit of John B. Daniel.
2-10-75	Filed Plaintiffs brief in opposition to defendants motion to dismiss.
2-12-75	Filed defendant International Brotherhood of Teamsters' notice of taking deposition of plaintiff.
2-18-75	Filed Plaintiff's memorandum in opposition to defendant International Brotherhood of Teamsters' memorandum in support of its motion to dismiss Counts I and II of the complaint.
2-18-75	Filed reply brief of defendant Local 705 et al in support of motion to dismiss.
2-18-75	Filed defendants notice of motion with motion to withdraw stipulation to dismiss Internatl Brotherhood Teamsters as party defendant.
2-19-75	Enter order dated February 18, 1975: On the courts own motion status report rescheduled for February 24, 1975 is cancelled.
2-18-75	Filed plaintiffs notice of motion.
2-18-75	Filed plaintiffs motion to file instanter brief opposition to defendant Internatl Brotherhood of Teamsters memorandum in support of motion to dismiss counts I and II of the complaint.
2-18-75	Filed plaintiffs motion to set briefing schedule.

Docket Entries

DATE	PROCEEDINGS
2-18-75	Filed plaintiffs motion to defer deposition of plaintiff John Daniel.
2-19-75	Enter order dated February 18, 1975: Leave to plaintiff to file brief in opposition to International Teamsters motion to dismiss on or before February 19, 1975 and leave to file reply thereto on or before February 26, 1975. Plaintiffs motion to set briefing schedule for plaintiffs motion to dismiss denied. Motion plaintiff to defer deposition of John Daniel is denied and said deposition is limited to issue of class action and leave is granted to all parties in this action to participate in said deposition. Austin, J. Mailed notices 2/19/75.
2-19-75	Enter order dated February 18, 1975: Motion of defendants 705 and Louis F. Peick to withdraw stipulation to dismiss International Brotherhood of Teamsters granted without objection. Austin, J. Mailed notices 2/19/75.
2-27-75	Filed defendant's Notice.
2-28-75	Enter order dated February 27, 1975: Motion of defendant International Brotherhood of Teamsters for leave to file instanter Reply Brief 20 pages in length in support of its pending Motion to Dismiss Counts I and II granted. Status report set for March 5, 1975 is reset for March 12, 1975. Austin, J. Notices mailed 2/28/75.
2-27-75	Filed reply brief of defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America in support of its motion to dismiss counts I and II of the complaint.

Docket Entries

DATE	PROCEEDINGS
3- 5-75	Filed Notice of Motion.
3- 5-75	Filed plaintiff's Motion for leave to file.
3- 5-75	Filed Supplemental Memorandum of plaintiffs in opposition to defendant International Brotherhood of Teamsters motion to dismiss counts I and II of the complaint.
3- 6-75	Enter order dated 3-5-75: Motion of plaintiff for leave to file instanter a 3 page brief memorandum in response to new or inappropriate matters raised by defendant, Teamsters International in its reply brief, granted. AUSTIN, J. Mailed Notices 3-6-75.
3- 5-75	Filed Notice.
3- 5-75	Filed Motion of defendant Teamsters International for motion on plaintiff to appear for his deposition on Tuesday, March 11, 1975.
3- 7-75	Enter order dated 3-5-75: Motion argued. Leave granted to withdraw motion.—AUSTIN J. Mailed Notices 3-7-75.
3- 7-75	Filed defendants notice of motion re leave to file reply to plaintiffs additional memorandum etc.
3- 7-75	Filed stipulation for plaintiff to withdraw his supplemental memorandum in opposition to defendant IBT motion to dismiss.
3-10-75	Enter order dated March 7, 1975: Motion of defendant Teamsters International for leave to file instanter (1) its answer to plaintiffs corrected amendment to the complaint and (2) its reply to plaintiffs additional memorandum opposing the motion to dismiss, granted. Austin, J. Mailed notices 3/10/75.

Docket Entries

DATE	PROCEEDINGS
3-10-75	Enter order dated March 7, 1975. Motion pursuant to stipulation to permit plaintiff to withdraw his supplemental memorandum filed March 5, 1975 and for the same to be stricken and disregarded by the Court, granted. Austin, J. Mailed notices 3/10/75.
3-10-75	Enter order dated March 7, 1975: On the courts own motion, the status report set for March 12, 1975 is cancelled. Austin J. Mailed notices 3/10/75.
3- 7-75	Filed answer of defendant International Brotherhood to corrected count VI of complaint.
3-11-75	Enter order dated March 4, 1975: IT IS HEREBY ORDERED that this cause is reassigned to the calendar of Judge Flaum from the calendar of Judge Austin in exchange for 74 C 570 and 74 C 1892-1902.
3-14-75	Enter order dated March 3, 1975: This matter is transferred to the Executive Committee with the recommendation that it be reassigned to the calendar of Judge Flaum in return for twelve related cases received from him. Austin, J. Mailed notices 3/14/75.
3-14-75	Enter order dated March 5, 1975: The above captioned case is presently pending on my calendar. I recommend that the Executive Committee assign it to the calendar of Judge Flaum for the reason indicated below. Austin, J. Enter order dated March 10, 1975: It is hereby ordered that the above captioned case be and the same is hereby reassigned to the calendar of Judge Flaum for the reason indicated above. Robson, J. for the executive committee. Mailed notices 3/14/75.

Docket Entries

DATE	PROCEEDINGS
3–12–75	Filed Notice.
3–12–75	Filed defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America's Motion for simultaneous consideration of class certification issues and plaintiff's motion to voluntarily dismiss International Teamsters.
3–12–75	Filed Memorandum in support of motion for simultaneous etc.
3–12–75	Filed plaintiff's motion to withdraw stipulation to withdraw supplemental memorandum of plaintiff's in opposition to defendant Teamsters' International motion to dismiss counts I and II of the complaint.
3–18–75	Enter order dated 3-12-75: The above captioned case is presently pending on my calendar. I recommend that the Executive Committee assign it to the calendar of Judge Austin for the reason indicated below. Flaum, J. Enter order dated 3-17-75: It Is Hereby Ordered that the above captioned cause be and the same is hereby reassigned to the calendar of Judge Austin for the reason indicated above. Will, J. Mailed Notices 3-18-75.
4– 9–75	Enter order dated April 9, 1975. The motion for class certification is taken under Local Rule 13 for briefing. Plaintiff is granted 10 days to file a memorandum in support of class certification, defendants are granted 10 days thereafter to reply. The motion to voluntarily dismiss International Teamsters is also taken under Local Rule 13. Austin, J. Mailed notices 4-9-75.

Docket Entries

DATE	PROCEEDINGS
4–22–75	Filed Plaintiffs notice of motion.
4–22–75	Filed Plaintiffs motion to defer the filing of a memorandum and motion with respect to class issues, etc.
4–22–75	Filed Memorandum in support of plaintiffs motion to defer the filing of a memorandum and motion with respect to class issues, etc.
4–23–75	Enter order dated April 22, 1975. Order leave plaintiff to file first wave and class interrogatories within 14 days, said interrogatories are limited to 20 questions. Plaintiffs memo with respect to class issues to be filed within 60 days, defendants' answering memo and answering memo re motion to dismiss to be filed within 20 days thereafter. Will, J. Mailed notices 4-23-75.
4–28–75	Enter order dated April 16, 1975. This matter is transferred to the Executive Committee with the recommendation that it be reassigned to the calendar of Judge Marovitz in return for the Bresler Ice Cream Co. Cases, 73 C 1397, 73 C 2777, and 74 C 1668. Austin, J. Mailed notices 4-28-75.
4–28–75	(a) Enter order dated April 18, 1975. Ordered transfer of case to the executive committee for reassignment for return for the Bresler Ice Cream cases, 73 C 1397, 73 C 2777 and 74 C 1668, Austin, J. (b) Enter order dated April 23, 1975: Ordered that this case be and the same is hereby reassigned to the calendar of Judge Marovitz, for the reason indicated in (a). For The Executive Committee, Parsons, J. Mailed notices 4-28-75 (Reassigned to Judge Marovitz).

Docket Entries

DATE	PROCEEDINGS
5- 6-75	Filed plaintiff's consolidated interrogatories to defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc., et al. Set No. 1.
5- 7-75	Filed plaintiff's notice of motion with motion for entry of order of this court allowing him to file first wave of interrogatories as of May 6, 1975.
5- 8-75	Enter order dated May 7, 1975. Enter order granting motion of plaintiff for entry of an order of this court allowing him to file first wave of interrogatories as of May 6, 1975. the date of actual filing, which date is 2 days later than heretofore authorized by order of court. Time to answer or object is extended to August 18, 1975. Leave is granted plaintiff to file reply brief to defendants reply brief. Motions to dismiss the complaint are set for disposition on July 18, 1975 at 10:00 a.m.—Marovitz, J. Mailed notices 5-8-75.
5-22-75	Filed notice.
5-22-75	Filed defendant, Teamsters International's motion to correct minute order entered May 7, 1975 to show plaintiff's motion for leave to file interrogatories withdrawn, not granted.
5-23-75	Enter order dated May 22, 1975. Enter order granting motion of defendant Teamsters International to correct minute order of May 7, 1975 to show motion of plaintiff for leave to file interrogatories withdrawn, not granted. Marovitz, J. Mailed notices 5-23-75.

Docket Entries

DATE	PROCEEDINGS
6- 6-75	Filed deposition of John B. Daniel.
7-17-75	Clerk's file copy of transcript of proceedings had before Honorable Hubert L. Will on April 22, 1975, filed by official court reporter.
7-22-75	Enter order dated July 18, 1975. Order cause is continued for disposition of motions to dismiss on November 21, 1975 at 11:00 a.m. Marovitz, J. Mailed notices 7-22-75.
9-22-75	Enter order dated September 22, 1975. On court's own motion, order cause set for status report on October 10, 1975 at 10:00 a.m. McGarr, J. Mailed notices 9-22-75.
9-19-75	Order cause reassigned to JUDGE McGARR (DRAFT)—The Executive Committee.
10- 9-75	Filed motion for plaintiff class action certification.
10- 9-75	Filed motion for defendant class action certification.
10-10-75	Enter order dated October 9, 1975. Motion for plaintiff class action certification and motion for defendant class action certification are entered and continued generally. Status report set for October 10, 1975 is vacated. McGarr, J. Mailed notices 10-10-75.
10- 9-75	Filed defendants' notice.
10- 9-75	Filed defendants' supplemental memorandum of defendant International Brotherhood of Teamsters in support of its motion to dismiss Counts I and II of the complaint.

Docket Entries

DATE	PROCEEDINGS
10–10–75	Enter order dated October 9, 1975. Enter order: motion of defendant Teamster International for leave to file instanter supplemental memorandum in support of its pending motion to dismiss Counts I and II is granted. McGarr, J. Mailed notices 10-10-75.
10–10–75	(A) Enter order dated October 8, 1975: ORDERED transfer of case to the Executive Committee for reassignment for reasons indicated on letter attached, to this order. McGarr, J. (B) Enter order dated October 8, 1975: ORDERED that this cause be reassigned to Judge Austin for the reason indicated on letter attached to order. Enter for the Executive Committee—Parson, C.J. Mailed notices 10-10-75. (REASSIGNED TO JUDGE AUSTIN)
10–15–75	Order cause reassigned to KIRKLAND. (DRAFT)—The Executive Committee.
10–20–75	Filed plaintiffs notice of motion with motion to vacate order allowing defendant Teamsters International to file supplemental memorandum and to enter order continuing such matter generally.
10–21–75	Enter order dated October 20, 1975: Plaintiffs motion to vacate order allowing defendant Teamsters International to file supplemental memorandum entered and continued before the Judge to whom this case will be reassigned. Will, J. Mailed notices 10-21-75.
10–30–75	Filed defendants notice.

Docket Entries

DATE	PROCEEDINGS
10–31–75	Enter order dated October 30, 1975. Ordered that cause is continued to December 2, 1975 for a report on status.—Kirkland, J. Mailed notices 10-31-75.
12– 1–75	Filed plaintiff's consolidated interrogatories to defendants' Set No. 1.
12– 3–75	Enter order dated 12-2-75, Cause is continued to December 18, 1975 for a further status report. KIRKLAND, J. Mailed notices 12-3-75.
12–18–75	Filed defendant's notice.
12–18–75	Filed defendants Local 705 and Peick's notice or motion; Motion of defendants that the court reject the plaintiff's first set of consolidated interrogatories or that their responses be stayed.
12–18–75	Filed Plaintiff's reply memorandum in opposition to defendant International Brotherhood of the Teamsters' motion to dismiss Counts I and II of the complaint.
12–18–75	Filed defendant Teamsters International to strike plaintiff's first set of interrogatories.
12–19–75	Enter order dated 12-18-75; Defendants' motion to strike plaintiff's interrogatories is to be briefed on a simultaneous schedule to plaintiffs motion to certify class. The movants in each motion are to file first brief January 17, 1976, respective answer briefs are due 20 days thereafter and reply briefs 10 days later. Cause is continued to May 4, 1976 for report on status.—KIRKLAND, J. Mailed notices 12-19-75.

Docket Entries

DATE	PROCEEDINGS
12-19-75	Enter order dated 12-18-75; Filed Memorandum of Court regarding order of procedure in the above-entitled cause—KIRKLAND, J. Mailed notices 12-19-75.
12-19-75	Filed Memorandum of Court.
1-27-76	Filed plaintiff's notice of motion with motion to allow filing instanter plaintiff's addition to the defendant Class motion heretofore filed.
1-28-76	Enter order dated 1-27-76; Motion to allow filing instanter plaintiff's addition to the defendant class motion heretofore filed is granted. Previously set status date of May 4, 1976 remains in effect. The memorandum in support of plaintiff's motion for plaintiff and defendant class action certification and determination pursuant to Rule 23 of the FRCP is given a briefing schedule of 30 days for defendants response and 15 days for plaintiff's reply.—KIRKLAND, J. Mailed notices 1-28-76.
1-27-76	Filed plaintiff's amendment to plaintiff's motion for defendant class certification.
1-27-76	Filed Memorandum of defendant Teamsters International in support of motion to strike plaintiff's interrogatories.
1-28-76	Enter order dated 1-27-76; Motion of defendant International Brotherhood of Teamsters for leave to file instanter its memorandum in support of its motion to strike plaintiff's interrogatories is granted. Plaintiffs are to file answering brief by February 16, 1976 and defendants reply February 26, 1976. Previously set status date of May 4, 1976 remains in effect. KIRKLAND, J. Mailed notices 1-28-76.

Docket Entries

DATE	PROCEEDINGS
1-27-76	Filed plaintiff's notice of motion with motion for leave to file second amendment to complaint.
1-27-76	Filed plaintiff's second amendment to the complaint.
1-27-76	Filed Memorandum in support of plaintiff's motion for plaintiff and defendant class action certification and determination pursuant to Rule 23 of the FRCP.
1-28-76	Enter order dated 1-27-76; Plaintiff's motion for leave to file second amendment to complaint instanter is granted. Briefing schedule re-filing of second amendment to complaint is set at 20 days for a response and 10 days for a reply. Previously set status date of May 4, 1976 remains in effect. KIRKLAND, J. Mailed notices 1-28-76.
3- 2-76	Issued summons and nine copies with nine copies of complaint to as to all defendants per amended complaint.
3- 2-76	Enter order dated 3-1-76; Enter Memorandum opinion and order (DRAFT) Defendants' motions to dismiss the complaint are denied in their entirety.—KIRKLAND, J. Mailed notices 3-2-76.
2-26-76	Filed defendant Local 705 and Peick's notice of motion; Motion to extend time within which to file their briefs with respect to the class action and other issues.
3- 3-76	Enter order dated 3-2-76; All parties are allowed 20 days to file briefs or briefs in support of motions already on file. Discovery matters will be referred to a Magistrate. KIRKLAND, J. Mailed notices 3-3-76.

Docket Entries

DATE	PROCEEDINGS
3- 3-76	Enter order dated 3-2-76; Defendant Teamsters International are allowed an extension of time of 20 days within which to file brief opposing plaintiffs motion to certify a class. KIRKLAND, J. Mailed notices 3-3-76.
3- 5-76	Enter order dated 3-3-76; Pursuant to Rule and Rule 1.01 C, this case is being referred to the Executive Committee for referral to a Magistrate for the resolution of all pending and future discovery matters. (b) It is hereby ordered that the above captioned case be referred by lot to a Magistrate of this Court according to the rules. Reassigned to MAGISTRATE SUSSMAN. Parsons, Chief Judge for Executive Committee. Mailed notices 3-8-76.
3- 9-76	Enter order dated 3-8-76; This matter is set for status on Tuesday, April 27, 1976 at 9:30 a.m.— SUSSMAN, M. Mailed notices 3-9-76.
3-15-76	Enter order dated 3-15-76; It is hereby ordered that the above captioned case be referred by lot to a Magistrate of this Court according to the Rules. PARSONS, J. Referred to MAGISTRATE BALOG. Mailed notices 3-15-76.
3-15-76	Enter order dated 3-11-76. It appearing that this cause was previously referred to a Magistrate, it is hereby ordered that the order of March 5, 1976 referring this cause to a magistrate according to the rules is vacated. PARSONS, J. Mailed notices 3-15-76.
3-16-76	Filed Plaintiff's Memorandum in opposition to defendants' motion and memorandum to strike plaintiff's interrogatories.

Docket Entries

DATE	PROCEEDINGS
3-23-76	Filed summons returned served on Local 705 Intern'l Bro'hood of Teamsters, etc. Frank Kraty, Bruno Fillipini, Peter Janopolous, Frank Bridge, W. Eugene McCarron, Ralph Nieders, Sr. and M. W. Siewart, Jr.
4-13-76	Filed affidavit of Joseph E. Dean.
4-13-76	Filed affidavit of Cramer M. Gilmore II with Exhibit A & B.
4-13-76	Filed defendant, Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America's brief in support of their motion to vacate the court's March 1, 1976 order as it relates to Counts I and II.
4-13-76	Filed defendants Local 705 International Brotherhood of Teamsters, etc. and Louis F. Peick's notice of motion with motion to vacate the March 1, 1976 order and dismiss Counts I & II of the complaint, or to amend the order to certify pursuant to 28 USC Section 1292(b).
4-13-76	Filed defendant, International Brotherhood of Teamsters etc. notice of filing motion to reconsider the order of March 1, 1976.
4-13-76	Filed defendant, International Brotherhood of Teamsters etc. motion (I) to reconsider the Court's order of March 1, 1976, Re: Counts I and II, to vacate that order and enter an order dismissing said counts; (II) or, alternatively, to amend said order to provide for certification pursuant to 28 U.S.C. Section 1292(b).

Docket Entries

DATE	PROCEEDINGS
4-14-76	Enter order dated April 13, 1976: Motions of defendants' for a review and reconsideration of Court's order entered on or about March 1, 1976 are denied. Defendant International Brotherhood of Teamsters denied leave to file its brief to review and reconsider. Defendants have until April 22, 1976 to file answer brief re: class certification. Reply brief due 30 days thereafter. Cause continued to April 16, 1976 for submission of certain agreed order. Kirkland, J. Mailed notices 4-14-76.
4-19-76	Enter order dated April 19, 1976: Motions of defendants for reconsideration of Court's order of March 1, 1976 are denied. The alternative motions of defendants for amendment of Court's order of March 1, 1976 are allowed. Motion of defendant International Brotherhood of Teamsters that proceedings herein be stayed pending interlocutory appeal is denied. Kirkland, J. (DRAFT) Mailed notices 4-19-76.
4-21-76	Filed defendants' notice of filing appearance for the additional defendants, those defendants' Motion to Dismiss, all local defendants' opposition to the plaintiff's requested class certifications, and brief in support thereof.
4-21-76	Filed appearance of defendants W. Eugene McCarron, Bruno Fillippini, Frank Bridge, M. J. Siewert, Jr., Peter Janopolous, and Ralph Niedert, as Trustees of the Local 705 International Brotherhood of Teamsters Pension Fund, and Frank Kratky, and that of their attorney Sherman Carmell.

Docket Entries

DATE	PROCEEDINGS
4-21-76	Filed motion of additional defendants to dismiss the second amended complaint.
4-21-76	Filed opposition of defendant trustees of the Local 705 pension fund and certain officers of Local 705 to the plaintiff's requested class certifications.
4-21-76	Filed Local defendants' brief in opposition to the plaintiff's requested class certifications.
4-22-76	Filed affidavit of Joseph W. Ballew.
4-22-76	Filed defendant International Brotherhood of Teamsters' motion for oral argument on class issues pursuant to Local Rule 13(d).
4-22-76	Filed defendant International Brotherhood of Teamsters' memorandum in opposition to plaintiff's motion for certification of plaintiff and defendant classes and with respect to plaintiff's motion for voluntary dismissal as to defendant International Brotherhood of Teamsters.
4-28-76	Enter order dated April 27, 1976. Status conference held. Matter continued for further status on Tuesday, June 15, 1976 at 9:00 a.m. Sussman, M. Mailed notices 4-28-76.
6- 8-76	Filed plaintiff's notice of motion with motion for extension of time to file memorandum in response to defendants' memorandum in opposition to plaintiff's motion for plaintiff's and defendants' class action certification.

Docket Entries

DATE	PROCEEDINGS
6- 9-76	Enter order dated June 8, 1976: Motion for extension of time to file plaintiff's memorandum in response to defendants' memorandum in opposition to plaintiff's motion for plaintiff's and defendants' class action certification to July 31, 1976 is granted. Ruling on motions to be rendered by mail. Cause is given a future status report date of October 21, 1976. Kirkland, J. Mailed notices 6-9-76.
6-18-76	Enter order dated 6-17 76; Order defendants to make appropriate responses to interrogatories, etc. Set for status on September 30, 1976 at 9:00 a.m. DRAFT. Sussman, M. Mailed notices 6-18-76.
6-18-76	Filed certified copy of order from U.S.C.A. This matter comes before the Court on the "Petition for permission to appeal under 28 USC Sec. 1292(b): filed herein on May 3, 1976 by counsel for the defendants-petitioners. The plaintiff-respondent was today granted permission to file instanter his memorandum in response to the aforesaid petition. Also as of this date, the National Coordinating Committee for Multiemployer Plans was granted permission to file an amicus curiae brief in support of the defendant-petitioners' petition for permission to appeal. It is ordered that the defendants' petitioners' petition for permission to appeal from the interlocutory orders of March 1, 1976 and April 19, 1976 is hereby granted. ($5.00 paid).
6-24-76	Transmitted copy of docket to U.S.C.A.—7th Circuit, and Mailed copy of certified copy of order from U.S.C.A. to Lawrence Walner & Assoc., Peter J. Barack, Sherman Carmell, and Sidney Dickstein.

Docket Entries

DATE	PROCEEDINGS
6-25-76	Filed bond on appeal. ($250.00).
7- 2-76	Filed defendant IBT description of transcript ordered.
7-12-76	Filed motion of defendant I.B.T. for extension of time for transmission of record on interlocutory appeal.
7-14-76	Enter order dated 7-12-76. Motion of Teamsters International pursuant to Rule 11 (d) of Federal Rules of Appellate procedure for two-week extension to August 10, 1976 of time to transmit record on appeal granted.—Grady, J. Mailed notices 7-14-76.
7-14-76	Filed answer of defendant IBT to plaintiff's first set of interrogatories.
7-27-76	Filed Designation for full record on appeal.
8- 4-76	Filed Notice.
8- 4-76	Filed Motion to extend time to transmit record.
8- 6-76	Enter order dated 8-4-76: Motion of defendant I.B.T. for extension of time until August 31, 1976 to transmit record on appeal, granted. Motion of plaintiff for an extension of time until October 1, 1976 to file reply brief is granted. Cause is continued to December 2, 1976 at 10:00 AM for further status report.—Kirkland, J. Mailed Notices 8-6-76.
8- 4-76	Filed withdrawal of plaintiff's motion to dismiss voluntarily defendant Teamsters' International.
8-27-76	Clerks filed copy of transcripts of proceedings had before Judge Kirkland on April 13, 1976 filed by official Court reporter.

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Case No. 74 C 2865

JOHN DANIEL, for himself and
on behalf of all others similarly situated,

Plaintiff,

—v.—

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS OF AMERICA, a labor union organization; and LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS OF AMERICA, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and LOUIS PEICK, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated,

Defendants.

Now comes the Plaintiff, John Daniel, by his attorneys, Peter J. Barack and Lawrence Walner, and complaining of the Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International

Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated, brings this civil action for himself and on behalf of all other members of all Teamster unions as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for cause of complaint alleges:

COUNT I

JURISDICTION

1. The jurisdiction of this Court to hear Counts I-II of this Complaint is based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a-78jj (hereinafter referred to as "Exchange Act"), and on Section 22(a) of the Securities Act of 1933, 15 U.S.C. Section 77a-77aa (hereinafter referred to as the "Securities Act"), and as hereinafter set forth, this action involves violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder as set forth in 17 CFR. 240.10(b)-5 and Section 17(a) of the Securities Act. The jurisdiction of this Court to hear Count III of this Complaint is based on the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U.S.C., Section 1337, and on Section 301(a) of the National Labor Relations Act, 29 U.S.C. Section 185(a) (hereinafter referred to as "NLRA"), and as hereinafter set forth, this action involves violations of Section 9(a) of the NLRA, 29 U.S.C. Section 159(a). This Court has pendant jurisdiction to hear Counts IV-V of this Complaint and, as hereinafter set forth more fully, Counts

IV-V of this Complaint involve claims, based on fraud and breach of fiduciary duty, which arise out of a nucleus of operative fact common to Counts I-III of this Complaint.

2. This action is not a collusive one to confer jurisdiction upon a Court of the United States which it would not otherwise have.

VENUE

3. The Defendants named in this Complaint are inhabitants of, are found in, or transact business within the Northern District of Illinois. (Section 22(a) of the Securities Act and Section 27 of the Exchange Act). The sales of securities involved herein took place, in part, in the Northern District of Illinois. (Section 22(a) of the Securities Act.) The Defendant labor union organizations named in this Complaint maintain their principal offices within or have their duly authorized officers or agents engaged in representing or otherwise acting for their members within the Northern District of Illinois (Section 301(c) of the NLRA).

PLAINTIFF

4. The Plaintiff, John Daniel, is a resident of the State of Illinois.

5. The Plaintiff is proceeding here on behalf of himself and on behalf of all other members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (hereinafter referred to as "Teamsters International"), Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (hereinafter referred to as "Local 705") and all other affiliate locals of the Teamsters International as a class, who have purchased and acquired an interest in a Teamsters pension fund.

6. The Plaintiff, by his attorneys, brings this action on his own behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as representative of the class of all other members of Teamsters International, Local 705, and all other affiliate locals of Teamsters International in the United States as described above. Said members of the class are similarly situated and are so numerous that joinder of all members is impracticable. Except as to the amount of damages each member of the class has by himself sustained, all other questions of law and fact are common to the class. The rights of the members of the class involve such common questions of law and fact which predominate over any questions affecting the Plaintiff named herein. This class action is superior to other methods for the fair and efficient adjudication of the controversy herein described. The claims of the Plaintiff are typical of those to be asserted for the class. Plaintiff will fairly and adequately protect the interests of the class.

DEFENDANTS

7. Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America is a national labor union organization consisting principally of a voluntary association of drivers of various vehicles and other workers. Teamsters International is named herein as a Defendant by itself and as a representative of the class of all local Teamster affiliate unions. By means of its constitution and the constitution of its various local affiliates, the allocation of dues and other monies, and various other ways, Teamsters International is contractually related to and otherwise associated and affiliated with its local Teamster union organizations throughout the United States. Moreover, on information and belief, Teamsters International also assists Local 705 and all other local affiliates of Teamsters International in the investment and man-

agement of monies held in Trust by the pension plans of all such local Teamster affiliates.

8. Defendant Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America is a labor union organization and local affiliate of Teamsters International, and is named herein as a Defendant by itself and as a representative of the class of all local affiliates of Teamsters International similarly situated.,

9. Defendant Louis Peick is a Trustee of the pension trust fund of Local 705, and is named herein as a Defendant by himself and as a representative of all Trustees of all Teamster pension trust funds. Defendant Peick is also an Officer of Local 705 and is also named herein as a Defendant as a representative of all Officers of Teamsters International and of all local affiliates of Teamsters International.

10. At all times hereinafter mentioned, the Defendants, jointly and/or individually, individually or as a servant, agent, trustee, or representative for each of the other Defendants, and each of them, acted for, ratified, and approved all of the acts alleged herein by each of the other Defendants; and the Defendants, at all times hereinafter mentioned, jointly and/or individually, individually or as servant, agent, trustee, or representative for each of the other Defendants, and each of them acted in concert with each of the other Defendants and aided and abetted each of the other Defendants in and with respect to all of the acts alleged herein.

FACTS

11. Teamsters International, Local 705, and all other local affiliates of Teamsters International negotiate labor

contracts with companies across the United States for the benefit of their members who are employees of such companies. Pursuant to the various terms and conditions of such contracts, the union members of Teamsters International, Local 705, and all other local affiliates of Teamsters International customarily agree to provide their labor services to and to work as employees of such companies in return for the payment of wages and the receipt of various other forms of consideration.

12. At least since 1955, or earlier, all or most of the labor contracts negotiated by Teamsters International, Local 705, and all other local affiliates of Teamsters International have provided for the establishment of pension plans for their union members. Pursuant to the terms of such labor contracts, companies who employ Teamster union members agree to make certain set payments into local Teamster affiliate or Teamsters International pension funds for such Teamster union members and as part consideration for the labor services provided by such union members. Such monies contributed into local Teamster affiliate or Teamsters International pension funds are customarily held in trust and invested by pension trust fund Trustees. Teamster union member employees thus contribute their labor services in return for, in part, their participating interest in such local Teamster affiliate or Teamsters International pension trust fund.

13. The pension plans established by the Teamsters International, Local 705, and all other local affiliates of Teamsters International do not differ in any material respect for the purposes of this litigation. All such pension plans have very long and arbitrary vesting periods. Under the length requirement of the vesting period provisions of the Teamster pension plans, no pension benefit of any kind is available to a Teamster union member who does not meet

the requisite vesting period. As a result, all contribution paid into any such pension fund by an employer for a Teamster union member employee would, if the length requirement were not met, be forfeited, and the value of the member's interest in the pension fund would be worthless. Although the length requirement of the vesting period may vary in some insignificant amount between the pension plans established by the Teamsters International, Local 705, and all other local affiliates of Teamsters International, the provisions requiring forfeiture and the denial of any pension benefit are the same.

14. All or most of the pension plans established by the Teamsters International, Local 705, and all other local affiliates of Teamsters International require not only a lengthy and arbitrary vesting period but also continuity of employment with an employer, or employers, who have entered into a labor contract with a Teamsters union over the full length of the vesting period. Under the continuity requirement or break in service rule of the Teamster pension plans, no pension benefit of any kind is available to a Teamster union member who has been employed with a covered employer, or employers, for the full length requirement of the vesting period but whose employment career is not continuous and uninterrupted. As a result, all contributions paid into any such pension fund by an employer for a Teamster union member employee would in this situation be forfeited, and the value of the member's interest in the pension fund would be worthless.

15. All monies contributed into a local Teamster affiliate or Teamsters International pension fund are invested by pension trust fund Trustees, and such trust funds would over the long run be reasonably expected to grow through the accumulation of dividends, interest and other earnings. A Teamster union member who does not meet the length

or continuity requirement of the vesting provision of his Teamster union pension plan will also forfeit his participating interest in any accumulated earnings on all employer contributions made on his behalf.

16. Plaintiff John Daniel has been a member of Local 705 since 1951. Plaintiff has paid or has had employer payments made on his behalf into the Local 705 pension fund for a period of about twenty-two and one-half years (22½), including past service contributions. The vesting provision of the Local 705 pension plan requires a union member to have worked for a covered employer, or employers, for twenty (20) consecutive years of uninterrupted service. Because Plaintiff John Daniel's twenty-two and one-half years (22½) of service with a covered employer, or employers, were interrupted by a four, or seven, month break from December, 1960 to July, 1961, he has been denied all benefits under the Local 705 pension plan. All employer contributions made on his behalf into the Local 705 pension fund have, accordingly, been forfeited, even though such break in service was occasioned by an involuntary lay off. All accumulated earnings on all employer contributions made on his behalf into the Local 705 pension fund have likewise been forfeited.

17. Beginning at least as early as 1955, and continuing until the present time, labor union defendants Teamsters International Local 705, and all other local affiliates of Teamsters International, and the individual Trustees of all Teamster pension funds, and the individual Officers of all Teamster unions, have, through the use of the mails and other instrumentalities of interstate commerce, knowingly misrepresented certain material facts and omitted to state other material facts relating to the value of a Teamster union member's participating interest in his local Teamster affiliate or Teamsters International pension fund.

Complaint

Such misrepresentations of certain material facts made by the Defendants and the omission to state other material facts include, but are not limited to:

A. Misrepresentations:

(1) Misleading statements as to the length requirement of the vesting provision for the payment of a benefit from a local Teamster affiliate or Teamsters International pension fund to a Teamster union member; and

(2) Misleading statements as to the continuity requirement of the vesting provision for the payment of a benefit from a local Teamster affiliate or Teamsters International pension fund to a Teamster union member.

B. Omissions of Material Fact:

(1) Omitting to state that a Teamster union member would receive no pension benefit from a local Teamster affiliate or Teamsters International pension fund if he did not meet the length requirement of the vesting provision of such fund;

(2) Omitting to state that a Teamster union member would receive no pension benefit from a local Teamster affiliate or Teamsters International pension fund if he did not meet the continuity requirement of the vesting provision of such fund;

(3) Omitting to state that all employer contributions made on behalf of a Teamster union member into a local Teamster affiliate or Teamsters International pension fund would be forfeited if the Teamster union member did not meet the length and continuity requirements of the vesting provision of such fund;

Complaint

(4) Omitting to state that all accumulated earnings on all employer contributions made on behalf of a Teamster union member into a local Teamster affiliate or Teamsters International pension fund would be forfeited if the Teamster union member did not meet the length and continuity requirements of the vesting provision of such fund;

(5) Omitting to state the actuarial basis on which any local Teamster affiliate or Teamsters International pension fund has been constructed and the actuarial likelihood that a Teamster union member will receive back as a pension benefit any or all of any employer contributions made on his behalf into a local Teamster affiliate or Teamsters International pension fund;

(6) Omitting to state that the actuarial basis on which any local Teamster affiliate or Teamsters International pension fund has been constructed is arbitrary and without any reasonable basis in fact; and

(7) Omitting to state that funds held in trust for local Teamster affiliate or Teamsters International pension funds have been diverted from their lawful purposes and have been used by the Defendants to their own benefit or to the benefit of others or to enhance Defendants' own position, status, or prestige, or to enhance the position, status or prestige of others.

18. As a result of such misrepresentations by Defendants of certain material facts and the omission by Defendants to state other material facts and the failure of Defendants to make full and complete disclosure as to the value of a Teamsters union member's participating interest

in his local Teamster affiliate or Teamsters International pension fund, Plaintiff and all other members of the class he represents have purchased and acquired an interest in a local Teamster affiliate or Teamsters International pension fund by agreeing to provide their labor services to employers who have labor contracts with any such local Teamster affiliate or Teamsters International.

VIOLATIONS ALLEGED

19. The misrepresentations of certain material facts and the omission to state other material facts relating to the value of a Teamster union member's participating interest in his local Teamster affiliate or Teamsters International pension fund by Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated, constitute a violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that Defendants have, in connection with the sale to Plaintiff, and all other members of the class he represents, of a security:

a) used means and instrumentalities of commerce and the mails; and have

b) employed a device, scheme, or artifice to defraud; and

c) made untrue statements of material fact or omitted to state a material fact necessary in order to make

the statements made, in light of the circumstances under which they were made, not misleading; and

d) engaged in acts, practices, and a course of business which operated as a fraud or deceit upon Plaintiff and all other members of the class he represents.

20. As a direct and proximate result of Defendants' violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Plaintiff and all other members of the class he represents have sustained substantial loss and injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Find that Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated, have violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

c) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of

all vesting provisions in such pension fund agreements;

d) Enter judgment against the Defendants in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon;

e) Enter judgment against the Defendants in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds which have been unlawfully diverted from their proper purposes; and

f) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

COUNT II

1.–18. Plaintiff herein realleges the allegations of Paragraphs 1 through 18 of Count I.

VIOLATIONS ALLEGED

19. The misrepresentations of certain material facts and the omission to state other material facts relating to the value of a Teamster union member's participating interest in his local Teamster affiliate or Teamsters International pension fund by Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly

situated, constitute a violation of Section 17(a) of the Securities Act in that Defendants have, in the offer or sale to Plaintiff, and all other members of the class he represents, of a security:

a) used means or instruments of transportation or communication in interstate commerce, or the mails; and have

b) employed a device, scheme, or artifice to defraud; and

c) obtained money or property by means of an untrue statement of material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and

d) engaged in transactions, practices and a course of business which operated as a fraud or deceit upon Plaintiff and all other members of the class he represents.

20. As a direct and proximate result of Defendants' violation of Section 17 of the Securities Act, Plaintiff and all other members of the class he represents have sustained substantial loss and injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Find that Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters,

Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds and as representative of all Officers of all Teamster unions similarly situated, have violated Section 17 of the Securities Act;

c) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of all vesting provisions in such pension fund agreements;

d) Enter judgment against the Defendants in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon;

e) Enter judgment against the Defendants in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds which have been unlawfully diverted from their proper purposes; and

f) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

COUNT III

1.-18. Plaintiff herein realleges the allegations of Paragraphs 1 through 18 of Count I.

19. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of

Teamsters International owe a statutory duty of fair representation to Plaintiff, and all other members of the class he represents, as union members, pursuant to Section 9(a) of the NLRA, 29 U.S.C. Section 159(a).

20. By themselves and by means of the acts of their officers and other agents, Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International have breached their statutory duty of fair representation through the misrepresentation of certain material facts and the omission to state other material facts relating to the value of a Teamster union member's participating interest in his local Teamster affiliate or Teamsters International pension fund, which conduct by the Defendant labor union organizations toward the Plaintiff, and all other members of the class he represents, is unreasonable, arbitrary, discriminatory, and/or in bad faith.

21. By themselves and by means of the acts of their officers and other agents, Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International have breached their statutory duty of fair representation through the establishment and use of:

a) Arbitrary and unreasonable actuarial bases for the determination of benefits to a Teamster union member from a local Teamster affiliate or Teamsters International pension fund;

b) Arbitrary and unreasonable length requirements as part of the vesting provisions of local Teamster affiliate or Teamsters International pension plans; and

(c) Arbitrary and unreasonable continuity requirements as part of the vesting provisions of local

Teamster affiliate or Teamsters International pension plans,

which conduct by the Defendant labor union organizations toward the Plaintiff, and all other members of the class he represents, is unreasonable, arbitrary, discriminatory and/or in bad faith.

22. By themselves and by means of the acts of their officers and other agents, Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International have breached their statutory duty of fair representation through their diversion of, or their acquiescence in the diversion by others of, funds held in trust for local Teamster affiliate or Teamsters International pension funds from their lawful purposes and to the benefit of Defendants or to the benefit of others, or to enhance Defendants' position, status, or prestige, or to enhance the position, status or prestige of others, which conduct toward the Plaintiff, and all other members of the class he represents is unreasonable, arbitrary, discriminatory and/or in bad faith.

23. As a direct and proximate result of Defendant labor union organizations' Teamsters International, Local 705, and all other local affiliates of Teamsters International, breach of their statutory duty of fair representation, Plaintiff and all other members of the class he represents have sustained substantial loss and injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Find that Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, have breached their statutory duty of fair representation to Plaintiff and have thereby violated Section 9(a) of the National Labor Relations Act, 29 U. S. C. Section 159 (a).

c) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of all vesting provisions in such pension fund agreements;

d) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon;

e) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International

Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves, and as representatives of the class of all local Teamster affiliate unions similarly situated, in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds which have been unlawfully diverted from their proper purposes; and

f) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

COUNT IV

1.–18. Plaintiff herein realleges the allegations of Paragraphs 1 through 18 of Count I.

19. The misrepresentations of certain material facts and the omission to state other material facts relating to the value of a Teamster union member's participating interest in his local Teamster affiliate or Teamsters International pension fund by Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and Louis Peick, by himself and as representative of all Trustees of all Teamsters pension funds and as representative of all Officers of all Teamsters unions similarly situated, constitute fraud and deceit and, as a direct and proximate result thereof, Plaintiff and all other members of the class he represents have sustained substantial loss and injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of all vesting provisions in such pension fund agreements;

c) Enter judgment against the Defendants in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon, and

d) Enter judgment against the Defendants in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds which have been unlawfully diverted from their proper purposes; and

e) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

COUNT V

1.–18. Plaintiff herein realleges the allegations of Paragraphs 1 through 18 of Count 1.

19. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International are the exclusive representatives of Plaintiff, and all other members of the class he represents, for the purposes of collective bargaining with each of the various employers of Plaintiff and all other mem-

bers of the class he represents. Accordingly, Plaintiff and all other members of the class he represents have placed their trust and confidence in the Defendant labor union organizations to establish and construct in their collective bargaining negotiations with the various employers of Plaintiff, and all other members of the class he represents, fair and reasonable pension fund plans. As the exclusive representatives of Plaintiff and all other members of the class he represents, Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International, thus owe a fiduciary duty to Plaintiff and all other members of the class he represents.

20. Defendant Peick and all other Trustees of all Teamster pension funds administer such pension funds under trust agreements and pursuant to statutory requirements, including the requirement that such pension trusts be for the sole and exclusive benefit of the employees. Section 305(5) of the NLRA, 29 U.S.C. Section 186(5). As trustees for Plaintiff and all other members of the class he represents (which members are the employees and beneficiaries of such pension trusts), Defendant Peick and all other Trustees of all Teamster pension funds owe a fiduciary duty to Plaintiff and all other members of the class he represents.

21. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendant Peick and all other Trustees of all Teamster pension funds have breached the fiduciary duty which they owe to Plaintiff and all other members of the class he represents through the establishment and use of:

a) Arbitrary and unreasonable actuarial bases for the determination of benefits to a Teamster union member from a local Teamster affiliate or Teamsters International pension fund;

b) Arbitrary and unreasonable length requirements as part of the vesting provisions of local Teamster affiliate or Teamsters International pension plans; and

c) Arbitrary and unreasonable continuity requirements as part of the vesting provisions of local Teamster affiliate or Teamsters International pension plans,

which conduct by the Defendant labor union organizations and the Defendant Trustees toward the Plaintiff, and all other members of the class he represents, is unreasonable, arbitrary, discriminatory, and/or in bad faith.

22. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendant Peick and all other Trustees of all Teamster pension funds have breached the fiduciary duty which they owe to Plaintiff, and all other members of the class he represents, through their diversion of, or their acquiescense in the diversion by others of, funds held in trust for local Teamster affiliate or Teamsters International pension funds from their lawful purpose and to the benefit of Defendants or to the benefit of others or to enhance Defendants' own position, status, or prestige, or to enhance the position, status or prestige of others.

23. As a direct and proximate result of Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendant Peick and all other Trustees of all Teamster pension funds, breach of their fiduciary duty, Plaintiff and

all other members of the class he represents have sustained substantial loss and injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Find that Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Defendant Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds, have breached their fiduciary duty which they owe to Plaintiff, and all other members of the class he represents;

c) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of all vesting provisions in such pension fund agreements;

d) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organi-

zation, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Defendant Peick, by himself and as representative of all Trustees of all Teamster pension funds, in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon;

e) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Defendant Peick, by himself and as representative of all Trustees of all Teamster pension funds, in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds which have been unlawfully diverted from their proper purposes; and

f) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

Respectfully submitted,

/s/ PETER J. BARACK
PETER J. BARACK

.....
LAWRENCE WALNER

Complaint

LAWRENCE WALNER & ASSOCIATES, LTD.
221 North LaSalle Street
Chicago, Illinois 60601
(312) 332-6576

OF COUNSEL:

PETER J. BARACK, ESQ.
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 649-8372

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY.

LAWRENCE WALNER
10/4/74

Motion of Defendants Local 705, etc., and Louis F. Peick to Dismiss Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Case No. 74 C 2865

JOHN DANIEL,

Plaintiff,

—v.—

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, individually,

Defendants.

MOTION OF DEFENDANTS LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOUIS F. PEICK TO DISMISS THE COMPLAINT

Come now defendants Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 705") and Louis F. Peick, individually, by Sherman Carmell, one of their attorneys, and pursuant to Rule 12(b) FRCP state:

1. With respect to the allegations contained in Counts I-III, inclusive, of the complaint:

(a) This court does not have subject matter jurisdiction, and the complaint does not state a claim upon which relief

can be granted, under either §17(a) of the Securities Act of 1933, 15 USC §77q, or §10(b) of the Securities Exchange Act of 1934, 15 USC 78j(b), as more fully appears from the complaint, the affidavit of Louis F. Peick and the exhibits attached and incorporated for all paragraphs herein as Exhibit 1 and 1A-I.

(b) The action is barred by the limitations provision of the Securities Act of 1933 and the Illinois Statute of Limitations.

(c) The complaint challenges alleged misrepresentations concerning an eligibility rule for pension benefits made and enforced by the Local 705 International Brotherhood of Teamsters Pension Fund ("Local 705 Pension Fund"); Board of Trustees of the Local 705 Pension Fund ("Local 705 Trustees") are indispensable parties; and Louis F. Peick is not representative of the Local 705 Trustees.

(d) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "International Union"), Local 705, and other local unions affiliated with the International Union, or any pension fund other than the Local 705 Pension Fund, are not proper parties defendant; and the defendants are not representative of any other person or defendant within the meaning of Rule 23.2.

(e) The plaintiff has not established the prerequisites for a class or representative action under Rules 23 and 23.2 FRCP.

2. In addition to the reasons stated in paragraph 1 of this motion, with respect to the allegations contained in Count III of the complaint concerning the breach of the duty of fair representation, the court lacks subject matter

jurisdiction and the complaint does not state a claim upon which relief can be granted because:

(a) The plaintiff is a member only of Local 705; therefore, the claimed duty can run only from Local 705 to the plaintiff.

(b) The eligibility rule and alleged misrepresentations which the plaintiff challenges did not arise out of the relationship between a union and its member under §9(a) of the National Labor Relations Act, 29 USC §159(a).

(c) The plaintiff has failed to allege that he has exhausted his intra-union remedies.

(d) This court does not have subject matter jurisdiction under §301(a) of the National Labor Relations Act, 29 USC §185(a).

3. In addition to the reasons stated in paragraph 1 of this motion, with respect to the allegations in Count V of the complaint concerning violation of the "sole and exclusive benefit" of employees provision of §302(c)(5) of the National Labor Relations Act, 29 USC §186(c)(5).

(a) This court does not have *in personam* or subject matter jurisdiction because the Local 705 Pension Fund, which promulgated and enforced the challenged eligibility rule, is the only proper party defendant, and the trustees are indispensable parties.

(b) The plaintiff's action is barred by the Illinois Statute of Limitations.

(c) The plaintiff is estopped from benefiting from a challenge to the service rule or the alleged representations where he made no attempt for 13 years to request that the Local 705 Trustees waive or cure the break in service and contributions or to challenge the representations.

Motion of Defendants Local 705, etc., and Louis F. Peick to Dismiss Complaint

(d) The Internal Revenue Service has exclusive subject matter jurisdiction over the matters alleged in the complaint; has ruled contrary to the plaintiff's allegations; and the plaintiff has not exhausted his administrative remedies.

(e) This court does not have subject matter jurisdiction and the complaint does not state a claim upon which relief can be granted under §302(c)(5) The relief sought exceeds that permitted by §302(c), 29 USC §186(e).

4. Count IV does not state a claim upon which relief can be granted and the court does not have subject matter.

WHEREFORE, these defendants pray that the complaint be dismissed and for their costs.

/s/ SHERMAN CARMELL
Sherman Carmell,
one of the defendants' attorneys

CARMELL & CHARONE, LTD.
29 So. LaSalle Street
Chicago, Illinois 60603
236-8033

Dated:

FILED
NOV. 22, 1974
STUART CUNNINGHAM
CLERK

Exhibit 1

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.:*

AFFIDAVIT OF LOUIS F. PEICK

LOUIS F. PEICK, being first duly sworn, says that if called as a witness, I could competently testify as follows:

1. I am a resident and citizen of the State of Illinois. I am Secretary-Treasurer of Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 705"). I am the Administrator, a trustee, and Secretary-Treasurer of the Local 705 International Brotherhood of Teamsters Pension Fund ("Local 705 Pension Fund"), a trust, with its principal office in Chicago. The facts contained in this affidavit are based on my personal knowledge or the books and records of Local 705 or the Local 705 Pension Fund maintained in the ordinary course of business under my supervision and control. I hold no office in any local union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International Union") except Local 705. I hold no position as trustee or otherwise with any pension fund except the Local 705 Pension Fund.

LOCAL 705 PENSION FUND

2. The Local 705 Pension Fund is a trust fund with its office in Chicago. The Local 705 Pension Fund was created as of January 1, 1955 through the process of collective bargaining between multi employer bargaining associations and Local 705 as the collective bargaining representative of certain employees of employer-members of the associations. The collective bargaining agreement creating the Local 705 Pension Fund provided, as pertinent:

"Commencing with January 1, 1955, the Employer shall pay the sum of 5 cents for each hour of employment by each employee into a trust fund for the purpose of providing pension benefits to employees covered by this agreement. A Board of Trustees, in consultation with actuaries and/or pension specialists shall administer such fund and shall decide upon the type and nature of pension plan (including eligibility, benefits, etc.) to be instituted."

3. As provided in that collective bargaining agreement, Local 705 and the employers' representatives signed an Agreement And Declaration Of Trust (the "trust agreement"), a copy of which is attached and incorporated as Exhibit 1A. Local 705 appointed the original three employee trustees. The trust agreement was later amended (the "amended trust agreement"), a copy of which is attached as Exhibit 1B. The preamble to, and Article 2, Section 2 of, the amended trust agreement were amended to increase the Board of Trustees ("Local 705 Trustees") to the present eight members by adding an additional union trustee and employer trustee. At all times the union trustees were appointed by Local 705 as provided in Article 2, Section 2 of the trust agreement and the amended trust agreement.

4. As provided in Article 7 of the trust agreement, the Local 705 Trustees, at meetings held on February 14, 1955 and April 4, 1955, passed eligibility rules for receipt of a normal retirement pension, including the "20 years of service" rule (the "service rule"). On April 22, 1955 Local 705 sent a letter to its members notifying them of this eligibility requirement, a copy of which is attached and incorporated as Exhibit 1C. In 1958 the Local 705 Pension Fund prepared and mailed to participating employees a

booklet containing the pension plan rules and regulations, including the service rule, a copy of which is attached and incorporated as Exhibit 1D. Other booklets were prepared and distributed in 1969 and 1973, copies of which are attached and incorporated as Exhibits 1E and 1F, respectively. Since the inception of the Local 705 Pension Fund, the pension plan has contained a service rule for a normal retirement pension benefit identical to the present §2.01(b) and (c) of the 1973 plan (Exhibit 1F).

5. On April 20, 1955 the Local 705 Pension Fund received a letter from the United States Treasury Department that its trust and plan met the requirements of Sections 401(c) and 501 of the Internal Revenue Code. Amendments to the pension plan have received similar approval, the latest being a letter dated July 23, 1974 relating to the 1973 plan (Exhibit 1F), a copy of which is attached and incorporated as Exhibit 1G.

6. On May 19, 1971, the Local 705 Trustees, after consultation with the actuary, enacted new pension benefits including a vested pension benefit effective July 1, 1971, as shown by the following portion of the minutes of that meeting:

"4. Vesting (Effective 7/1/71)

An employee who has attained the years of service for a normal pension but not the age, and who leaves the craft, shall be vested with a monthly pension benefit of $250.00 payable commencing the first month after attaining age 65. Upon the death of the employee before or after attaining 65, no Death benefits or benefit for surviving spouse or dependent children shall be payable."

• • •

"The above changes are to be considered as the substantive intent of the board of trustees, and the board reserves the right to formally draft the amendments and to promulgate rules and regulations to implement the amendments. The Board instructed Carmell & Charone, together with the actuary, to prepare and submit amendments to the Internal Revenue Service."

On or about June 11, 1971, the Local 705 Pension Fund notified the participating employees of the changes, including the vested pension benefit, a copy of which is attached and incorporated as Exhibit 1H. The amendments were drafted and later codified in the 1973 plan booklet which began with the following explanation (p. 2):

"Vested pension.

If you leave covered employment before age 57, but after 20 years of service, and do not work in the craft afterwards, you are entitled to a vested pension of:

$250 a month

when you reach 65. To collect your pension, ask the administrator for a pension eligibility notice when you leave. Then, no sooner than six months before your 65th birthday, send in your application and your eligibility notice. Monthly payments will start after age 65 and after the trustees have your application. Anyone who fails to apply before age 70 loses his pension rights. See official pension plan 2.03.

If you receive a vested pension, you do not qualify for survivor protection or other local 705 post-retirement benefits."

The formal plan amendment relating to the vested pension benefit was codified in §§2.03 and 3.03 of the 1973 plan. The service rule remained the same. The 1973 plan

booklet was submitted to the Internal Revenue Service together with an actuarial report and subsequent amendments, as more fully appears from a copy of the March 18, 1974 letter from counsel attached and incorporated as Exhibit 1I. As noted before, the 1973 plan, as amended, was approved by the Internal Revenue Service on July 23, 1974.

7. The Local 705 Pension Fund has filed with the United States Department of Labor Forms D-1 and D1-A which contained copies of the various pension plan booklets and amendments as required by the Welfare and Pension Plan Disclosure Act, which were available for inspection and copying.

JOHN DANIEL APPLICATION TO THE LOCAL 705 PENSION FUND

8. In 1973, John Daniel made an inquiry to the Local 705 Pension Fund concerning eligibility for either a normal retirement pension or a vested pension and was advised that he did not have the required years of service. He then requested a review. The request was referred to the Local 705 Trustees under Section 5.02 of the 1973 pension plan (Exhibit 1F). On December 26, 1973 John Daniel appeared before the Local 705 Trustees, who were and are:

UNION TRUSTEES	EMPLOYER TRUSTEES
Frank Kratky (President– Local 705)	W. Eugene McCarron —Chairman
Louis F. Peick (Secretary-Treasurer— Local 705)	Ralph A. Niedert
Bruno Fillipini (Trustee—Local 705)	Frank Bridge
P. W. Janopoulos (Bus. Rep.--Local 705)	M. J. Siewert, Jr.

The minutes of that meeting, as regards, John Daniel, state:

> John Daniel requested that the trustees cure a break in service to make him eligible for pension benefits. The fund records show that Mr. Daniel entered covered employment in April 1950 upon transfer from Local 777. He had a break in service and contributions between December 5, 1960 and July 5, 1961, and is now age 63; therefore, he has 12 years and 5 months of consecutive years of service and contributions since July 5, 1961. In accordance with the plan, and upon motion duly made and seconded, the request was denied.

Mr. Daniel was notified personally and in writing of the decision of the Local 705 Trustees. Thereafter, Mr. Daniel requested an opportunity to again appear before the Local 705 Trustees to ask that they reconsider the December 26, 1973 decision. The request was granted and on March 28, 1974, Mr. Daniel appeared before the same Local 705 Trustees and again requested that he be granted a pension benefit. As shown by the minutes of that meeting:

> Mr. Daniel appeared before the board to request a reconsideration of its December 26, 1973 denial to waive a break in service and contributions between December 5, 1960 and July 5, 1961. Mr. Daniel said that the break was only four months because he had returned to work in December, 1960, worked four months, but the employer's bookkeeper did not make the proper payments, and that the company is out of business and there were no records available. Mr. Daniel admitted that he had at least four months break in service and contributions. Although Mr. Daniel claimed that he had returned to work earlier than July 5, 1961, the records do not indicate that any contributions were

> received on his behalf or that he returned his withdrawal card to Local 705 as an indication that he was not working for a contributing employer. The chairman noted that there has been no new evidence presented which had not been considered by the board previously, and upon motion duly made and seconded, the board reaffirmed its denial of December 26, 1973.

LOCAL 705

9. Local 705 is a voluntary unincorporated labor organization with its principal office in Chicago. In the Chicago Metropolitan area there are approximately 27 local unions chartered by and affiliated with the International Union, including Local 705, and I believe that throughout the United States and Canada there are over 700-800 other such local unions. The Local 705 officers and executive board members, individually and collectively, do not participate as officers, executive board members, appointed or elected business representatives, or members, in the direction and control of any of the local unions except Local 705.

JOHN DANIEL'S COMPLAINT

10. I have read the complaint filed by John Daniel in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 74 C 2865, and state:

(a) With respect to ¶7 of the complaint, the service rule complained of by John Daniel, which is the same for a normal retirement pension and a vested pension, was created and applied only by the Local 705 Pension Fund. Local 705 does not provide a pension benefit and John Daniel has not requested any benefit from it. The following allegation is untrue:

> "Moreover, on information and belief, TEAMSTERS INTERNATIONAL also assist LOCAL 705 . . . in the investment and management of monies held in Trust by the pension plans of all such local Teamster affiliates."

Local 705 does not hold or manage any of the employer pension fund contributions made on behalf of participating employees. All such contributions are made to and held by the Local 705 Pension Fund in accordance with the trust agreements and the collective bargaining agreements. The International Union has not and does not participate, assist, directly or indirectly, in the investment or management of any funds held by the Local 705 Pension Fund. At the time John Daniel made his application to the Local 705 Pension Fund, and as of December 6, 1973 and March 28, 1974, the collective bargaining agreement between John Daniel's employer and Local 705 provided:

ARTICLE 17

Pension Trust Fund

Section 1. The Employer for each regular Employee shall pay the sum of nineteen dollars ($19.00) per week (plus the additional payments provided for in Section 3 hereof) to Local 705 International Brotherhood of Teamsters Pension Trust Fund (Fund), an irrevocable trust heretofore created by an Agreement and Declaration of Trust (Trust Agreement) pursuant to a Collective Bargaining (Cartage) Agreement between certain Employers and the Union. The Fund shall use these payments for purposes permitted under the Trust Agreement and to provide pension, death and such other benefits as permitted by said Trust Agreement, as amended, from time to time, and by Section 302(c) of the Labor-Management and Relations Act of 1947. The Trustees of the Fund shall have the sole power (a) to construe the provisions of the Trust Agreement and rules and regulations and all terms used therein, and (b) to determine all disputes with respect to eligibility, the right to participate in benefits of the Fund, time, method of payment, payment

during periods of Employee illness or disability, methods of enforcement of payment and related matters, and any construction adopted and any determination made by the Trustees in good faith shall be final and binding upon all Employers, Employees, participants, legal representatives, dependents, relatives and all persons and parties.

11. The enactment and maintenance of the service rule, the denial of John Daniel's application for a normal retirement or vested pension benefit, and all other actions involving the Local 705 Pension Fund, were performed and taken only by the Local 705 Trustees, and not by the International Union, Local 705, any other local union affiliated with the International Union, any other person, or ratified by anyone else. Therefore, the statements contained in ¶10 of the complaint are not correct.

12. John Daniel transferred into employment covered by the Local 705 Pension Fund in April 1950. Employer contributions to the Local 705 Pension Fund began in January 1955 when the fund was created. However, the Local 705 Trustees granted past unfunded service credit for years prior to January 1, 1955 for all employees, including John Daniel, who were employed by an employer under contract with Local 705. Therefore, contrary to the statement in ¶16 of the complaint, no contributions were received by the Local 705 Pension Fund on behalf of John Daniel between April 1950 and January 1955.

/s/ LOUIS F. PEICK
Louis F. Peick

Subscribed and sworn to before me
this 22nd day of October, 1974.

/s/ FLORENCE UNRATH
Notary Public

Exhibit 1A

Local 705 Trust Agreement

(See Opposite) ☞

TRUST AGREEMENT

Creating the Local 705 International Brotherhood of Teamsters (A. F. of L.) Pension Trust

THIS AGREEMENT and Declaration of Trust, made and entered into this day of , 195 , by and between TRUCK DRIVERS, OIL DRIVERS, Filling Station and PLATFORM WORKERS' UNION, LOCAL 705, an affiliate of the International Brotherhood of Teamsters, (AFL), an unincorporated association commonly known as a labor organization (hereinafter referred to as the "Union"), by its duly authorized representatives, and the ILLINOIS MOTOR TRUCK OPERATORS ASSOCIATION, CENTRAL MOTOR FREIGHT ASSOCIATION, and CARTAGE EXCHANGE OF CHICAGO, for and on behalf of themselves, their present and future constituent members, and such other Employers who may become parties hereto, (hereinafter collectively referred to as the "Employer"), and the TRUSTEES, (hereinafter referred to as "the Trustees") selected as hereinafter described, who have affixed their respective signatures hereto, accepting the trust obligations herein declared:

WITNESSETH:

WHEREAS, the Union and the Employer believe that it is in the best interest of the employees of such Employer represented by the Union, and the families and dependents of such employees, to provide for retirement benefits and for that purpose to establish a trust fund as hereinafter provided; and

WHEREAS, the Union and the Employer have heretofore entered into a collective bargaining agreement under the terms of which it is provided: "Commencing with January 1, 1955, the Employer shall pay the sum of 5 cents for each hour of employment by each employee into a trust fund for the purpose of providing pension benefits to employees covered by this agreement. A Board of Trustees, in consultation with actuaries and or pension specialists shall administer such fund and shall decide upon the type and nature of pension plan (including eligibility benefits, etc.) to be instituted"; and

WHEREAS, H. E. WOOD, LOUIS F. PEICK and FRED TIEDT, Trustees, have been designated as the original Trustees to represent the Union in accordance with the provisions of this agreement, and JOHN VIKING, THOMAS O. SMITH and GEORGE W. JOHNSON have been designated to represent the Employer as the original Trustees of the Trust in accordance with the provisions of this agreement;

NOW, THEREFORE, for and in consideration of the premises and of the mutual covenants and agreements herein contained, the Union and the Employer hereby accept and adopt all of the provisions herein contained and the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees (all such contributions, money and property being hereinafter referred to as "the Trust Fund"), with the powers and duties, uses and purposes as hereinafter set forth, to wit:

ARTICLE 1

Definition of Terms

SECTION 1. *Employer*—The term "Employer" as used herein shall mean any association or individual employer who has duly executed a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement.

SECTION 2. *Union*—The term "Union" as used herein shall mean TRUCK DRIVERS, OIL DRIVERS, FILLING STATION and PLATFORM WORKERS' UNION, LOCAL 705, an affiliate of the International Brotherhood of Teamsters, (AFL).

SECTION 3. *Employees*—The term "Employees" as used herein shall include

a. A person working within the jurisdiction of the Union for an employer, as hereinbefore defined, and on whose behalf payments shall be made to the FUND by the employer; or

b. All persons employed by the Union upon being proposed by the Union and after acceptance by the Trustees, and as to such Union personnel the Union shall be considered an employer within the meaning of this agreement and declaration of Trust and shall, on behalf of such personnel, make payments to the TRUST at the times and at the rate of payment equal to that made by any other employer who is a party to the TRUST, or

c. All persons employed by the TRUST upon acceptance by the TRUSTEES, and as to such TRUST personnel the TRUSTEES shall be deemed an employer within the meaning of this agreement and declaration of TRUST and shall, on behalf of such personnel, make payments to the TRUST at the times and at the rate of payment equal to that made by any other employer who is a party to the TRUST.

SECTION 4. *Trustees*—The term "Trustees" as used herein shall mean the Trustees designated in this Agreement and Declaration of Trust together with their successors designated and appointed in accordance with the terms of this Agreement.

SECTION 5. *Trust Fund*—The term "Trust Fund" shall refer to all property of whatever nature which shall be in said Trust.

SECTION 6. *Employer Contributions*—The term "Employer Contributions" as used herein shall mean payments made by Employers to the Trust Fund herein created.

SECTION 7. *Military Service of the United States*—The term "Military Service of the United States" shall refer to active service in the Armed Forces of the United States, including active service in the Regular or Reserve components of the Army, Navy, Marine Corps, Air Force, Coast Guard and United States Merchant Marine.

SECTION 8. *Period of National Emergency*—The term "period of National Emergency" shall include any period during which the United States is at war with another Country or during which the President of the United States or the Congress of the United States has declared the United States to be in a National Emergency or state of war or during which the United States is engaged in "police" or other actions pursuant to the United Nations Charter or similar treaties or agreements; and any person serving in the Military Service of the United States by reason of involuntary induction through a Selective Service System or similar system of induction shall be regarded as serving during a period of National emergency.

ARTICLE 2

Creation of Trust Fund and Board of Trustees

SECTION 1. *Designation*—The Union and the Employers hereby create and establish, with the Trustees herein provided for, a Trust, to be known as LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS (AFL) PENSION TRUST FUND, which shall be comprised of assets initially derived from Employer contributions made pursuant to the collective bargaining agreement between the parties (plus any additional sum or sums, from Employer contributions which may hereafter be agreed upon by the Employers and the Union and set forth in written collective bargaining agreements), together with all insurance and annuity contracts (including dividends, refunds, or other sums payable to the Trustees on account of such insurance and annuity contracts) and all investments made and held by the Trustees on account of such insurance and annuity contracts, all investments made and held by the Trustees, all moneys received by the Trustees as contributions or as income from investments made and held by the Trustees or otherwise, and any other property received and held by the Trustees for the uses, purposes and trusts, set forth in this Agreement and Declaration of Trust where any of the foregoing is derived from the Employer contributions.

SECTION 2. *Board of Trustees*—There is hereby created a Board of Trustees consisting of three persons representative of the employees and three persons representative of the employer. The Employer Trustees shall be designated by the Employers' Associations. The Employee Trustees shall be designated by the Union.

SECTION 3. *Impartial Trustee*—Should a deadlock occur the Trustees shall appoint a neutral person empowered to break such deadlock within a reasonable length of time, failing which, an impartial umpire to decide such dispute, shall on petition of either the Union or the Employer Trustee be appointed by The Honorable Walter J. LaBuy, a Judge of the District Court of the United States in Chicago, as provided by law.

SECTION 4. *Vacancies in Board of Trustees*—In case of vacancies by death, legal incapacity, resignation or otherwise, of the Employer Trustee or Employee Trustee, a successor thereto shall be appointed as provided in Article II, Section 2, hereof. Any Trustee or Trustees shall have the right to resign upon tendering ten (10) days' written notice to the remaining Trustee or Trustees, to each of the Employers' Associations parties hereto, and to the Union.

SECTION 5. *Term of Office*—The Trustees shall serve for a term of four (4) years. The officers of the Board of Trustees shall consist of a Chairman and a Secretary-Treasurer. The officers shall be elected in January and they shall serve for one year or until the successors are duly elected and qualified.

SECTION 6. *Limitation of Liability of Successor Trustees*—No Successor Trustee shall be liable or responsible for any acts or defaults of any Co-Trustee or Predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee, nor be required to inquire into or take any notice of the prior administration of the Trust Fund.

ARTICLE 3

Contributions and Collections

SECTION 1. *Amount of Contributions*—Each employer shall make continuing and prompt payments to the Trust Fund in accordance with the Agreement between the parties as follows:

a. The amount of $2.00 per employee per week shall be contributed for each employee other than casual or emergency employees, covered under the Collective Bargaining Agreement for any week in which such employee performs any service for the employer, even when such service is not performed under the terms of the Collective Bargaining Agreement.

b. Payment shall be made on casual or emergency employees who are defined, for this purpose only, as employees who are not on a seniority list and such payment shall be made for the days actually worked at the rate of forty cents (40c) per day.

c. The Trustees of the Pension Trust shall take into consideration the problem of unexcused absences in establishing standards for determination of eligibility for retirement benefits.

d. If an employee is absent because of non-occupational illness or injury, the employer shall continue to make the required $2.00 contribution for a period of four weeks.

e. If an employee is absent because of occupational illness or injury, the required $2.00 contribution shall be made until the employee returns to work, or for a period of six months whichever is the shorter.

f. The obligation to make the above contributions shall continue during periods when the Collective Bargaining Agreement is being negotiated.

g. All leaves of absence, when granted by the employer, in addition to the requirements of the parties, shall be conditioned upon the employer and the employee making satisfactory arrangements for paying the $2.00 weekly contribution to the Pension Fund, and at all times the payment shall be made by the employer for the period of such granted leave of absence.

SECTION 2. *Time of Payment*—The Trustees shall, by regulation, fix the time of payment for contributions and shall send a copy of such regulations to each employer required to contribute.

SECTION 3. *Receipt of Payment and Other Property of Trust*—The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and annuity contracts and other assets and properties described or referred to in Article II and this Article III and to hold the same in Trust hereunder for the uses and purposes of the Trust herein created.

SECTION 4. *Collections and Enforcement of Payment*—The Trustees, in their fiduciary capacities, shall have the power to demand and collect, the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of and intervention in any legal proceeding that may be necessary or desirable to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps deemed necessary for such purpose.

SECTION 5. *Production of Records*—Each employer shall promptly furnish to the Trustees, on demand, the names of its employees, their Social Security numbers, the hours worked by each employee and such other information as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may by their representatives examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether (a) the Company is a Corporation and the names of all of its officers; (b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

SECTION 6. *Penalties*—The Trustees are hereby given the power to require the payment of liquidated damages in an amount to be fixed by the rules and regulations promulgated by them as hereinafter provided, for failure to make prompt payments to the Fund as provided for herein and in the collective bargaining agreement, and are hereby given the power to collect such damages, when assessed, in the same manner as they are given power to collect the contributions.

SECTION 7. *Guarantee Deposits*—The Trustees are given the power and authority, in their discretion, in appropriate cases, to require Employers, who are not members of any signatory Association, to deposit with the Trustees, in advance, as a guarantee for the payment of monthly contributions, an amount to be determined by the Trustees, as a condition to such Employer's participation herein, and are given the right to require that said guarantee be continuously maintained by such Employer as a condition to the continued participation herein.

ARTICLE 4

Powers and Duties of Trustees

SECTION 1. The Trustees shall have general supervision of the operation of the Trust and shall conduct the business and activities of the Trust according to this Trust Agreement.

SECTION 2. The Trustees shall hold, manage, care for and protect the Trust Fund and collect the income therefrom and contributions thereto.

SECTION 3. The Trustees shall have the power, in their sole discretion, to invest in such securities or other property as shall be permissible investments for Trustees in the State of Illinois, and may sell or otherwise dispose of such bonds or obligations at any time and from time to time as they so see fit; provided, however, the Trustees may, in their discretion, invest the Trust Fund or any part thereof in retirement annuity contracts, annuity contracts, retirement income con-

tracts, group contracts, and such other forms of contracts provided all such contracts are issued by legal reserve life insurance companies authorized to do business in the State of Illinois, as may be selected by the Trustees, for the purpose of providing for all or a part of the benefits provided under this Trust.

SECTION 4. All Trust Funds not invested shall be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits shall be made in the name of the Trust. All such funds shall be disbursed only by check or draft, signed by at least one Trustee representing the employers and one Trustee representing the Employees. No Trustee shall be liable in any manner for the failure of any depository selected by the Trustees, in good faith, and in the exercise of reasonable business judgment.

SECTION 5. The Trustees shall keep true and accurate books of account and a record of all their transactions, meetings, and the actions taken at such meetings or by informal action of the Trustees.

SECTION 6. The Trustees shall procure an audit of the books of the Trust by a Certified Public Accountant not less frequently than once each year and a copy of each such audit shall be furnished to each Trustee, the Employers, and the Union, and a copy of such audit shall be kept available for inspection by authorized persons during business hours at the office of the Trustees. The Trustees, in addition thereto, shall prepare a quarterly financial statement for the parties.

SECTION 7. All checks, drafts, vouchers or other withdrawals of funds from the Trust Fund shall be signed by the Employer Trustee and the Employee Trustee, provided, however, that the Trustees may establish a special bank account of limited amount out of which expenses of operation of the Trust may be paid on the signature of a Trustee or a duly authorized employee of the Trust.

SECTION 8. The Trustees shall incur no liability in acting upon any instrument, application, notice, request, signed letter, telegram, or other paper or document believed by them to be genuine and to contain a true statement of facts, and to be signed or sent to the proper person.

SECTION 9. Any Trustee may rely upon any instrument in writing purporting to have been signed by a majority of the Trustees as conclusive evidence of the fact that a majority of the Trustees have taken the action stated to have been taken in such instrument.

SECTION 10. No Trustee shall be liable for any action taken or omitted to be taken by him in good faith, nor for the wrongful acts of any agent, employee or attorney selected by the Trustees with reasonable care, nor for any act of commission or omission of any other Trustee.

SECTION 11. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of this Agreement. All rules and regulations adopted by majority action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust and all persons claiming any benefits hereunder.

SECTION 12. Any successor Trustee appointed in accordance with the provisions of this Agreement, upon accepting in writing the terms of this Trust, shall be vested with all of the rights, powers and duties of his predecessor.

SECTION 13. No party dealing with the Trustees shall be obliged (a) to see the application to the trust purposes herein stated of any money or property belonging to the Trust Fund, or (b) to see that the terms of this Agreement have been complied with, or (c) to inquire into the necessity or expediency of any act of the Trustees. Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon (a) that at the time of the delivery of said instrument the Trust was in full force and effect, (b) that the instrument was executed in accordance with the terms and conditions of this Agreement and (c) that the Trustees were duly authorized and empowered to execute the instrument.

SECTION 14. The receipt of the Trustees for any money or property or checks, after such checks are honored at the bank and paid to the Trust Fund received by the Trustees shall discharge the person or persons paying or transferring the same.

SECTION 15. The Trustees shall, by regulation, establish rules relating to payments of contributions by Employers for employees during periods of such employees' illness or disability and related matters.

SECTION 16. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law;

a. To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Trust Funds and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the employees involved.

b. To keep property and securities registered in the name of the Trustees or in the name of a nominee or nominees or in unregistered or bearer form without disclosure of any fiduciary relationship.

c. To establish and accumulate as part of the Trust Fund a reserve or reserves, adequate, in the opinion of the Trustees, to carry out the purposes of such Trust.

d. To pay out of the funds of the Trust all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Trust Fund or any money, property or securities forming a part thereof.

e. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

SECTION 17. The Trustees shall use and apply the Trust Fund for the following purposes:

a. To pay or provide for the payment of all reasonable and necessary expenses of collecting the contributions and administering the affairs of this Trust, including the employment of such administrative, legal, actuarial, expert and clerical assistance, as may be reasonably necessary, the leasing of such premises as may be necessary for the operation of the affairs of the Trust, and the purchase or leasing of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate to the performance of their duties.

b. To pay or provide for the payments of retirement benefits to eligible Employees in accordance with the terms, provisions and conditions of the pension plan to be formulated and agreed upon hereunder by the Trustees.

SECTION 18. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the pension plan, and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

SECTION 19. The Trustees, by resolution, shall provide for fidelity bonds, in such amounts as they may determine, for their employees and for the Trustees who shall be authorized to withdraw moneys from the Trust.

ARTICLE 5

Controversies and Disputes

SECTION 1. In any controversy, claim, demand, suit at law, or other proceeding between any member, beneficiary, or any other person and the Trustees, the Trustee shall be entitled to rely upon any facts appearing in the records of the Trustees, any instruments on file with the Trustees, with the Union or with the Employers, any facts certified to the Trustees by the Union or the Employers, any facts which are of public record, and any other evidence pertinent to the issue involved.

SECTION 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Trust Fund or the operation thereof, whether as to any claim for any benefits preferred by any member, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Board of Trustees for decision, and the decision of a majority of the Board, if made in good faith, shall be binding upon all persons dealing with the Trust Fund or claiming any benefit thereunder.

SECTION 3. The Trustees may, in their sole discretion, compromise or settle any claim or controversy in such manner as they think best, and any majority decision made by the Board of Trustees in compromise or settlement of a claim or controversy, or any compromise or settlement agreement entered into by the Trustees, shall be conclusive and binding on all Parties interested in this Trust.

ARTICLE 6

Operation of Board of Trustees

SECTION 1. *Officers*—The officers of the Board of Trustees shall consist of a chairman and a secretary-treasurer. The officers shall be elected in January and they shall serve for one year or until their successors are duly elected and qualify.

SECTION 2. *Quorum*—A quorum of the Trustees for the transaction of business, except as otherwise specifically provided herein, shall consist of at least two Trustees, one of whom shall be representative of the Employers and one of whom shall be representative of the Employees. It is the intention of the parties that at any time any vote or other action is taken by the Board of Trustees, that the number of Union Trustees and Employer Trustees qualified to act, vote and constitute a quorum shall always be equal.

SECTION 3. *Power to Act in Case of Vacancy*—No vacancy or vacancies in the Board of Trustees shall impair the power of the remaining Trustees, acting in the manner provided by this Agreement, to administer the affairs of the Trust notwithstanding the existence of such vacancy or vacancies.

SECTION 4. *Expenses*—All proper and necessary expenses incurred by any Trustee shall be paid for from the funds of the Trust Fund.

SECTION 5. *Meetings*—A regular annual meeting of the Trustees shall be held during the month of January each year at a date fixed by the Trustees. The Chairman, the Secretary-Treasurer, or any two Trustees, may call a meeting of the Trustees at any time by giving at least five (5) days' written notice of the time and place thereof to each Trustee. There shall also be meetings at not

less than three month intervals. Such notice may be delivered in person, by mail or by telegram. A meeting so called shall be adjourned for a reasonable period upon the request of any Trustee showing a justifiable cause therefor to the Trustees. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto. In the event that the Trustees shall concur in writing upon any proposition no meeting thereon need be held by the Trustees. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by them.

ARTICLE 7

Establishment of Pension Plan

SECTION 1. *Formulation of Plan*—Employer Trustee and Employee Trustee, together with the Impartial Trustee, shall formulate a plan for the payment of such retirement pension benefits, permanent disability pension benefits and death benefits as feasible and shall begin active operation of such plan as soon as possible. Said Trustees shall draft procedures, regulations and conditions for the operation of the plan, including by way of illustration and not limitation: Conditions of eligibility for covered employees, procedure for claiming benefits, schedules of type and amount of benefits to be paid, and procedure for the distribution of benefits.

SECTION 2. *Assistance for Drafting Plan*—The Trustees may consult with or employ such actuarial and other experts as they deem necessary for the proper formulation and operation of said pension plan.

SECTION 3. *Copies of Plan & Notice*—A copy of such pension plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees and one (1) copy of such plan shall be distributed to the Union and to each employer.

SECTION 4. *Amendment of Plan*—The pension plan may be amended by the Trustees from time to time provided that such amendments comply with the purposes as set forth in this Trust Agreement. A copy of each amendment of the pension plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees and one copy thereof shall be distributed to the union and to each employer, or employer signatories to this trust agreement.

ARTICLE 8

Spendthrift Clause

SECTION 1. All benefit payments to employees, if and when such payments shall become due, shall, except as to persons under legal disability, be paid to such employees in person and shall not be liable or taken for any obligation of such employees.

ARTICLE 9

Payments to Persons Under Legal Disability

SECTION 1. In case any benefit payments hereunder become payable to a person under legal disability, or to a person not adjudicated incompetent but, by reason of mental or physical disability, in the opinion of the Trustees, is unable to administer properly such payments, then such payments may be paid out by the Trustees for the benefit of such person in such of the following ways as they think best, and the Trustees shall have no duty or obligation to see that the Funds are used or applied for the purpose or purposes for which paid:

a. directly to any such person;

b. to the legally appointed guardian or conservator of such person;

c. to any spouse, parent, brother or sister of such person for his welfare, support and maintenance;

d. by the Trustees using such payments directly for the support, maintenance and welfare of any such person.

ARTICLE 10

Amendment of Agreement

It is anticipated that in the administration of this Trust, conditions may arise that are not foreseen at the time of the execution of this Agreement, and it is the intention of the parties that the power of amendment, which is hereinafter given, be exercised in order to carry out the provisions of this Trust, among which is to pay the largest benefits possible which are consistent with the number of members becoming and likely to become eligible for such payments, the amount of funds which are available and which will probably become available, and the following of sound actuarial practice. Therefore, the power is given to the Trustees to amend this Agreement by majority vote, at any time and from time to time, and all parties to the Trust and all persons claiming an interest thereunder shall be bound thereby, and no member, employee member, beneficiary or any other person shall have any vested interest or right in the Trust Fund or in any payment from the Trust Fund, and the Trustees have full authority to amend, repeal, add to, or take away any right or payment retroactive or otherwise that they deem proper for the preservation of this Trust; providing, however, in no event shall the Trust Fund be used for any other purpose other than the purpose set forth in this Trust Agreement, and for the purposes of paying the necessary expenses incurred in the administration of this Trust.

ARTICLE 11

Termination of Trust

SECTION 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

a. In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to become due under this Agreement to persons already drawing benefits.

b. In the event there are no individuals living who can qualify as employees hereunder.

SECTION 2. In the event this Trust shall terminate for any of the reasons set forth in Section 1 of this Article 11 hereof, the Trustees shall distribute the Trust Fund in the following manner:

a. The Trustees shall, to the extent permitted by the Trust Fund, pay over and distribute to such employees as are receiving retirement benefits under the provisions of this Agreement, the sum equal to the actuarial value of unpaid benefits computed in accordance with the Carlisle Table of Mortality. In the event the Trust Fund is inadequate to make such payments in full, all such payments shall be decreased proportionately to the end that all such employees shall receive pro rata payments.

b. In the event there are any moneys remaining in the Trust Fund after the payments provided for in subsection a. of this Section, then in that event such moneys shall forthwith be distributed to all employees who have been employed for at least fifteen (15) years, in equal shares.

SECTION 3. In the event the Trust hereby created is subject to the Rule against Perpetuities as existing in the law of the State of Illinois at the time in this sentence fixed for termination of the Trust, the Trust shall terminate twenty (20) years after the date of the death of the last of the members of any Union covered by this Agreement at the time of the execution of this Agreement, otherwise this Trust shall have perpetual existence except as provided in the next preceding paragraph hereof.

ARTICLE 12

Extension of Plan

SECTION 1. The Trustees are authorized to extend the coverage of this Agreement and Trust to such other employers and employees as such Trustees shall agree upon, provided such employers and employees are required to conform to the terms and conditions of the trust and to make the same rate of payments required of the Employers herein.

ARTICLE 13

Vesting of Rights

SECTION 1. No employee, or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund; provided, however, the rights of any person who has become eligible for benefits hereunder by fully meeting the requirements of this Trust Agreement shall not be affected, changed, or altered by any amendment to this Trust Agreement, unless the Trust Fund, in the opinion of the Trustees, is inadequate to meet the payments due, in which event the Trustees shall determine whether such benefits shall be reduced or the Trust terminated.

ARTICLE 14

Miscellaneous

SECTION 1. In no event shall the Employers, directly or indirectly, receive any refund or contributions made by them to the Trust, except in case of bona fide mistake, nor directly or indirectly participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund. Upon transfer to the Trustees, all responsibilities of the Employers for each contribution shall cease, and the Employers shall have no responsibilities for the acts of the Trustees. No employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust Fund, except as may be expressly provided for in this Agreement.

SECTION 2. The Union or the Employer may, at any time, demand of the Trustees an accounting with respect to any and all accounts upon agreement to pay necessary expenses thereof. The Trustees shall be entitled, at any time, to have a judicial settlement of their accounts and judicial determination of any questions in connection with their duties and obligations under this Trust, or in connection with the administration or distribution thereof. The Trustees may, from time to time, file with the Union and the Employer a statement of their accounts thereunder, and the Union and the Employer may enter into an Agreement approving and allowing such statement or accounting, and any such Agreement shall be binding and conclusive upon all persons whomsoever, and shall constitute a full discharge and acquittance of the Trustees with respect to the matters set forth in such statement or accounting. Any Trustee who has resigned, been removed from office or not been reappointed shall execute all instruments necessary to transfer the Trust Fund.

SECTION 3. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until an adjudication of such question or dispute, satisfactory to the Trustees, in their sole discretion,

shall have been made, or the Trustees shall have been adequately indemnified against loss to their satisfaction.

SECTION 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, the Trustees are hereby given the power to add to the contribution of any Employer a substantial penalty to be fixed by the rules and regulations promulgated by them as hereinafter provided, for failure to make prompt payments to the Fund as provided for herein and in the collective bargaining agreement, and are hereby given the power to collect such penalty, when assessed, in the same manner as they are given power to collect the contributions. Failure to pay or comply with any provision of this Trust Agreement, or any rule or regulation made by the Trustees, shall be considered a violation of the terms and conditions of the employment agreement with any Employer.
The Trustees shall have the right to request the Union to undertake the obligation of assisting the Trustees in the collection of contributions to the Trustees from all Employers of members of the Union within the jurisdiction outlined above.

SECTION 5. Where used in this Agreement, words in the masculine shall be read and construed as in the feminine, and words in the singular shall be read and construed as though used in the plural, in all cases where such construction would so apply.

SECTION 6. The Article titles are included solely for convenience and shall, in no event, be construed to affect or modify any part of the provisions of this Agreement or be construed as part thereof.

SECTION 7. This Agreement shall in all respects be construed according to and be governed by the laws of the State of Illinois.

ARTICLE 15

Recordation of Agreement

It shall be the duty of the Trustees to record this Agreement in the office of the Recorder of Deeds of Cook County, Illinois, within fifteen (15) days after the execution thereof, and thereafter to record any amendments thereto within fifteen (15) days after any such amendment is adopted in accordance with the terms hereof.

ARTICLE 16

Savings Clause

Should any provision of this Declaration of Trust be held to be unlawful or unlawful as to any person or instance, such fact shall not adversely affect the other provisions herein contained or the application of said provisions to any other person or instance, unless such illegality shall make impossible the functioning of the plan. No trustee shall be held liable for any act done or performed in pursuance of any provision hereof prior to the time such act or provision shall be held unlawful by a court of competent jurisdiction.

IN WITNESS WHEREOF, the Union and the Employers have caused this Agreement to be executed by its President and attested by its Secretary, and the Trustees, in order to evidence their acceptance of the Trust hereby imposed have caused this Agreement to be executed this

day of , A. D. 195 .

APPROVED:

(Union)

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION and PLATFORM WORKERS' UNION, LOCAL 705, an affiliate of the International Brotherhood of Teamsters (AFL)

.....

.....

.....

(Employers)

ILLINOIS MOTOR TRUCK OPERATORS ASSN.

BY.....

CENTRAL MOTOR FREIGHT ASSOCIATION

The Trustees

BY.....

CARTAGE EXCHANGE OF CHICAGO

BY.....

Exhibit 1B

Amended Trust Agreement

(See Opposite) ☞

LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS PENSION TRUST FUND

AMENDED TRUST AGREEMENT

The undersigned duly appointed, qualified and acting Trustees of Local 705 International Brotherhood of Teamsters Pension Trust Fund existing under and by virtue of an Agreement and Declaration of Trust (hereinafter referred to as "Agreement" or "Trust Agreement") entered into as of January 1, 1955, by and between Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association commonly known as a labor organization (therein referred to as the "Union"), the Illinois Motor Truck Operators Association, Central Motor Freight Association and Cartage Exchange of Chicago, for and on behalf of themselves, their then and future constituent members, and such other Employers who may become parties thereto (therein collectively referred to as the "Employer"), and H. E. Wood, Louis F. Peick and Fred Tiedt (therein designated as the original Trustees to represent the Union in accordance with the provisions thereof), and John Viking, Thomas O. Smith and George W. Johnson (therein designated as the original Trustees to represent the Employer in accordance with the provisions thereof) pursuant to Article 10 of said Trust Agreement, hereby amend the same, effective January 1, 1969, to read as follows:

WITNESSETH:

WHEREAS, the Union and the Employer, believing that it was in the best interests of Employees represented by the Union (as those terms are hereinafter defined) and the families and dependents of such Employees, to provide for retirement and related benefits, therefore established Local 705 International Brotherhood of Teamsters Pension Trust Fund (Trust Fund); and

WHEREAS, the Union and the Employer have heretofore entered into written Collective Bargaining Agreement(s) under the terms of which it is provided that the Employer make certain payments to said Trust Fund and therein further specifying the basis upon which such payments are to be made;

NOW, THEREFORE, for and in consideration of the premises and of the mutual covenants and agreements herein contained, the Union and the Employer hereby accept and adopt all of the provisions herein contained, and the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees of and for the Trust Fund, with the powers, duties, uses and purposes as hereinafter set forth:

ARTICLE 1

Definition of Terms

SECTION 1. *Employer*—The term "Employer" as used herein shall mean any employer association or individual employer who heretofore has executed or who hereafter executes a collective bargaining agreement with the Union or any Local Union affiliated with said International Brotherhood of Teamsters therein obligating the Employer to make certain payments to the Trust Fund and specifying the basis upon which said payments are to be made; provided, further, however, that such Employer satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Trust Agreement and all amendments made thereto from time to time.

SECTION 2. *Union*—The term "Union" as used herein shall mean Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, an affiliate of said International Brotherhood of Teamsters.

SECTION 3. *Employees*—The term "Employees" as used herein shall include:

a. A person working within the jurisdiction of the Union or for an Employer who on the Employee's behalf makes contributions to the Trust Fund;

b. All persons employed by, and officers of, the Union and persons employed by the Trust Fund. The Union and Trust Fund shall be deemed an Employer as to such persons under this Trust Agreement and shall make the same payments to the Trust Fund upon the basis specified in collective bargaining agreements in force from time to time between the Union and Employer covering cartage drivers (said collective bargaining agreement presently in force is known as the "Joint Area Cartage Agreement"). Neither the Union nor Trust Fund shall participate as an Employer in the appointment or selection of Employer Trustees under the provisions of Article 2, Section 2 and related provisions of this Trust Agreement.

SECTION 4. *Trustees*—The term "Trustees" as used herein shall mean the Trustees designated in the Trust Agreement together with their successors designated and appointed in accordance with the terms of said Trust Agreement.

SECTION 5. *Trust Fund*—The term "Trust Fund" shall include and refer to all of its property of any kind and nature whatsoever.

SECTION 6. *Employer Contributions*—The term "Employer Contributions" as used herein shall mean payments made by Employers to the Trust Fund herein created.

SECTION 7. *Military Service of the United States*—The term "Military Service of the United States" shall refer to active service in the Armed Forces of the United States, including active service in the Regular or Reserve components of the Army, Navy, Marine Corps, Air Force, and Coast Guard.

SECTION 8. *Period of National Emergency*—The term "Period of National Emergency" shall include any period during which the United States is at war with another Country or during which the President of the United States or the Congress of the United States has declared the United States to be in a National Emergency or state of war or during which the United States is engaged in "police" or other actions pursuant to the United Nations Charter or similar treaties or agreements; and any person serving in the Military Service of the United States by reason of involuntary induction through a Selective Service System or similar system of induction shall be regarded as serving during a period of National emergency.

ARTICLE 2

Creation of Trust Fund and Appointment of Trustees

SECTION 1. *Designation*—The Union and the Employers hereby create and establish, with the Trustees herein provided for, a Trust, to be known as LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS PENSION TRUST FUND, which shall be comprised of assets initially derived from Employer contributions made pursuant to the Collective Bargaining Agreement between the parties (plus any additional sum or sums, from Employer contributions which may hereafter be agreed upon by the Employers and the Union and set forth in written collective bargaining agreements), together with all insurance and annuity contracts (including dividends, refunds, or other sums payable to the Trustees on account of such insurance and annuity contracts) and all investments made and held by the Trustees on account of such insurance and annuity contracts, all investments made and held by the Trustees, all moneys received by the Trustees as contributions or as income from investments made and held by the Trustees or otherwise, and any other property received and held by the Trustees for the uses, purposes and trusts, set forth in this Agreement and Declaration of Trust where any of the foregoing is derived from the Employer contributions.

SECTION 2. *Trustees*—There are hereby designated six Trustees consisting of three persons representative of the Employees and three persons representative of the Employer. The Employer Trustees shall be designated by the Employers' Associations. The Employee Trustees shall be designated by the Union, and shall be known as the "Union Trustees."

SECTION 3. *Impartial Trustee*—Should a deadlock occur the Trustees shall appoint a neutral person empowered to break such deadlock within a reasonable length of time, failing which, an impartial umpire to decide such dispute, shall on petition of either the Union or the Employer Trustees be appointed by the District Court of the United States in Chicago, as provided by law.

SECTION 4. *Vacancies in office of Trustees*—In case of vacancies by death, legal incapacity, resignation or otherwise, of the Employer Trustee or Union Trustee, a successor thereto shall be appointed as provided in Article II, Section 2, hereof. Any Trustee or Trustees shall have the right to resign upon tendering ten (10) days' written notice to the remaining Trustee or Trustees, to each of the Employers' Associations parties hereto, and to the Union.

SECTION 5. *Term of Office*—The Trustees shall serve for a term of ten (10) years or until their successors are duly appointed and qualified.

SECTION 6. *Limitation of Liability of Successor Trustees*—No Successor Trustee shall be liable or responsible for any acts or defaults of any Co-Trustee or Predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee, nor be required to inquire into or take any notice of the prior administration of the Trust Fund.

ARTICLE 3

Contributions and Collections

SECTION 1. *Amount of Contributions*—Payments to the Trust Fund by an Employer on behalf of an Employee shall be made in the amount and upon the basis specified in the then existing:

a. Written Collective Bargaining Agreement between the Union and the Employer; and

b. Rules and Regulations promulgated by the Trustees.

SECTION 2. *Time of Payment*—The Trustees shall, by regulation, fix the time of payment for contributions and shall send a copy of such regulations to each Employer required to contribute.

SECTION 3. *Receipt of Payment and Other Property of Trust*—The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and annuity contracts and other assets and properties described or referred to in Article 2 and this Article 3 and to hold the same in Trust hereunder for the uses and purposes of the Trust herein created.

SECTION 4. *Collections and Enforcement of Payment*—The Trustees, in their fiduciary capacities, shall have the power to demand and collect, the contributions of the Employers to the Fund. Said

Trustees shall take such steps, including the institution and prosecution of and intervention in any legal proceeding that may be necessary or desirable to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps deemed necessary for such purpose. The failure, however, of the Trustees or the Union to take any action to enforce collection of such contribution shall not make either of them liable for such failure to any person affected thereby, and each Employee shall be obligated to inquire and make certain that his Employer is not delinquent in making contributions to the Fund.

SECTION 5. *Production of Records*—Each Employer shall promptly furnish to the Trustees on demand, the names of its Employees, their Social Security numbers, the hours worked by each Employee and such other information as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may by their representatives examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether (a) the Employer is a Corporation and the names of all of its officers; (b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

SECTION 6. *Penalties*—The Trustees are hereby given the power to require the payment of liquidated damages in an amount to be fixed by the rules and regulations promulgated by them as hereinafter provided, for failure to make prompt payments to the Fund as provided for herein and in the Collective Bargaining Agreement, and are hereby given the power to collect such damages, when assessed, in the same manner as they are given power to collect the contributions.

SECTION 7. *Guarantee Deposits*—The Trustees are given the power and authority, in their discretion, in appropriate cases, to require Employers to deposit with the Trustees, in advance, (as a guarantee for the payment of monthly contributions, and amount to be determined by the Trustees,) as a condition to such Employer's participation herein, and are given the right to require that said guarantee be continuously maintained by such Employer as a condition to the continued participation herein.

ARTICLE 4

Powers and Duties of Trustees

SECTION 1. The Trustees shall have general supervision of the operation of the Trust and shall conduct the business and activities of the Trust according to this Trust Agreement.

SECTION 2. The Trustees shall hold, manage, care for and protect the Trust Fund and collect the income therefrom and contributions thereto.

SECTION 3. The Trustees shall have the power, in their sole discretion, to invest in such securities or other property (real or personal) as may be permissible investments for Trustees in the State of Illinois and may sell or otherwise dispose of such securities or other property at any time and from time to time as they see fit; provided, further, the Trustees in their discretion may invest the Trust Fund or any part thereof in personal property, real property and improvements thereto and thereon, retirement annuity contracts, retirement income contracts, group contracts, and such other forms of contracts, provided all such contracts are issued by a legal reserve life insurance company authorized to do business in the State of Illinois as may be selected by the Trustees for purposes of providing for all or a part of the benefits provided under this Trust.

SECTION 4. All Trust Funds not invested shall be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits shall be made in the name of the Trust. All such funds shall be disbursed only by check or draft, signed by at least one Trustee representing the Employers and one Trustee representing the Employees. No Trustee shall be liable in any manner for the failure of any depository selected by the Trustees, in good faith, and in the exercise of reasonable business judgment.

SECTION 5. The Trustees shall keep true and accurate books of account and a record of all their transactions, meetings, and the actions taken at such meetings or by informal action of the Trustees.

SECTION 6. The Trustees shall procure an audit of the books of the Trust by a Certified Public Accountant not less frequently than once each year and a copy of each such audit shall be furnished to each Trustee, the Employers, and the Union, and a copy of such audit shall be kept available for inspection by authorized persons during business hours at the office of the Trustees. The Trustees, in addition thereto, shall prepare a semi-annual financial statement for the parties.

SECTION 7. All checks, drafts, vouchers or other withdrawals of funds from the Trust Fund shall be signed by the Employer Trustee and the Union Trustee, provided, however, that the Trustees may establish a special bank account of limited amount out of which expenses of operation of the Trust may be paid on the signature of a Trustee or a duly authorized employee of the Trust.

SECTION 8. The Trustees shall incur no liability in acting upon any instrument, application, notice, request, signed letter, telegram, or other paper or document believed by them to be genuine and to contain a true statement of facts, and to be signed or sent to the proper person.

SECTION 9. Any Trustee may rely upon any instrument in writing purporting to have been signed by a majority of the Trustees as conclusive evidence of the fact that a majority of the Trustees have taken the action stated to have been taken in such instrument.

SECTION 10. No Trustee shall be liable for any action taken or omitted to be taken by him in good

faith, nor for the wrongful acts of any agent, employee or attorney selected by the Trustees with reasonable care, nor for any act of commission or omission of any other Trustee.

SECTION 11. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of this Agreement. All rules and regulations adopted by majority action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust and all persons claiming any benefits hereunder.

SECTION 12. Any successor Trustee appointed in accordance with the provisions of this Agreement, upon accepting in writing the terms of this Trust, shall be vested with all of the rights, powers and duties of his predecessor.

SECTION 13. No party dealing with the Trustees shall be obliged (a) to see the application to the trust purposes herein stated of any money or property belonging to the Trust Fund, or (b) to see that the terms of this Agreement have been complied with, or (c) to inquire into the necessity or expediency of any act of the Trustees. Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon (a) that at the time of the delivery of said instrument the Trust was in full force and effect, (b) that the instrument was executed in accordance with the terms and conditions of this Agreement and (c) that the Trustees were duly authorized and empowered to execute the instrument.

SECTION 14. The receipt of the Trustees for any money or property or checks, after such checks are honored at the bank and paid to the Trust Fund received by the Trustees shall discharge the person or persons paying or transferring the same.

SECTION 15. The Trustees shall, by regulation, establish rules relating to payments of contributions by Employers for Employees during periods of such Employees' illness or disability and related matters.

SECTION 16. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law;

a. To enter into any and all contracts and agreements for carrying out the terms of this Agreement and for the administration of the Trust Funds and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the Employees involved.

b. To keep property and securities registered in the name of the Trustees or in the name of a nominee or nominees or in unregistered or bearer form without disclosure of any fiduciary relationship.

c. To establish and accumulate as part of the Trust Fund a reserve or reserves, adequate, in the opinion of the Trustees, to carry out the purposes of such Trust.

d. To pay out of the funds of the Trust all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Trust Fund or any money, property or securities forming a part thereof.

e. To employ and compensate from the Trust Fund an investment agent and delegate to such investment agent all of the Trustees' powers, duties and responsibilities regarding the purchase, sale, exchange, disposition, voting and management of such of the assets of the Trust Fund as are deposited with the investment agent from time to time; provided, however, that such investment agent shall be a national or state bank or trust company authorized to conduct a trust business in Illinois, having a capital, surplus and undivided profit of not less than $25,000,000.00; and provided, further, that such investment agent or the Trustees may terminate such employment at any time upon reasonable notice to the other; and provided, further, that none of the assets of the Trust Fund shall be invested in securities or other property of any person, firm or corporation engaged in the trucking industry.

f. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

SECTION 17. The Trustees shall use and apply the Trust Fund for the following purposes:

a. To pay or provide for the payment of all reasonable and necessary expenses of collecting the contributions and administering the affairs of this Trust, including the employment of such administrative, legal, actuarial, expert and clerical assistance, as may be reasonably necessary, the acquiring by lease, ownership or otherwise, of such premises as may be necessary for the operation of the affairs of the Trust, and the purchase or leasing of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate to the performance of their duties.

b. To pay or provide for the payment of benefits (under a plan as formulated by the Trustees under Article 7, Section 1 of this Agreement) to Employees (their families and dependents) and to provide like payments of benefits to other Employees (their families and dependents) who are not members of the

Union but are members of any other International Brotherhood of Teamsters Local Union whose Employer has become obligated under a written Collective Bargaining Agreement with said other Teamster Local Union to make contributions to the Trust Fund and whose contributions, when made and accepted by the Trustees, shall bind such an Employer to the Trust Agreement, as amended from time to time and the Rules and Regulations promulgated thereunder from time to time.

SECTION 18. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the pension plan, and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

SECTION 19. The Trustees, by resolution, shall provide for fidelity bonds, in such amounts as they may determine, for their Employees and for the Trustees who shall be authorized to withdraw moneys from the Trust.

SECTION 20. The Trustees may employ an Administrative Director and others who may be Trustees, to assist them in the administration, supervision and operation of the Trust and the conduct of the business and activities of the Trust, according to this Trust Agreement, and provide for reasonable compensation to be paid the said Administrator and others, but in no event shall such hire be for a period in excess of fifteen (15) years.

SECTION 21. The Trust Fund shall indemnify and save harmless any person (including his executors, administrators, heirs, legatees or legal representatives) who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was an officer, trustee, employee, or agent of the Trust Fund, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, proceedings or investigation, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Trust Fund, and with respect to any criminal action or proceedings had no reasonable cause to believe that his conduct was unlawful, irrespective of the final outcome of such action or proceedings.

ARTICLE 5

Controversies and Disputes

SECTION 1. In any controversy, claim, demand, suit at law, or other proceeding between any member, beneficiary, or any other person and the Trustees, the Trustees shall be entitled to rely upon any facts appearing in the records of the Trustees, any instruments on file with the Trustees, with the Union or with the Employers, any facts certified to the Trustees by the Union or the Employers, any facts which are of public record, and any other evidence pertinent to the issue involved.

SECTION 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Trust Fund or the operation thereof, whether as to any claim for any benefits preferred by any Employee, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or this Agreement, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees for decision, and the decision of a majority of the Trustees, present and voting, if made in good faith, shall be binding upon all persons dealing with the Trust Fund or claiming any benefit thereunder.

SECTION 3. The Trustees may, in their sole discretion, compromise or settle any claim or controversy in such manner as they think best, and any majority decision made by the Trustees in compromise or settlement of a claim or controversy, or any compromise or settlement agreement entered into by the Trustees, shall be conclusive and binding on all Parties interested in this Trust.

ARTICLE 6

Operation of Trustees

SECTION 1. *Officers*—The officers of the Trust Fund shall consist of a chairman and a secretary-treasurer who shall be Trustees. The officers shall be elected in January and they shall serve for one year or until their successors are duly elected and qualify.

SECTION 2. *Quorum*—A quorum of the Trustees for the transaction of business, except as otherwise specifically provided herein, shall consist of at least two Trustees, one of whom shall be representative of the Employers and one of whom shall be representative of the Union. It is the intention of the parties that at any time any vote or other action is taken by the Trustees, that the number of Union Trustees and Employer Trustees qualified to act, vote and constitute a quorum shall always be equal.

SECTION 3. *Power to Act in Case of Vacancy*—No vacancy or vacancies in the office of Trustees shall impair the power of the remaining Trustees, acting in the manner provided by this Agreement, to administer the affairs of the Trust notwithstanding the existence of such vacancy or vacancies.

SECTION 4. *Expenses*—All proper and necessary expenses incurred by any Trustee shall be paid for from the funds of the Trust Fund.

SECTION 5. *Meetings*—A regular annual meeting of the Trustees shall be held during the month of February or March each year at a date fixed by the Trustees. The Chairman, the Secretary-

Treasurer, or any two Trustees, may call a meeting of the Trustees at any time by giving at least five (5) days' written notice of the time and place thereof to each Trustee. There shall also be meetings at six-month intervals. Such notice may be delivered in person, by mail or by telegram or conveyed by telephone. A meeting so called shall be adjourned for a reasonable period upon the request of any Trustee showing a justifiable cause therefor to the other Trustees. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto. In the event that the Trustees shall concur in writing upon any proposition and then no meeting thereon need be held by the Trustees. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by them.

ARTICLE 7

Establishment of Pension Plan

SECTION 1. *Formulation of Plan*—The Trustees shall formulate a plan for the payment of such retirement pension benefits, disability pensions and death benefits as feasible and shall begin operation of such plan as soon as they deem it possible and necessary. Said Trustees shall draft procedures, regulations and conditions for the operation of the plan, including, by way of illustration and not limitation: conditions of eligibility for covered Employees, procedure for claiming benefits, schedules of type and amount of benefits to be paid and procedures for distribution of benefits.

SECTION 2. *Assistance for Drafting Plan*—The Trustees may consult with or employ such actuarial and other experts as they deem necessary for the proper formulation and operation of said pension plan.

SECTION 3. *Copies of Plan & Notice*—A copy of such pension plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees and one (1) copy of such plan shall be distributed to the Union and to each Employer.

SECTION 4. *Amendment of Plan*—The pension plan may be amended by the Trustees from time to time provided that such amendments comply with the purposes as set forth in this Trust Agreement. A copy of each amendment of the pension plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees and one copy thereof shall be distributed to the Union and to each Employer.

ARTICLE 8

Spendthrift Clause

SECTION 1. *No Assignment or Attachment of Benefits*—Benefits payable under this plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, including any such liability which is for alimony or other payments for support of a spouse or former spouse or for any relative of the Employee prior to actually being received by the person entitled to the benefit under the terms of any Plan, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits hereunder shall be void. The Trust Fund shall not in any manner be liable for or subject to the debts, contracts, liabilities, engagements or torts of any person entitled to benefits hereunder.

ARTICLE 9

Payments to Persons Under Legal Disability

SECTION 1. In case any benefit payments hereunder become payable to a person under legal disability, or to a person not adjudicated incompetent but, by reason of mental or physical disability, in the opinion of the Trustees, is unable to administer properly such payments, then such payments may be paid out by the Trustees for the benefit of such person in such of the following ways as they think best, and the Trustees shall have no duty or obligation to see that the Funds are used or applied for the purpose or purposes for which paid:

a. directly to any such person;

b. to the legally appointed guardian or conservator of such person;

c. to any spouse, parent, brother or sister of such person for his welfare, support and maintenance;

d. by the Trustees using such payments directly for the support, maintenance and welfare of any such person.

ARTICLE 10

Amendment of Agreement

It is anticipated that in the administration of this Trust, conditions may arise that are not foreseen at the time of the execution of this Agreement, and it is the intention of the parties that the power of amendment, which is hereinafter given, be exercised in order to carry out the provisions of this Trust, among which is to pay the largest benefits possible which are consistent with the number of members becoming and likely to become eligible for such payments, the amount of funds which are available and which will probably become available, and the following of sound actuarial

practice. Therefore, the power is given to the Trustees to amend this Agreement by majority vote, at any time and from time to time, and all parties to the Trust and all persons claiming an interest thereunder shall be bound thereby, and no member, employee member, beneficiary or any other person shall have any vested interest or right in the Trust Fund or in any payment from the Trust Fund, and the Trustees have full authority to amend, repeal, add to, or take away any right or payment retroactive or otherwise that they deem proper for the preservation of this Trust; providing, however, in no event shall the Trust Fund be used for any other purpose other than the purpose set forth in this Trust Agreement, and for the purposes of paying the necessary expenses incurred in the administration of this Trust.

ARTICLE 11

Termination of Trust

SECTION 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

a. In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to become due under this Agreement to persons already drawing benefits.

b. In the event there are no individuals living who can qualify as Employees hereunder.

SECTION 2. In the event this Trust shall terminate for any of the reasons set forth in Section 1 of this Article 11 hereof, the Trustees shall distribute the Trust Fund in the following manner:

a. The Trustees shall, to the extent permitted by the Trust Fund, pay over and distribute to such Employees as are receiving retirement benefits under the provisions of this Agreement, the sum equal to the actuarial value of unpaid benefits computed in accordance with the Carlisle Table of Mortality. In the event the Trust Fund is inadequate to make such payments in full, all such payments shall be decreased proportionately to the end that all such Employees shall receive pro rata payments.

b. In the event there are any moneys remaining in the Trust Fund after the payments provided for in subsection a. of this Section, then in that event such moneys shall forthwith be distributed to all Employees who have been employed for at least fifteen (15) years in equal shares.

SECTION 3. In the event the Trust hereby created is subject to the Rule against Perpetuities as existing under the law of the State of Illinois at the time in this sentence fixed for termination of the Trust, the Trust shall terminate twenty (20) years after the date of the death of the last of the members of any Union covered by this Agreement at the time of the execution of this Agreement, otherwise this Trust shall have perpetual existence except as provided in the next preceding paragraph hereof.

ARTICLE 12

Extension of Plan

SECTION 1. The Trustees are authorized to extend the coverage of this Agreement and Trust to such other Employers and Employees as such Trustees shall agree upon, provided such Employers and Employees are required to conform to the terms and conditions of the Trust and to make the same rate of payments required of the Employers herein.

ARTICLE 13

Vesting of Rights

SECTION 1. No Employee, or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund; provided, however, the rights of any person who has become eligible for benefits hereunder by fully meeting the requirements of this Trust Agreement shall not be affected, changed, or altered by any amendment to this Trust Agreement, unless the Trust Fund, in the opinion of the Trustees, is inadequate to meet the payments due, in which event the Trustees shall determine whether such benefits shall be reduced or the Trust terminated.

ARTICLE 14

Miscellaneous

SECTION 1. In no event shall the Employers, directly or indirectly, receive any refunds of contributions made by them to the Trust, except in case of bona fide mistake, nor directly or indirectly participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund. Upon transfer to the Trustees, all responsibilities of the Employers for each contribution shall cease, and the Employers shall have no responsibilities for the acts of the Trustees. No Employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust Fund, except as may be expressly provided for in this Agreement.

SECTION 2. The Union or the Employer may, at any time, demand of the Trustees an accounting with respect to any and all accounts upon agreement to pay necessary expenses thereof. The Trustees shall be entitled, at any time, to have a judicial settlement of their accounts and judicial

determination of any questions in connection with their duties and obligations under this Trust, or in connection with the administration or distribution thereof. The Trustees may, from time to time, file with the Union and the Employer a statement of their accounts thereunder, and the Union and the Employer may enter into an Agreement approving and allowing such statement or accounting, and any such Agreement shall be binding and conclusive upon all persons whomsoever, and shall constitute a full discharge and acquittance of the Trustees with respect to the matters set forth in such statement or accounting. Any Trustee who has resigned, been removed from office or not been reappointed shall execute all instruments necessary to transfer the Trust Fund.

SECTION 3. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until an adjudication of such question or dispute, satisfactory to the Trustees, in their sole discretion, shall have been made, or the Trustees shall have been adequately indemnified against loss to their satisfaction.

SECTION 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, the Trustees are hereby given the power to add to the contribution of any Employer a substantial penalty to be fixed by the rules and regulations promulgated by them as hereinafter provided, for failure to make prompt payments to the Fund as provided for herein and in the Collective Bargaining Agreement, and are hereby given the power to collect such penalty, when assessed, in the same manner as they are given power to collect the contributions. Failure to pay or comply with any provision of this Trust Agreement, or any rule or regulation made by the Trustees, shall be considered a violation of the terms and conditions of the Collective Bargaining Agreement between the Union and the Employer.

SECTION 5. Where used in this Agreement, words in the masculine shall be read and construed as in the feminine, and words in the singular shall be read and construed as though used in the plural, in all cases where such construction would so apply.

SECTION 6. The Article titles are included solely for convenience and shall, in no event, be construed to affect or modify any part of the provisions of this Agreement or be construed as part thereof.

SECTION 7. This Agreement shall in all respects be construed according to and be governed by the laws of the State of Illinois.

ARTICLE 15

Recordation of Agreement

It shall be the duty of the Trustees to record this Agreement in the office of the Recorder of Deeds of Cook County, Illinois, within fifteen (15) days after the execution thereof, and thereafter to record any amendments thereto within fifteen (15) days after any such amendment becomes effective in accordance with the terms hereof.

ARTICLE 16

Savings Clause

Should any provision of this Trust Agreement be held to be invalid or invalid as to any person or instance, such fact shall not adversely affect the other provisions herein contained or the application of said provisions to any other person or instance, unless such invalidity shall make impossible the functioning of the plan. No Trustee shall be held liable for any act done or performed in pursuance of any provision hereof prior to the time such act or provision shall be held invalid by a court of competent jurisdiction.

APPROVED:

UNION TRUSTEES	EMPLOYER TRUSTEES
Albert Taphorn	Roy Pride
Louis F. Peick	Howard Willett, Jr.
Frank Kratky	Eugene McCarron

Affiliated With
...can Federation of Labor
...o State Federation of Labor
Chicago Federation of Labor

EXHIBIT 1 C

H. E. WOOD
Secretary-Treasurer

Local Union No. 705

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

Phone: SEeley 8-3333

220 SOUTH ASHLAND BOULEVARD
CHICAGO 7, ILLINOIS

April 22, 1955

Re: PENSION FUND

Dear Member:

I am happy to report that I have received the necessary approval from the Department of Internal Revenue regarding our Pension Plan.

As you know, I have been very anxious to get this plan set up and in working order for the benefit and protection of the members and their families.

We still have a lot of work to be done such as meetings with the Employer Trustees, the Trustees of this Local Union and our attorney, to lay the ground work, setting up rules and regulations, etc., in order to give the members the best deal possible.

There is one set rule at this time, and that is in order to be eligible for Pension the driver must have been employed for a period of 20 consecutive years with any employer who is, or has been under Contract with this Local Union. The driver must also have reached the age of 65 years.

Any member who thinks he is eligible and would like to take advantage of the Pension Plan, please report to this office for further information.

Fraternally yours,

H. E. WOOD, *Sec'y-Treas.*
Local 705, I. B. of T., A. F. of L.

HEW/mp

Exhibit 1D

1958 Local 705 Health & Welfare and Pension Funds Booklet

(See Opposite) ☞

LOCAL 705, I. B. of T.

HEALTH & WELFARE AND PENSION FUNDS

220 SOUTH ASHLAND BOULEVARD
CHICAGO 7, ILLINOIS
Telephone SEeley 8-2800

HEALTH & WELFARE AND PENSION PLANS

As Revised
AUGUST 1, 1958

Local Union No. 705

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

220 SOUTH ASHLAND BOULEVARD
CHICAGO 7, ILLINOIS

Phone: SEeley 8-2800

Dear Sir and Brother:

You and your family, including unmarried children up to 18 years of age, are protected by Local 705, International Brotherhood of Teamsters, Health and Welfare Fund and Local 705 International Brotherhood of Teamsters Pension Trust Fund. The rules and regulations of the respective funds are contained in this booklet. The purpose of these Funds is to take care of you and your family in case of illness, disability, accident, retirement, or death.

It is during those times that you and your family need the greatest amount of help because illness deprives the family of their breadwinner and his earnings. These plans were designed as far as we possibly could go subject to the Taft-Hartley Law in protecting you and your family. We would have liked to have done more, but we were limited by both the laws and the amount of contribution paid into the Funds. It is useless to promise you benefits when the Funds will be unable to pay them, and therefore, the Trustees have designed this plan so that they will pay the highest amount of money possible consistent with solvent and workable Funds. Under the law the Funds must be administered jointly by an equal number of Employer and Union representatives and therefore the Union does not have the full say as to how the Fund shall be run or what benefits shall be paid. It must be done jointly with the Employers. Only in the event of a deadlock among Trustees does the law provide for the appointment of an impartial Trustee to break the deadlock.

The Trustees at all times have the right to make all necessary and proper changes which they believe are necessary for the protection of the members and the Fund, and these rules and regulations which are set forth in this pamphlet are subject to this understanding and limitation.

READ THE RULES CAREFULLY. Keep this book with you at all

times and see that your family and others who are eligible to participate in this plan are also made acquainted with the contents of this pamphlet.

Remember, too, you must be an employee member who is in good standing and has paid your dues to be eligible for benefits under these plans.

Just a friendly reminder (inasmuch as Local 705 I. B. of T. has collective bargaining agreements with all employers), to be eligible for benefits from the Health and Welfare Fund or Pension Fund you must observe the following:

1. If you are a new member you must be in good standing with Local 705 I. B. of T. for six consecutive months.
2. Your union dues must be paid during the first month of each quarter (January, April, July, October).
3. You must have had paid into the Health and Welfare Fund the required weekly sum (now $3.50 per week) since January 1, 1953, and into the Pension Fund the required weekly sum (now $2.50 per week) since January 1, 1955 or from the date that you became a member of the union.
4. Your Health and Welfare Fund and Pension Fund payments must be made before the tenth of each month for the previous month.
5. You must not be in arrears in your union dues or payments to the Health and Welfare or Pension Funds. Otherwise you must wait ninety days after making such payments in order to become eligible to receive benefits from the respective Funds.
6. If an employee is injured on the job the Employer shall continue to pay the required contributions until such employee returns to work, provided, however, such contributions shall not be paid for a period of more than six (6) months in any twelve-month period.
7. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall be required to make contributions for a period of four (4) weeks.
8. The Employee shall pay the required contributions of $3.50 per week to the Health & Welfare Fund and $2.50 per week to the Pension Fund if he is off more than four (4) weeks due to illness or off-the-job injury in order to continue to be eligible for any future benefits.

To be eligible to receive Pension payments you must have reached the age of sixty-five, been employed by a covered employer who has been under contract with Local 705 I. B. of T. for twenty consecutive years and either he or you has paid into the Pension Fund continuously the required weekly payments beginning with January 1, 1955 on your behalf, be retired and not engaged in the craft (see Rule 1 on page 6).

THE FOLLOWING QUESTIONS AND ANSWERS SHOULD BE OF INTEREST TO YOU.

HOSPITAL AND SURGICAL CLAIMS

1. *Q. If I use Dr. Simon's service for an operation do I have to pay any part of the doctor or hospital bills?*

   A. If you use Dr. Simon's service through the Clinic you do not pay any part of the doctor or hospital bills *except* for blood used in transfusions.

2. *Q. How do I make claims for hospital or surgical benefits if I use any other hospital or doctor?*

   A. If you use any other hospital or doctor do the following:

   a. Request physician's report form from the Health & Welfare office and give to your doctor to fill out.

   b. Pay your doctor and hospital bill and present paid bills and physician's report to Dr. Simon's Clinic.

   c. Be sure you give all necessary information needed such as who incurred the bill, your ledger book number, home address and phone number. This information will speed the processing of the bills. You will be reimbursed within a week to ten days according to the schedule in the Health & Welfare booklet, if you are eligible for benefits.

3. *Q. Will the amount shown in the schedule be paid for surgical operation if a less expensive rate is obtained?*

   A. No. The Plan provides payment for ACTUAL FEES CHARGED, with a maximum benefit equal to the amount shown in the schedule.

4. *Q. Am I entitled to be paid for office or house calls by a doctor other than from Dr. Simon?*

   A. No. You would have to pay for office calls and house calls if you do not use Dr. Simon's services.

5. *Q. Must I report to Dr. Simon's office before going to any other doctor or hospital?*

   A. No. You must, however, present your paid bills for allowable reimbursement within 30 days after discharge from the hospital.

THINGS TO REMEMBER . . .

1. *Q. How can I make sure that my Health & Welfare and Pension Fund payments are paid each month?*

   A. It is your responsibility to check with the Health & Welfare Office to see that your payment is included on the list that your Employer turns into the office each month.

2. *Q. What happens if I change my employment which comes under the jurisdiction of another Local?*

   A. Your benefits terminate the day you take a transfer card from this Local or you stop working under the jurisdiction of Local 705, I. B. of T.

3. *Q. What happens if I take a withdrawal card?*

   A. Your benefits terminate the day that you take the withdrawal card.

4. *Q. How do I report on the sick list?*

   A. By notifying the Health & Welfare Office either by telephone or by mail.

5. *Q. When do the benefits start?*

   A. From the day that you notify the office or from the day that your letter is postmarked.

6. *Q. Will I receive any sick benefit if I am off less than five (5) working days?*

   A. No. You will be paid $45.00 per week sick benefit only if you are off five (5) full working days. You will not receive any sick benefit for time off for less than five (5) working days.

7. *Q. Will I receive any sick benefit if I do not report until I go back to work?*

   A. No. You must report the first day of sickness or injury, and you will only be paid from the day that such sickness or injury was reported to the Health & Welfare Office.

8. *Q. Must I report off of the sick list?*

   A. Yes. You must report off the sick list the same day that you return to work.

9. *Q. If I am off with the same illness or disability for a period of 24 months, am I entitled to collect forty (40) weeks' sick benefit?*

A. No. The maximum sick benefit allowed to any sick or disabled member from any one sickness or disability shall be twenty (20) weeks, but in no event shall more than twenty (20) weeks' benefits be allowed in any one twelve (12) month period.

We shall strive to better these plans as the law and economic conditions may allow.

Fraternally yours,

LOUIS F. PEICK, *Secretary-Treasurer*

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

PENSION TRUST FUND

Union Trustees
Fred Tiedt
Louis F. Peick
Frank Kratky

Employer Trustees
Roy Pride
George W. Johnson
William C. Winkler

RULES AND REGULATIONS

RULE 1

An employee member shall be eligible to receive a pension of $75.00 per month upon reaching his sixty-fifth birthday, provided, nevertheless, that (a) he is qualified to receive such pension under the provisions of the Pension Trust and the rules and regulations promulgated thereunder and as amended from time to time; (b) he has been both employed by an employer who has been under collective bargaining agreements with Local 705, and a member of good standing of Local 705 for twenty (20) consecutive years, and provided, further, that he, or his employer, has continuously paid for him into the Pension Trust Fund the sums required under respective collective bargaining agreements in force from time to time since January 1, 1955; (c) he shall not be employed while receiving pension benefits either as a driver nor be engaged in any employment or occupation in State of Illinois which may come under the jurisdiction of Local 705, nor shall he engage directly or indirectly as employee, partner, associate, or shareholder or officer of any corporation, or otherwise, in the trucking industry outside of the State of Illinois, and provided, further, that the trustees may from time to time designate other employments in which pensioners may not engage as a condition to continuing eligibility entitlement; (d) he makes written application to the trustees in form approved by them for pension payments, and payment shall commence on the first day of the calendar month next succeeding either the date of his retirement or thirty days after his written application for pension, whichever occurs later.

RULE 2

An employee member who is otherwise eligible for pension but who does not retire shall not receive pension benefits until after retirement, provided, nevertheless, that on the date of his retirement he shall meet the requirements and comply with the provisions as hereinbefore set forth in RULE 1.

RULE 3

All pension payments and eligibility requirements shall be subject to extension, revision, or other conditions which the trustees may impose or promulgate from time to time, provided that such conditions shall be uniform in application to all eligible employee members similarly circumstanced.

RULE 4

A. The maximum sum of $2.50 per regular employee, per week, shall be paid by the employer for each employee other than casual or emergency employees, covered under Collective Bargaining Agreement for any week in which such employee performs any service for the employer, even when such service is not performed under the terms of the Collective Bargaining Agreement. Casual or emergency employees are to be paid for at the rate of $0.50 per day.

B. If an employee is absent because of non-occupational illness or injury, the employer shall continue to make the required $2.50 weekly contribution to the Pension Fund for a period of four (4) weeks.

C. If an employee is absent because of occupational illness or injury, the required $2.50 weekly contribution shall be made into the Pension Fund until the employee returns to work or for a period of six months, whichever period is the shorter.

D. All leaves of absence, when granted by the employer, in addition to the requirements of the parties, shall be conditioned upon the employer and the employee making satisfactory arrangements for paying the $2.50 weekly contribution to the Pension Fund and at all times the payments shall be made by the employer for the period of such granted leave of absence.

E. Payments are due not later than the 10th of the month immediately following the employer's payroll period based on the number of Saturdays in the previous month. For example, a four week's payment of $2.50 per week or a total of $10.00 will be due the Pension Fund for those months which have four Saturdays; and a five weeks' payment of $2.50 per week or a total of $12.50 will be due the Pension Fund for those months which have five Saturdays.

F. If payment is not received by the tenth day of the month the employee member will not be eligible to receive any benefits.

G. All payments required to be made to the Pension Fund shall be payable to Local 705 I. B. of T. Pension Fund, 220 South Ashland Boulevard, Chicago 7, Illinois, and shall be accompanied by an original copy of remittance in the form approved by the trustees.

H. In the event of delinquent payments to the Fund by an employer or employee member, then such employee member shall be ineligible to participate in the Fund until the expiration of ninety (90) days from the date upon which all latest delinquencies have been paid and satisfied. The delinquency of an employee member can not be cured after his death, and his beneficiaries shall be barred from participating in the Fund unless such delinquency had been cured more than ninety (90) days preceding such death.

RULE 5

These rules shall apply to employee members of International Brotherhood of Teamsters, Local Unions 301, 704, and 801, respectively, whose employers have become obligated under a collective bargaining agreement to make contributions to the Fund and who have, with the written consent of the trustees, accepted and agreed to be bound by the trust agreement and the rules and regulations, as amended from time to time, in which event such respective locals shall be substituted for Local 705 wherever the same appears herein and the context so admits. Whenever Local 705, International Brotherhood of Teamsters, absorbs the members of another International Brotherhood of Teamsters Local Union, then such members' employment, for purposes of pension entitlement, shall be reckoned from the time they became members of the absorbed local, provided, nevertheless, that they otherwise comply with, qualify, and are eligible for pension under then existing rules.

RULE 6

The eligibility date for the beginning of pensions shall be April 1, 1955. These rules shall become effective August 1, 1958, and shall supersede all other rules and shall in no wise be deemed to amend the declaration of trust creating the Fund. Nothing herein contained shall be construed as requiring any employer or employee member to violate any applicable law. If any rule shall be ultimately declared invalid or inoperative by competent authority the trustees reserve authority to suspend the operation of such provision during the period of its invalidity and to substitute in its place and stead provisions which will meet such objections. If any rule shall be held invalid the remaining rules or the application of such rule to persons or circumstances other than those to which they may have been declared invalid shall not be affected thereby.

Exhibit 1E

1969 Local 705 Health & Welfare and Pension Funds Booklet

(See Opposite) ☞

LOCAL 705 I. B. of T.

HEALTH & WELFARE AND PENSION FUNDS

220 SOUTH ASHLAND BOULEVARD
CHICAGO, ILLINOIS 60607
Telephone 738-2800

HEALTH & WELFARE AND PENSION PLANS

As Revised
Effective January 1, 1969

Local Union No. 705

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Phone: 738-2800

220 SOUTH ASHLAND BOULEVARD
CHICAGO, ILLINOIS 60607

Dear Sir and Brother:

This new booklet contains the *revised* rules effective January 1, 1969 respecting two benefit plans which have been *greatly improved* and which are very important to you and your family, namely:

Local 705 International Brotherhood
of Teamsters Pension Trust Fund
and
Local 705 International Brotherhood
of Teamsters Health & Welfare Fund

These funds afford protection to you and your wife and unmarried children under eighteen years of age. Each Fund serves a purpose in taking care of you and your family in case of illness, disability, retirement or death—for it is during such times that you or your family need help because either of the loss of your earnings or the hardship imposed in meeting bills for medical, surgical and hospital care and services.

These Plans have been improved and now provide new and valuable benefits. While they started from scratch a few years ago, nevertheless they have been continually improved as a result of securing larger contributions from Employers under Collective Bargaining Agreements with Local 705. The Funds have always been financially sound and have met all benefit obligations to eligible Employee-members and Dependents.

The Pension Plan:

The Pension Plan now provides for two kinds of retirement, namely: *Normal Retirement* and *Permanent Physical Disability Retirement.*

Normal Retirement covers an Employee member who reaches age fifty-seven or retirement, whichever is later, has twenty consecutive years of unbroken service with a covered Employer and has faithfully complied with the provisions required of Employee members under the Collective Bargaining Agreement in force during that time between his covered Employer and the Union.

Originally the Pension Plan only covered Normal Retirements and paid $75.00 a month for life, starting at age sixty-five, or retirement, whichever was later. Then the pension was increased to $100.00 per month for life, starting at age sixty-two, or retirement, whichever was later.

Later, a pensioner who retired prior to April 1, 1965, was entitled to receive $150.00 per month for life. On April 1, 1965, Normal Retirement age started at age fifty-seven, or retirement, whichever was later, and a pensioner who retired on or after that date was entitled to $250.00 per month during the first sixty (60) months of his entitlement and $150.00 per month thereafter for life. *Effective January 1, 1969, while Normal Retirement still remains at age fifty-seven, or retirement, whichever is later, nevertheless a pensioner who retires on and after that date will be entitled to receive $250.00 per month for life.*

The *Permanent Physical Disability Retirement* age has now been lowered to cover an Employee member who is at least *forty-five years of age* with only *fifteen consecutive years of unbroken service with a covered Employer* and who has faithfully complied with the Collective Bargaining Agreement in force during that period of time between his covered Employer and the Union, but who, because of physical or mental condition, is permanently prevented from working. Under such conditions the Employee-member is entitled to a pension after six full months of Permanent Physical Disability, provided that he makes application therefor within seven months after the disability originated.

The monthly Permanent Physical Disability Retirement pension payments are the same as those paid under Normal Retirement. All monthly pension payments are in addition to Social Security benefits which you and your wife may receive.

Both Plans—Normal Retirement and Permanent Physical Disability Retirement—provide that if a pensioner dies before he has received one hundred twenty monthly payments from the Fund and is survived by a wife to whom he was married at the time of his retirement, then the monthly payments shall be continued to be paid to her until one hundred twenty monthly payments shall have been made since her husband's retirement, unless she dies sooner.

Also, a death benefit of $1,000.00 is now paid upon the death of a pensioner.

The Health & Welfare Plan:

There are two benefit plans—Plan A and Plan B—under Health and Welfare for medical, surgical and hospital benefits.

Plan A—gives you, your wife and unmarried children under eighteen years of age complete medical, surgical and hospital care without cost by going to Dr. Oscar Simon, 2018 South Ashland Avenue, Chicago, Illinois, who is the official doctor for the Fund.

Plan B—is limited to reimbursement for charges actually paid by you but not in excess of those contained in the Schedule of Operations —if you go to your own doctor. See pp. 41-52 for Schedule.

Both plans are subject to certain exclusions such as illness or disease covered by workmen's compensation, care available from the government, treatment for alcoholism, drug addiction, mental illness, dental care, eye glasses, etc. The plans also provide for *maternity benefits* for your wife, and *weekly sick benefits* to you for disability. There, too, are *Death Benefits up to $10,000.00*, for accidental death on the job payable to your wife, children, parents, brothers or sisters, when you die.

Whenever you or your family require medical, surgical or hospital care, then you or your family must elect to be covered by either Plan A or Plan B, but once you have selected a Plan, then you cannot switch to the other Plan for benefits relating to the same sickness, treatment or operation.

Also (a) the Health & Welfare Fund (Rule 12(11)) and the Pension Fund (Rule 4(K)) now waive contributions by you for a period of eleven (11) months while you are incapacitated by reason of non-occupational illness or injury, and (b) if you are laid off, then you and your family are entitled to benefits for sixty (60) days under Plan A even though delinquent in contributions to the Health & Welfare Fund (Rule 11(5)).

These plans go as far as we possibly can at this time. It is useless to promise you benefits which the Funds will be unable to pay, and, therefore the Trustees of the respective plans have designed them to give you the maximum benefits possible consistent with maintaining solvent and workable Funds.

Also, under the law, the Funds must be administered jointly by an equal number of Employer and Union representatives, and, therefore, neither one has the full say as to how the Funds shall be run or what benefits shall be paid. This must be done jointly by the Employer and Union Trustees. Only in the event of a deadlock among the Trustees does

the law provide for the appointment by the Federal Court of an impartial Trustee to break the deadlock.

The Trustees have the right to make changes in the plans from time to time which they believe are necessary to protect Employee-members or the Funds. Keep this in mind as you go over the rules and regulations set forth in this booklet.

Read the following pages—containing the Rules—carefully. Keep this booklet with you or in a safe handy place and see that members of your family who are eligible to participate in the Funds are familiar with the contents too.

Remember, too, that not only your Employer but also *you* must comply with the respective rules in order to receive the benefits which the Health & Welfare Plan and Pension Plan provide. One of the things required of you is that *you become and remain a member of the Union in good standing* as a condition of employment as required under the Collective Bargaining Agreement between your Employer and the Union, for otherwise you may be discharged and thus jeopardize your benefit standing for Health and Welfare Benefits and continuity of employment required for Pension Benefits.

You must make satisfactory arrangements with your Employer for making contributions to each of the Funds in the event you take a leave of absence. Should you or your Employer become delinquent in contributions to the Health & Welfare Fund, then you and your family must wait ninety days after the delinquency is cured before you and your family are again eligible for benefits; nor is your family eligible to death benefits if your death occurs within ninety days after any delinquency was paid. Toward the end of this letter is a summary of the eligibility requirements you must observe in order that you or your family may receive benefits from each Fund under the Collective Bargaining Agreement between your Employer and the Union, and this is followed by questions which are often asked and answers to the same. It is believed that these may be of help to you.

While delinquencies to the Health & Welfare Fund can be paid and you must wait ninety days thereafter until you are again eligible for benefits, nevertheless delinquency in payment to the Pension Fund affects the continuity of payments required to be made for or by you for twenty (20) consecutive, full years (Pension Rule 1A (4)).

The Trustees, as such, receive no compensation for serving the Funds. The affairs of the Funds have been regularly audited by certified public accountants. The Commissioner of Internal Revenue has ruled that our

Funds are exempt from Federal income taxation since they meet the requirements of the Internal Revenue Code, as amended. We have hired an outstanding firm of actuaries who counsel and advise us in all our planning.

Again, just a friendly reminder:

(1) You are not eligible for Health & Welfare Benefits until you have been employed by a covered Employer for at least six consecutive months during which time the required contributions to the Health & Welfare Fund have been made.

(2) You must have faithfully complied with all of the provisions required of you under the Collective Bargaining Agreement at all times.

(3) You must have had paid into the Health & Welfare Fund the required contributions since January 1, 1953, and into the Pension Fund the required contributions since January 1, 1955, or from the date you became a covered Employee-member.

(4) Your Health & Welfare Fund and Pension Fund payments must be made before the tenth of each month for the previous month.

(5) If you or your Employer is delinquent in making payments to the Health & Welfare Fund and you have not complied with the Collective Bargaining Agreement, then you or your family must wait ninety days after curing such delinquency in order to be eligible for benefits.

(6) If an Employee-member is injured on the job the Employer will continue to pay the required contributions until such Employee-member returns to work, provided, however, such contributions shall not be paid for a period of more than twelve (12) months.

(7) If an Employee-member is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall be required to make contributions for a period of four (4) weeks.

(8) The Employee-member must pay the required contributions to the Health & Welfare Fund and the Pension Fund if he is off more than twelve (12) months due to injury or illness.

QUESTIONS AND ANSWERS RELATING TO THE HEALTH AND WELFARE FUND

A. HOSPITAL AND SURGICAL CLAIMS

1. *Q. If I use Dr. Simon's service for an operation do I have to pay any part of the doctor or hospital bills?*

   A. No. If you use Dr. Simon's service through the Clinic you do not pay any part of the doctor or hospital bills *except* for blood used in transfusions, etc.

2. *Q. How do I make claims for hospital or surgical benefits if I use any other hospital or doctor?*

   A. If you use any other hospital or doctor do the following:

   a. Request Physician's Report form from the Health & Welfare office and give it to your doctor to fill out.

   b. Pay your doctor and hospital bill and present paid bills and Physician's Report to Dr. Simon's Clinic or call the Health & Welfare office for direct payment and present unpaid bills.

   c. Be sure you give all necessary information needed, such as who incurred the bill, your ledger book number, home address and phone number. This information will speed the processing of the bills. You will be reimbursed within a week to ten days according to the schedule in the Health & Welfare booklet, if you are eligible for benefits, and if your claim was complete in its entirety when submitted. Incomplete claims require longer to process.

3. *Q. Will the amount shown in the schedule be paid for surgical operation if a less expensive rate is obtained?*

   A. No. The Plan provides payment for ACTUAL FEES CHARGED, with a maximum benefit equal to the amount shown in the schedule.

4. *Q. Am I entitled to be paid for office or house calls by a doctor other than from Dr. Simon?*

   A. No. You will have to pay for office calls and house calls if you do not use Dr. Simon's services, except for a house call where Dr. Simon is unable to send a doctor and his office authorizes you to call another doctor. *Each* call must be authorized by Dr. Simon's office to be eligible for refund.

5. *Q. Must I report to Dr. Simon's office before going to any other doctor or hospital?*

   A. No. You must, however, present claim and your paid bills for allowable reimbursement within 30 days after discharge from the hospital.

B. THINGS TO REMEMBER . . .

1. *Q. How can I make sure that my Health & Welfare and Pension Fund payments are paid each month?*

   A. It is your responsibility to check with the Health & Welfare and Pension Office to see that your payment is included on the list that your Employer turns into the office each month.

2. *Q. What happens if I change my employment and my new Employer has no collective bargaining agreement with the Union requiring him to make contributions to either the Health & Welfare Fund or Pension Fund?*

   A. Your benefits terminate when you cease working for a covered Employer.

3. *Q. What happens if at a later date I again become employed by a covered Employer?*

   A. You are considered as a new Employee-member from the date that you were hired by the new covered Employer.

4. *Q. What happens if I change my employment from one covered Employer to another covered Employer?*

   A. Then you are still covered provided there are no delinquencies between the time you have stopped working for one covered Employer and entered the employ of another covered Employer.

5. *Q. How do I report on the sick list?*

   A. By notifying the Health & Welfare Office either by telephone: 738-2800, or by mail: 2 0 South Ashland Boulevard, Chicago, Illinois 60607.

6. *Q. When do the benefits start?*

   A. From the day that you notify the office or from the day that your letter is postmarked.

7. *Q. Will I receive any sick benefit if I am off less than five (5) working days?*

   A. No. You will be paid $ 0.00 per week sick benefit only if you are off five (5) full working days (Saturday and Sunday excluded). You will not receive any sick benefit for time off for less than five (5) working days.

8. *Q. Will I receive any sick benefit if I do not report until I go back to work?*

   A. No. You must report the first day of sickness or injury, and you will only be paid from the day that such sickness or injury was reported to the Health & Welfare Office.

9. *Q. Must I report off of the sick list?*

   A. Yes. You must report off the sick list the same day that you return to work.

10. *Q. If I am off with the same illness or disability for a period of 24 months, am I entitled to collect fifty-two (52) weeks' sick benefit?*

A. No. The maximum sick benefit allowed to any sick or disabled member from any one sickness or disability is twenty-six (26) weeks, but in no event shall more than twenty-six (26) weeks' benefits be allowed in any one twelve (12) month period.

11. *Q. Am I covered for death benefit for accidental death on the job?*

A. Yes. However if death is sustained by an Employee-member while engaged in his line of duty and resulting from injury suffered by him arising out of and in the course of his employment then double death benefits will be paid.

This double death benefit is in addition to any benefits payable under Workmen's Compensation or similar laws.

QUESTIONS AND ANSWERS RELATING TO THE PENSION FUND FOR THOSE RETIRING ON AND AFTER JANUARY 1, 1969.

1. *Q. Is there more than one kind of pension?*

A. Yes. There is a Normal Retirement Pension and a Permanent Physical Disability Pension.

2. *Q. What is the difference between the two?*

A. *Normal Retirement Pension* applies to an Employee-member who is at least 57 years of age—normal retirement age—and has 20 years of covered service.

Permanent Physical Disability Pension applies to an Employee-member who is at least 45 years of age and has 15 years of covered service but "retires from active service because of a physical or mental condition which totally and permanently prevents him from engaging in any" gainful occupation or employment.

3. *Q. When am I eligible for Normal Retirement Pension?*

A. You are eligible for Normal Retirement Pension when you reach 57 years of age and have 20 consecutive years of unbroken covered service with a covered Employer who during that time has made contributions to the Fund on your behalf, and you have during that period complied with the terms of the Collective Bargaining Agreements.

4. *Q. Can I qualify for Normal Retirement Pension before I am 57 years of age but have put in my 20 years of covered service?*

   A. No. You must be at least 57 years old to retire and you must have at least 20 years of covered service, whichever is later.
   EXAMPLE: If you have 20 years of covered service at age 55, then you must work until you are 57; but if you are 57 and have only 17 years of covered service, then you must work at least 3 more years until you have 20 years of covered service before you can qualify for pension.

5. *Q. Who is eligible for Permanent Physical Disability Pension?*

   A. An Employee-member who is at least 45 years of age and has at least 15 consecutive years of unbroken covered service, and has during that period of time complied with the Collective Bargaining Agreement under which he worked, and who retires because of a physical or mental condition which wholly prevents him from engaging in any gainful employment or occupation, provided such disability has persisted for a period of 6 full consecutive calendar months.

6. *Q. Suppose I am forced to retire because of some disability which does not totally incapacitate me, am I then entitled to a Permanent Physical Disability Pension?*

   A. No. See answer to Question No. 5.

7. *Q. What is meant by "Covered Service," "Covered Employer" and "Covered Employee"?*

   A. "Covered Service" is employment by an Employer(s) who under a *written* Collective Bargaining Agreement with Local 705 is and has been obligated to and is making and has made contributions to the Fund in your behalf. He is called a "Covered Employer" and you are called a "Covered Employee" as long as you are employed by him and he makes contributions to the Fund. The period while you are so employed is called "Covered Service."

8. *Q. When was the Fund established?*

   A. January 1, 1955.

9. *Q. If I went to work for a Covered Employer before January 1, 1955, must I have 20 consecutive years of unbroken covered service after January 1, 1955 to qualify for pension?*

   A. No. You would get past service credit for the time you worked for an Employer prior to January 1, 1955 if on that date you

were and thereafter remained in his employ and he was a Covered Employer and made all contributions on your behalf thereafter.

EXAMPLE: On January 1, 1947, you went to work for an Employer and continued in his employ until January 1, 1967, and from January 1, 1955 to January 1, 1967 he made contributions to the Fund on your behalf pursuant to a written agreement with Local 705, then you would be given past service credits for 8 years prior to January 1, 1955 and 12 years thereafter, making 20 years of covered service.

10. *Q. Suppose my Employer made contributions to the Fund and I paid my dues to Local 705, but my Employer had no written contract with Local 705—how would that affect my pension?*

A. You would *not* be entitled to a pension unless your Employer not only contributed to the Fund but also had a *written* Collective Bargaining Agreement with Local 705 obligating him to contribute to the Fund and fixing the amount of his contributions.

11. *Q. How much is the Normal Retirement Pension?*

A. The Normal Retirement Pension is $250.00 per month for life. However, if a pensioner dies before he has received 120 monthly pension payments and is survived by a wife to whom he was married at the time of his retirement, then she is entitled to monthly payments (See Question 12).

12. *Q. If a Pensioner dies and is survived by a wife, does she receive any pension benefits?*

A. If a qualified Pensioner dies before he has received 120 monthly payments of $250.00 each ($30,000) and is survived by a wife to whom he was married at the time of his retirement, then monthly payments of $250.00 each are made to her until either a total of 120 monthly payments shall have been made since her husband's retirement, or she dies sooner.

EXAMPLE: A who is married to B retires on January 1, 1969, and receives his first monthly pension check on February 1, 1969. He dies on February 10, 1972, after having received 36 monthly payments of $250.00 each, leaving 84 monthly payments to be paid to B:

	120 monthly payments of $250.00 each	$30,000
less	36 monthly payments of $250.00 each (paid during A's lifetime)	9,000
leaves	84 monthly payments of $250.00 each (to be paid to B unless she dies before 120 monthly payments have been made by the Fund since her husband's retirement; then all payments cease)	$21,000

13. *Q. How much is the Permanent Physical Disability Pension?*

A. The Permanent Physical Disability Pension payments—$250.00 a month for life—are the same as the Normal Retirement Pension payments except if the disabled pensioner recovers, then he is not entitled to receive pension benefits until he reaches Normal Retirement Age 57 and has the required 20 years of covered service except that the period during which he was receiving Permanent Physical Disability Pension is counted as covered service and the amount of pension he received during that period is charged against the 120 monthly payments in the event that he dies and leaves a wife surviving him who is entitled to monthly pension benefits.

EXAMPLE 1: A becomes disabled and receives 36 monthly payments when he recovers and returns to work. Later he retires on Normal Retirement Pension but dies 48 months later. His widow would receive 36 monthly payments if she lives that long.

36 monthly Permanent Physical Disability payments to Husband
48 monthly Normal pension payments

84 monthly payments deducted from 120 leaves 36

EXAMPLE 2: A goes on Permanent Physical Disability Pension when he is 45 years of age and has 15 years of covered service. After being on Permanent Physical Disability Pension for 4 years he recovers and goes back to work. He is then 49 years of age and has 19 years of covered service—15 years before disability and 4 years while disabled—but he is not eligible for Normal Retirement Pension until he reaches age 57 and accrues 20 years of covered service in the meantime. If he goes on Permanent Physical Disability Pension at age 53 and has 15

years of covered service, then when he reaches Normal Retirement Age 57 during the 4 years while on disability, nevertheless he lacks 1 year of covered service and must work another year for a Covered Employer before being eligible for Normal Pension.

14. *Q. When do I receive my first Normal Retirement Pension check, assuming that I qualify therefor?*

    A. On the 1st of the month following your application for pension or retirement, whichever is the later.

    EXAMPLE: You make an application for pension on February 10, 1969, but do not retire until March 1, 1969. Your first pension check will be paid to you on April 1, 1969. The same would apply if you retired on February 7, 1969, but did not make an application for pension before March 1, 1969.

15. *Q. When do I receive my first pension check, assuming that I qualify for a Permanent Physical Disability Pension?*

    A. Permanent Physical Disability Pensions are paid on the 1st day of the calendar month following a period of 6 full continuous calendar months of disability or 30 days after written application for pension is made because of the foregoing, whichever is later. No Permanent Physical Disability Pension is paid for the first 6 months of disability.

16. *Q. Suppose I am on Permanent Physical Disability Pension but recover so that I am able enough to work at some employment, how would that affect my pension?*

    A. Under the circumstances, as soon as you recover and are able to engage in a gainful occupation or employment, then you would not be entitled to further disability pension payments.

17. *Q. How do I apply for a Normal Retirement pension?*

    A. Obtain from the Fund an Application for Pension Benefits within 30 days before you retire; fill out these forms very carefully, and return them to the Fund.

18. *Q. May I make an application for pension before I retire?*

    A. Yes, but your pension does not go into effect until you actually retire. See answer to Q. 17.

19. *Q. When must an application be made for total Permanent Physical Disability Pension?*

A. An application for total Permanent Physical Disability Pension must be made to the Fund within 7 months after the disability originated; otherwise the applicant shall be deemed to have waived it and shall not be entitled to it.

20. *Q. How does receiving a Permanent Physical Disability Pension affect the future benefit rights of a pensioner's widow?*

A. When a pensioner recovers from the total disability for which he qualified for pension, then he must wait until he qualifies for normal pension before monthly payments will be resumed. However, in computing the balance of the 120 monthly payments to be paid to his surviving wife upon his death, all monthly payments made to him in his lifetime are added together, whether disability or normal payments, and subtracted from the 120 monthly payments, and she is entitled to the balance if she survives her husband and does not die before the aggregate 120 monthly payments have been made to her husband.

21. *Q. Are there any other benefits under the Pension Plan besides pensions?*

A. Yes. There is a $1,000.00 funeral benefit payable upon the death of a Pensioner.

22. *Q. Who administers the Pension Plan?*

A. The Plan is administered by the Trustees, consisting of 3 Union and 3 Employer representatives. The decision of a majority of the Trustees is final in all matters relating to pensions.

23. *Q. Who recommends the amount of and qualification for pension benefits and how is it determined?*

A. The Collective Bargaining Agreement under which the Fund was established in 1955 provided that the "Trustees in consultation with actuaries . . . shall decide upon the type and nature of the pension (including eligible benefits, etc.) to be instituted" and the Trust Agreement provided that "The Trustees may employ such actuarial and other experts as they deem necessary for the proper formulation and operation of (the)

Pension Plan." The work of the actuary is to calculate risks, that is, determine how much money is needed in order to provide pension benefits and to make reasonably certain that the Fund will have enough money on hand to pay the benefits when they become due. One of the things which they take into consideration is "life expectancy"—which is the average number of years which an individual of a given age may expect to live and that is based upon statistics gathered and computed by the actuaries. Based upon the foregoing they make recommendations to the Trustees regarding pension benefits, the length of service necessary to qualify for benefits, funding, etc., and the Trustees, then acting upon the actuaries' recommendation, establish the amount of benefits and the conditions under which such benefits will be paid. This is also necessary in order to insure that the Fund will be federally tax exempt,

24. *Q. What do you mean when you say the Plan is funded?*

A. A funded pension is one which requires an Employer to make contributions while the Employee-member works, instead of after he retires. Your Employer is contributing to the Fund now so that the money needed to pay your pension will be there when you retire. This has several advantages for you. Most important is that your pension payments are assured, regardless of what may happen to your Employer after you retire. Another advantage is that the contributions earn income by being invested. Consequently, the money originally contributed grows. Without this income growth the Fund could not accumulate enough money to pay the $250.00 monthly pensions provided by the Plan. Under an unfunded plan Employers contribute as the money is needed to pay pensions. If an Employer goes out of business there is no more money coming in to pay pensions to his retired Employees. And, even if contributions continue, there is no investment income, so pensions have to be smaller.

25. *Q. What is the life expectancy of a pensioner after normal retirement and how much will he receive in pension payments?*

A. The table below shows the average number of years a pensioner is expected to live after retirement (Average Life Expectancy) and the average total pension benefits it is expected that a pensioner will receive during his lifetime who retires at each age from 57 to 65.

Age of Retirement	*Average Life Expectancy*	*Average Total Pension Payments*	
		Unmarried	*Married*
57	another 21.14 years	$63,420	$65,100
58	20.35	61,050	62,880
59	19.58	58,740	60,720
60	18.81	56,430	58,590
61	18.05	54,150	56,520
62	17.30	51,900	54,480
63	16.57	49,710	52,560
64	15.84	47,520	50,640
65	15.13	45,390	48,780

26. *Q. Why are the average total pension payments higher for a married pensioner than for an unmarried pensioner?*

A. The reason for the higher average for a married pensioner is that the Fund continues pension payments to a surviving widow if her husband dies before receiving 120 monthly payments. Since some retired members will die before receiving 120 monthly payments and if they are unmarried, no further payments are made, therefore, the average total payment to pensioners and their surviving widows are larger than the average total payments to an unmarried pensioner.

27. *Q. Why must an Employee-member have 20 years of covered service to get a pension?*

A. Pensions are paid for out of the Employer contributions for each covered Employee-member employed by him. If retirement were permitted before completion of 20 years of service there would be less money in the Fund and pensions would have to be considerably lower. The actuaries take into consideration the amount of money which a covered Employer has contributed to the Fund in 20 years and then determine how much more money the Fund will have to earn on that contribution in order to be able to make the monthly payments required under the Plan. By requiring 20 years of service at age 57 or later, the Fund is accumulating enough money to pay each member $250.00 a month for life when he retires, or at least 120 monthly payments certain if he dies and is survived by a wife who lives at least 120 months after her husband has retired and qualified for pension.

28. *Q. Who may change the Pension Plan?*

A. The Pension Plan may only be changed by a majority vote of the Trustees.

29. *Q. Who chooses the Trustees and how many are there?*

A. The Taft-Hartley Act requires the Union and the Employers to be equally represented in the administration of the Fund and therefore the Trust Agreement provides that there shall be 6 Trustees, 3 of whom are Union Trustees appointed by Local 705, and the other 3 are Employer Trustees who are appointed by the Illinois Motor Truck Operators Association, Central Motor Freight Association, and Cartage Exchange of Chicago.

30. *Q. What is the Trust Agreement?*

A. The Trust Agreement is an agreement which was entered into as of January 1, 1955, between Local 705, Illinois Motor Truck Operators Association, Central Motor Freight Association and the Cartage Exchange of Chicago on behalf of themselves and their members and other Employers and Fred M. Tiedt, H. E. Wood, Louis F. Peick (the then Union Trustees) and John Viking, Thomas O. Smith and George W. Johnson (the then Employer Trustees), to establish a Trust Fund for the purpose of providing retirement benefits for Employees. It contemplated: "Trustees (who) in consultation with actuaries and/or pension specialists, shall administer such Fund and shall decide upon the type and nature of Pension Plan (including eligibility, benefits, etc.) to be instituted." This met the requirements of the federal law which regulated the conditions set forth by Congress for permitted industrial welfare funds and exemptions from federal taxation.

31. *Q. Is my pension affected by the amount of Social Security benefits that I may receive?*

A. No. Pension benefits are in addition to any Social Security benefits which you may receive.

32. *Q. How much will I get in Social Security?*

A. Your monthly Social Security will depend on your average earnings taxed for Social Security and your age when your Social Security benefits begin. Social Security pays monthly benefits for life. Full benefits are available at age 65 and reduced benefits as early as age 62. An Employee member's wife

also gets Social Security even though she may never have worked. Here are some typical monthly Social Security benefits under the current law.

Average monthly taxed pay	*For you at 62*	*For you at 65*	*Couple both 62*	*Couple both 65*
$400	$123	$154	$181	$230
500	142	178	209	266
600	163	204	240	306
650	174	218	253	323

Because earnings taxed for Social Security have been lower in the past, average taxed pay will not reach the higher levels for many years. Monthly payments to members retiring in 1969 are about $130 if benefits begin at age 62, about $160 beginning at age 65, about $190 for a couple both age 62, and about $240 for a couple both age 65 when benefits begin.

33. *Q. If I take another job after I retire, will I lose my pension?*

A. Yes, you must not engage directly or indirectly in any capacity whatsoever in the trucking or hauling industry without written dispensation from the Trustees, which may be issued only upon your written application therefor.

34. *Q. If I am a qualified Pensioner, must I do anything else to continue receiving pension payments?*

A. Yes. You must always keep the Fund informed of your address. If your pension check is returned because of the wrong address, then payments will be stopped. If the Fund does not receive the correct address within 1 year, then you will lose all rights to past pension payments.

35. *Q. If I cannot work because of accident or sickness, will that affect my pension?*

A. If your sickness or injury is occupational, your Employer is required to continue to make contributions for 1 year. Thereafter, you must continue to make your own contributions to the Fund in order to remain in good standing so long as you can not work. However, if your sickness is not occupational, then your Employer must contribute to the Pension Fund for 4 weeks, and the Fund will waive contributions for the next 11 months or during your incapacity, whichever is sooner. Thereafter, if you are still incapacitated, whether resulting from

occupational or non-occupational accident or illness, you must continue to make your own contributions to the Fund as a condition of continuing eligibility until you return to work. However, the time during which you are off because of illness or accident will count toward your covered service.

36. *Q. Who makes contributions to the Fund when I am on leave of absence?*

    A. When you take a leave of absence, then you must make satisfactory arrangements with your Employer to pay the weekly payments to the Fund, and he then must make the payment to the Fund during your leave of absence. You must make sure that he does make the payments to the Fund on time; otherwise your pension will be jeopardized.

37. *Q. If I am laid off, who must make contributions to the Fund during my absence from work?*

    A. You must make contributions in the same monthly amount as that required of your Employer during any period of layoff as a continued condition of your eligibility for pension benefits, and failure to do so breaks the 20 consecutive years of unbroken covered service and contributions.

38. *Q. What happens to my pension rights if I enter Military Service?*

    A. Your covered service is not broken during the period of time that you are in Military Service, provided that you were employed by a Covered Employer immediately before entering Military Service and qualified for and entered the reemployment of such Covered Employer within the allowable time provided by law upon your discharge from Military Service, or you entered the employ of another Covered Employer immediately upon your discharge from Military Service.

39. *Q. Does the Fund provide benefits for Employee-members represented by Teamster Locals other than Local 705, and why?*

    A. Yes. The Fund also provides benefits for Employee-members represented by Teamster Locals 301, 704 and 801, respectively, because their Employers have become obligated under a written Collective Bargaining Agreement to make contributions to the Fund, and who have, with the written consent of the Trustees of the Fund, accepted and agreed to be bound by the Trust Agreement and the Rules and Regulations of the Fund as amended from time to time.

40. *Q. May the Fund provide benefits for Employee-members represented by Teamster Locals other than Teamster Locals 705, 301, 704 and 801?*

A. No, because Employers of Employee-members represented by other Teamster Local Unions do not make contributions to the Fund under a written agreement with a Teamster Local Union to which their Employee-members belong. The Fund may not use the contributions received from Employers of Employee-members represented by Locals 705, 301, 704 and 801 for purposes of supplying benefits to Employee-members represented by locals whose Employers make no contribution to the Fund.

41. *Q. May my Employer deduct from my wages the contributions which he makes to the Fund on my behalf?*

A. No. The Employer is obligated to make the contributions to the Fund under his written Agreement with Local 705, and this contribution has nothing to do with your wages and should not be deducted by him. Any deduction of contributions by an Employer should be immediately reported to Local 705, except whenever an Employee-member takes a leave of absence he may arrange with his Employer to make the weekly contributions to the Fund and deduct them from the Employee's wages.

42. *Q. To whom are pension contributions made and may any of the contributions be returned to the Employer or given to the Union?*

A. No. Pension contributions are made directly to the Pension Fund and belong solely to it.

43. *Q. How does changing my job affect my pension rights?*

A. If you go to work for any one who is not a Covered Employer, then you break your continuity of service and are no longer qualified for pension.

44. *Q. What happens if my covered service is broken?*

A. You lose all service credits and are no longer covered by the Plan. A break also occurs when no payments are made by you to the Fund when required under the Plan. See Rule 4—Contributions.

45. *Q. Can the Plan be changed?*

A. Yes. The Trustees have authority to change the Plan. However, no change will affect unfavorably any pensioner unless the change is required to obtain the approval of the Plan by the Treasury Department or meet the payments due. The Plan has been set up on the sound advice of our actuaries and it is continuously reviewed by them and by the Trustees, and it is unlikely that any member will ever be adversely affected.

46. *Q. Are the above questions and answers the Plan and is there anything else I must remember?*

A. The above questions and answers are merely intended as an explanation of the Plan. The Plan appears at the end of this booklet. Remember, also, that you must be in a Covered Employee status at the time of your retirement. Remember, too, that if you are seeking Permanent Physical Disability Pension Benefits before you are age 62, then you must have a Certificate of Social Security Insurance Award for Disability Benefits.

We shall strive to better these plans as the law and economic conditions may allow.

Fraternally yours,

LOUIS F. PEICK, *Secretary-Treasurer*

LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS

PENSION TRUST FUND

Union Trustees	*Employer Trustees*
Albert Taphorn	Roy Pride
Louis F. Peick	Howard Willett, Jr.
Frank Kratky	Eugene McCarron

RULES AND REGULATIONS

RULE 1

Eligibility

A. Normal Retirement

An Employee-member shall be eligible for pension, subject to the conditions hereinafter contained, who:

(1) Attains Normal Retirement Age fifty-seven (57);

(2) Retires from active service in the craft;

(3) Has for twenty (20) consecutive, continuous and uninterrupted years immediately preceding normal retirement age, or retirement, whichever occurs last: (a) been employed by a Covered Employer, that is an Employer who during such period of time has been a signatory to a Collective Bargaining Agreement (Agreement) with Local Union No. 705 International Brotherhood of Teamsters (Union) covering the said Employee-member, and (b) as an Employee of such Covered Employer has faithfully complied with and performed all the conditions required of him under said Agreement(s);

(4) Has or had paid for him continually since January 1, 1955, if then employed by a Covered Employer; if not, then continually

since the beginning of employment by a Covered Employer, all contributions to the Pension Fund as required under the Agreements between said Employer and the Union; and

(5) Has made written application to the Fund in the form approved by them for pension payments within thirty days from the date upon which he intends to retire.

B. Permanent Physical Disability

(1) An Employee-member who meets all the requirements of Rule 1A except that he has attained only forty-five (45) years of age and has only fifteen (15) consecutive, continuous and uninterrupted years of employment and faithful compliance with the conditions of the Agreement(s) as defined in Rule 1A, and who retires from active service because of a physical or mental condition which wholly and permanently prevents him from engaging in any remunerative occupation or employment, shall be entitled to a pension on the first day of the calendar month following a period of disability of six (6) full and continuous calendar months, or thirty (30) days after his written application for pension payments because of the foregoing, whichever is later. Written application for Permanent Disability Pension must be made to the Fund within seven (7) months after the disability shall have originated, otherwise the applicant shall not be entitled to pension benefits.

(2) The Fund shall require, as proof of disability, evidence satisfactory to the Fund of the determination by the Social Security Administration that the Employee-member is entitled to a Disability Insurance Benefit under the Federal Social Security Act, or if such determination is not available to the Employee-member because he is receiving Social Security Old Age Retirement Benefits, then he shall submit to a physical examination as directed by the Fund. The Fund may also require such additional evidence as they deem necessary.

C. Death Benefit

(1) A death benefit of one thousand dollars ($1,000.00) shall be paid upon the actual and not presumptive death of an Employee-member who has received or was entitled to receive pension payments immediately prior to his death. This death benefit shall be for the purpose of providing a decent burial for such deceased Employee-member.

(2) Due proof of actual and not presumptive death, accompanied by a certified copy of a death certificate and an undertaker's bill, shall be made to the Fund, who may then allocate or pay any part of the death benefit to the following:

(a) The undertaker in charge of the interment of the deceased Employee-member, provided, however, that in the event a paid funeral bill is presented to the Fund, then the Fund may in their discretion reimburse the party who paid the funeral bill, but in no event in excess of the death benefit, and the balance remaining after the payment of such funeral expense shall be paid to the following survivors in the order of their designation:

(1) Widow

(2) Children, including legally adopted children

(3) Parents

(4) Brothers and sisters

(b) In the event an Employee-member dies and leaves neither wife, children, parents, brothers nor sisters surviving him, then no death benefits shall be paid but the Fund shall have charge of the funeral and pay reasonable expenses therefor not in excess of the maximum death benefit and the Fund shall be entitled to benefits accruing from the Social Security Administration.

(c) No beneficiary designation by will or otherwise shall be binding upon the Fund. The Fund shall be discharged from all liability or obligation whenever it makes payment of the aggregate death benefit to any one or to all of the above-named or to the executor or administrator of the deceased Employee-member's estate if he is survived by any of the above-listed relatives.

RULE 2

Pension Payments

A. Effective Dates and Monthly Pension Payments

(1) Retirement prior to April 1, 1965

An Employee-member who retired and qualified for pension before April 1, 1965, shall be paid one hundred fifty dollars ($150.00) per month during his lifetime and period of entitlement, commencing with the monthly payment to be made December 1, 1965, and upon the death of said Employee-member

before he has received one hundred twenty (120) monthly payments, and is survived by a wife to whom he was married at the time of his retirement, then monthly payments shall be continued to be made to her until either an aggregate of one hundred twenty (120) monthly payments shall have been made since her husband's retirement, or she dies, whichever is the earlier.

(2) Retirement on and after April 1, 1965

An Employee-member who retires and qualifies for pension on and after April 1, 1965, shall be paid during his lifetime and the period of his entitlement the sum of $250.00 per month during the first sixty (60) months of his entitlement, and $150.00 per month thereafter, and upon the death of an Employee-member before he has received one hundred twenty (120) monthly payments and is survived by a wife to whom he was married at the time of his retirement, then monthly payments shall continue to be made to her until either an aggregate of one hundred twenty (120) monthly payments shall have been made since her husband's retirement, or she dies, whichever is the earlier.

For Example: A retires on April 1, 1965, at which time he was married to B. A dies on April 1, 1967, after having received twenty-three (23) monthly pension payments of $250.00 each. B survives him. B is entitled to receive thirty-seven (37) monthly payments—60 minus 23 (which her husband had received)—of $250.00 each, and thereafter sixty (60) monthly payments of $150.00 each. A dies after he has received sixty (60) monthly pension payments of $250.00 each and ten (10) monthly payments of $150.00 each, and B survives him. B is entitled to receive fifty (50) monthly payments—120 minus 70 (which her husband had received)—of $150.00 each. However, if B should die before 120 payments have been made since her husband's retirement, then payments cease.

(3) An Employee-member who retires and qualifies for pension on and after January 1, 1969, shall be entitled to a monthly pension of $250.00 per month for life, and if he dies before receiving one hundred twenty (120) monthly payments and is survived by a wife to whom he was married at the time of his retirement, then monthly payments shall continue to be made to her until either an aggregate of one hundred twenty (120) monthly payments shall have been made since her husband's retirement, or she dies, whichever is the earlier.

B. Effective Date of Rules

These rules, as amended, shall become effective January 1, 1969, but Employee-members who retired prior to that date shall be governed by the rules in effect at the time of their retirement except in so far as amended in RULE 2A herein relating to monthly pension payments.

C. No Assignment or Attachment of Benefits

Benefits payable under this Plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, including any such liability which is for alimony or other payments for support of a spouse or former spouse or for any relative of the Employee-member prior to actually being received by the person entitled to the benefit under the terms of this Plan, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits hereunder shall be void. The Trust Fund shall not in any manner be liable for or subject to the debts, contracts, liabilities, engagements or torts of any person entitled to benefits hereunder.

D. Failure to Keep Fund Advised of Change of Address

If a pension check is returned because of a wrong address, then payments will be stopped, and if the Fund does not receive the correct address of a Pensioner within one (1) year, then he will lose all rights to past pension payments.

RULE 3

Revision and Stoppage of Payments

A. Revision

All pension payments and eligibility requirements shall be subject to modification, extension, revision, curtailment, or other conditions which the Trustees may impose or promulgate from time to time, provided that such conditions shall be uniform in application to all eligible Employee-members or pensioners similarly circumstanced. The Trustees may, from time to time, establish other and different plans and rules affecting Employee-members who may be employed by a single Employer or group of Employers when circumstances in the sole discretion of the Trustees warrant such action.

B. Stoppage of Pension Payments

No pension shall be paid for any period when a pensioner is engaged, directly or indirectly, individually or as an Employee, associate, member, partner or officer of or in any firm or corporation engaged in the trucking or hauling industry, and the Trustees may:

(1) From time to time designate other employments in which pensioners may not engage as a condition of continuing eligibility to pension entitlement, and

(2) Grant dispensation to pensioners (both the dispensation and application therefor must be in writing) authorizing him to work for a trucker or hauler without stoppage of pension payments, but such dispensation shall not authorize employment or engagements similar to that performed by the pensioner at the time of his retirement or immediately preceding thereto, nor which in any way may compete or conflict with the business or interests of any Employer who at any time employed such pensioner prior to retirement when such Employer was a signatory to a Collective Bargaining Agreement with the Union covering the pensioner and pursuant thereto made contributions to the Fund.

(3) Terminate Pension Payments if an Employee-member has retired because of Permanent Physical Disability, as provided in RULE 1B and, prior to his attainment of age fifty-seven (57), the Trustees determine that he has recovered from such disability then the retired Employee-member shall no longer be entitled to a pension and his pension payments shall cease. In such event, the Employee-member shall only be entitled to a pension when he attains age fifty-seven (57) if he meets the requirements of RULE 1A, provided, however, that in determining whether he meets such requirements, the period during which he was on Permanent Physical Disability pension under RULE 1B shall be considered as a consecutive, continuous and uninterrupted period of employment by a Covered Employer.

RULE 4

Contributions

The Employer payments to the Pension Fund shall be as follows:

A. Amount

The amount (required under a Collective Bargaining Agreement between the Employer and the Union) per Employee member per

week, shall be paid for each regular Employee-member covered by such Agreement for any week in which such Employee-member performs any services for the Employer, even when such services are not performed under the terms of such Agreement.

B. Replacements

Payment shall be made on replacements for absentee Employee-members for the weeks worked by such replacements at a rate equal to twenty per cent (20%) per day of the aforesaid weekly payment.

C. Non-Occupational Illness or Injury

If an Employee-member is absent because of non-occupational illness or injury, the Employer shall pay the required payment for a period of four (4) weeks.

D. Occupational Illness or Injury

If an Employee-member is absent because of occupational illness or injury, the Employer shall pay the required payment for a period of twelve (12) months.

E. During Negotiations of New Contract

The obligation to make the above payments shall continue during periods when a new Collective Bargaining Agreement is being negotiated.

F. Leaves of Absence

All leaves of absence, when granted by the Employer, in addition to the requirements of the parties, shall be conditioned upon the Employer and the Employee-member making satisfactory arrangements for paying the weekly payment to the Fund, and at all times the payment shall be made by the Employer for the period of such granted leave of absence.

G. Employee-member Payments

Whenever an Employer is not obligated to make payment to the Fund for an Employee-member, then the Employee-member shall make the required payment.

H. Date of Contribution Payments

Payments are due not later than the 10th of the month immediately following the Employer's payroll period based on the number of Saturdays in the previous month. For example, a four weeks' payment will

be due the Pension Fund for those months which have four Saturdays; and a five weeks' payment will be due the Pension Fund for those months which have five Saturdays.

I. Ineligibility for Non-Contributions

If payment is not received by the tenth day of the month, the Employee-member will not be eligible to receive any benefits.

J. Place of Payment

All payments required to be made to the Fund shall be made payable to Local 705 I.B.T. Pension Trust Fund, 220 South Ashland Boulevard, Chicago, Illinois 60607, or at such other address as the Fund may from time to time, in writing, direct, and shall be accompanied by an original copy of remittance in the form approved by the Fund.

K. Waiver of Contributions

The Fund will waive contributions during an Employee-member's incapacity to work by reason of non-occupational injury or illness, evidence thereof being made to the satisfaction of the Fund, provided, however, that such waiver shall not be for a period in excess of eleven (11) months and shall exclude the first four (4) weeks inasmuch as it is contemplated that the latter will be paid by the Employer.

RULE 5

Coverage—Local Unions 301, 704 and 801 I. B. of T.

These rules shall apply to Employee-members represented by International Brotherhood of Teamsters Local Unions 301, 704, and 801, respectively, whose Employers have become obligated under a Collective Bargaining Agreement to make contributions to the Pension Fund and who have, with the written consent of the Trustees, accepted and agreed to be bound by the Trust Agreement and the rules and regulations, as amended from time to time, in which event such respective locals shall be substituted for Local 705 wherever the same appears herein and the context so admits. Whenever Local 705 International Brotherhood of Teamsters, absorbs the members of another International Brotherhood of Teamsters Local Union, then such members' employment, for purposes of pension entitlement, shall be reckoned from the time they

became members of the absorbed local, provided, nevertheless, that they otherwise comply with, qualify, and are eligible for pension under then existing rules, provided, nevertheless, that this provision shall be applied prospectively from the effective date hereof, but not retroactively.

RULE 6

Saving Clause

A. Construction

These rules shall not be deemed an amendment or modification of the Trust Agreement and shall be so construed, interpreted and applied so as not: (1) to be incompatible or in conflict with the Trust Agreement, or (2) invalid under any applicable law, or (3) to impair any preferred treatment or disqualify any exempt status which the Fund may enjoy under the Internal Revenue Code as amended.

B. Invalidity of Any Provision

If any provision of these rules or the application thereof to any persons or circumstances shall be adjudged invalid, then the remainder of the rules and the application to persons and circumstances other than those to which it is held invalid shall not be affected thereby. The Trustees may suspend the operation of any provision adjudged invalid or inoperative during the period of its invalidity and substitute in its place and stead a provision which will meet the objections to such invalidity and which will accord with the intent and purpose of the invalidated provision if that can be done legally.

Exhibit 1F

1973 Local 705 Pension Plan Booklet

(See Opposite) ☞



INCOME FOR TOMORROW

LOCAL 705 I.B. of T.

PENSION PLAN

As Revised Effective Jan. 1973



Local 705 International
Brotherhood of Teamsters
Pension Trust Fund

Union Trustees	*Employer Trustees*
Louis F. Peick	Eugene McCarron
Frank Kratky	Howard Willett
Peter Janopoulos	Ralph Niedert
Bruno Fillipini	Frank Bridge

INCOME FOR YOUR RETIREMENT ACTIVITIES

Retired employees of contributing employers received their first checks from our pension fund in 1955. At that time our pension plan paid $75 a month for life. An employee qualified by working until age 65 and completing 20 continuous years of service. The plan provided only for *normal* retirement. There have been many improvements since those first checks were mailed.

Normal retirement age has been lowered twice--first to 62, and then all the way down to 57. Recently a *vested* pension was added so an employee can receive income from the plan at 65 even if he leaves covered employment long before retirement age.

Disability protection began in 1962. The first step was to allow a disabled employee to contribute for himself until he qualified for a normal pension at 62. In 1963 a disability pension was added to the plan. A participant who became totally and permanently disabled after age 55 and 15 years of service qualified for this new pension. He no longer had to contribute and wait until age 62 for his monthly payments. Later the age requirement was lowered to 45, and recently it was eliminated altogether.

Survivor protection started in 1963. In that year a cash benefit for funeral expenses was added to the plan. Later on, protection was extended to include monthly income for an employee's eligible spouse or children if he died after eligibility for normal retirement and before receiving his pension for ten years.

Pension amounts have increased a number of times. Starting with 1971 a pensioner can get as much as $400 a month for life--quite an improvement over the $75 pension offered in 1955.

This booklet describes the highlights of your Local 705 International Brotherhood of Teamsters Pension Plan as amended through January 1, 1973. The plan covers truck drivers, oil drivers and platform workers, represented by Local 705, and, where applicable also Local 301, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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All benefits from the Local 705 pension plan are *in addition* to social security benefits. To help you estimate your total income for your retirement activities this booklet also includes information about social security.

Normal retirement

You are eligible for normal retirement after you reach age 57 and have 20 consecutive years of uninterrupted service. The amount of your normal pension depends on your age when you retire from covered employment.

Age at Retirement	Monthly Pension
57	$250
58	300
59	350
60 or over	400

Monthly payments begin at retirement and continue as long as you live—even longer in some cases, as described later on. You receive the *largest* monthly amount if you wait until age 60 to retire, but you receive *more* monthly payments over your lifetime if you retire sooner.

Vested pension

If you leave covered employment before age 57, but after 20 years of service, and do not work in the craft afterwards, you are entitled to a vested pension of:

$250 a month

when you reach 65. To collect your pension, ask the administrator for a pension eligibility notice when you leave. Then, no sooner than six months before your 65th birthday, send in your application and your eligibility notice. Monthly payments will start after age 65 and after the trustees have your application. Anyone who fails to apply before age 70 loses his pension rights. See official pension plan 2.03.

If you receive a vested pension, you do not qualify for survivor protection or other Local 705 post-retirement benefits.

Disability retirement

You qualify for a disability pension if you have to stop working because of total and permanent disability after 15 years of service. The plan pays:

$250 a month

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starting 26 weeks after you become disabled, or 30 days after you apply, if later. The health and welfare plan pays sick benefits during the early stages of disability.

Survivor protection

Your pension plan includes survivor protection during employment after age 57 and 20 continuous years of service, and also during normal retirement or disability retirement. Here are the survivor benefits the plan offers:

- *Ten-year-certain pension.* If you should die after meeting the requirements for a normal pension—age 57 and 20 years of service—but before you actually retire, your eligible spouse or children will receive your pension for ten full years.

  When you retire, your normal or disability pension carries with it a ten-year-certain guarantee. This means that you will receive monthly payments for the rest of your life, no matter how long you live. However, if you should die before receiving 120 monthly payments—or payments for ten years—your pension will be paid to your eligible spouse or children for the remainder of the ten years.

  Your spouse will be eligible for your pension if married to you for at least one year on your last day of employment. If you leave no eligible spouse, or if your spouse dies before your pension has been paid for the full ten years, then your dependent children may receive your checks for the remainder of the ten years. A child qualifies while unmarried and under 18, or under 23 if a full-time student at an accredited college or university. If two or more are eligible, they share the monthly amount.

- *$1,000 in cash.* If you die during employment after age 57 and 20 continuous years of service, or during normal or disability retirement, the pension plan pays up to $1,000 in cash for funeral expenses. Your spouse, children, parents, or brothers and sisters receive any part of the $1,000 which is left over.

The Local 705 health and welfare plan also offers survivor benefits. In case of your death during employment (if you are eligible for a normal retirement pension), your eligible

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survivor may choose whether benefits are to be paid under the pension plan or under the health and welfare plan.

Figuring your service

In general, *service* means your last period of continuous uninterrupted employment in a covered position with one or a succession of employers having a bargaining agreement with this union. Of course all required contributions to the pension fund must have been made for you since the plan began in 1955.

In certain situations employment while you were represented by another union also counts as service. For example, if you worked for an employer who contributed to another pension fund of the International Brotherhood of Teamsters or Chicago Truck Drivers Union (Independent), you receive credit for service under the other pension plan if:

- your employer's business was acquired by an employer having a bargaining agreement with your present union, and
- your employer immediately began contributing to the Local 705 pension plan for you.

Ordinarily if employment and contributions stop you lose your service and begin over again when they resume. However, after January 1, 1970, twice during your lifetime the trustees may approve an application for reinstatement and restore the service you had when employment and contributions stopped, providing the total breaks in service and contributions do not exceed 24 months (2 years). They may do so only if:

- contributions stopped because of a layoff or other reason beyond your control; such as illness or military service—but not discharge for just cause or receipt of vested pension certificate of eligibility
- service and contributions begin again within less than two years and continue for at least three more years (or six months in case of death or disability)
- you apply for reinstatement within 90 days after completing the additional three years.

What social security can add

Social security pays full benefits upon retirement at age 65, reduced retirement benefits after 62, and disability

and survivors benefits at any age. Benefits are based on your average taxed pay—that part of your earnings which is taxed under social security law. A wife receives benefits based on her husband's earnings. Or, if she has worked under social security herself she gets her own benefit if larger.

The table gives examples of benefits under the law as amended in 1972, depending on averaged taxed pay and age when benefits begin. However, because of lower ceilings on taxable pay in the past, only those who retire far in the future can attain the higher averages. The maximum average taxed pay for people who retire at 65 in 1973 is about $520, and the maximum benefit about $275.

MONTHLY SOCIAL SECURITY BENEFIT

Average Taxed Pay	If Benefits Start at Age 62	If Benefits Start at Age 65	For Couple Both 65
$ 400	$186	$233	$350
500	215	269	404
600	247	309	464
700	274	342	513
800	291	364	546
900	307	384	576
1,000	323	404	606

Social security disability benefits are figured like retirement benefits that start at 65. Payments begin after five months of disability.

In case of your death, these dependents may receive survivor benefits:

- your family until your children reach age 18 (22 for full-time students) or marry
- your widow or widower after age 60, or after age 50 if disabled.

Benefits for your family depend on your average taxed pay, the number of individuals eligible for benefits, age, sex, and other considerations. The current maximum benefit for the family of a person who was born before 1930 is about $500 a month.

Final facts about your Local 705 pension plan

Contributions. The benefits described in this booklet are available only if your employer has made all required con-

tributions to the pension fund--or else you have done so yourself where provided in the plan. Pension contributions must be made before the tenth of each month for the previous month.

If you are injured on the job your employer will continue to pay the required contributions until you return to work, but not longer than *12 months*. If you are absent because of illness or an off-the-job injury, and you notify your employer, then your employer is required to contribute for you for up to *four weeks*. To keep your coverage after you have been off for 12 months, you must pay the required contributions yourself during your remaining period of illness.

Generally your employer contributes for you if you are granted a leave of absence, but it is your responsibility to work out the arrangements with your employer.

Administrator, Trustees and Appeals:

All questions or claims concerning eligibility or benefits, or interpretation of the pension plan should be directed to;

Louis F. Peick, *Administrator*
Local 705, I. B. of T. Pension Fund
300 South Ashland Boulevard
Chicago, Illinois 60607

After you have received an answer from the administrator you have ten (10) days to request that the trustees review that answer. The request must be made in writing to the administrator, if you ask to appear before the trustees you will then receive a notice when and where the trustees will consider your appeal and if you do not request a review within ten (10) days after receipt of the administrator's answer (or within an extension allowed by the administrator within the 10-day period), that decision will be final and binding.

Official rules and regulations. This booklet describes the main features of your plan. Your actual benefits will be determined in accordance with the official pension plan which appears on the following pages. Please read the plan carefully and pay particular attention to the eligibility requirements of 2.01 through 2.07 and the appeal procedures in 5.01 through 5.03.

We shall strive to better these plans as the law and economic conditions may allow.

Fraternally yours,
LOUIS F. PEICK, *Secretary-Treasurer*

LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS PENSION TRUST FUND PENSION PLAN
AS AMENDED TO JANUARY 1, 1973

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DEFINITIONS

1.01 *Trust Agreement* means the Agreement and Declaration of Trust dated January 1, 1955, between representatives of the Employer and the Union, as amended to date and hereafter.

1.02 *Pension Fund* means the Local 705 International Brotherhood of Teamsters Pension Fund established by the trust agreement which includes the monies or other things of value which comprise the trust fund.

1.03 *Trustees* means the signators to the trust agreement and their successors who are appointed pursuant to the trust agreement. The trustees in their collective capacity shall be known as the Board of Trustees of the Local 705 International Brotherhood of Teamsters Pension Fund and may conduct the business of the pension fund and execute all instruments in that name.

1.04 *Union* means Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and, where applicable, Local 301, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and such other labor organizations as the trustees approve in writing.

1.05 *Employer* means one or more individuals, partnerships, associations, corporations, or legal representatives of every nature which now or hereafter have a collective bargaining agreement with the Union, and who agree in writing to be bound by the trust agreement; and such other employers as are approved in writing by the trustees.

1.06 *Employee* means (a) an individual employed by the Employer in a bargaining unit represented by the Union for whom the Employer is obligated to contribute to the pension fund. For purposes of credit for "past service" it shall in-

clude periods of such employment preceding the date when the Employer became so obligated; (b) employees of the pension fund; and (c) employees and officers of the Union.

1.07 *Pensioner* means a retired employee who is receiving a benefit under the pension plan.

1.08 *Dependent child or children* means one or more living unmarried natural or legally adopted children of the employee or pensioner under the age of 18, or under the age of 23 for a child who is attending an accredited college or university on a full time basis, and only for such period of time as each child meets each of these requirements. Retarded children are also covered to age 23 if attending a school for retarded children.

1.09 *Pension Plan* means this written detailed basis for the payment of benefits, or as amended thereafter.

1.10 *Retires or Retirement* means voluntary or involuntary (except by death) permanent termination of employment with any Employer.

1.11 *Disability* means a physical or mental condition which wholly and permanently prevents an employee from engaging in any remunerative occupation or employment.

1.12 *Administrator* means Louis F. Peick, and his successors, designated by the trustees to act as executive administrative officer of the pension fund.

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ELIGIBILITY

2.01 *Normal Retirement.* An employee is eligible for a normal retirement pension if he meets all of the following conditions:

(a) He retires after attaining normal retirement age (57).

(b) He has been an employee of an Employer for at least 20 consecutive, continuous and uninterrupted years immediately preceding retirement, subject to the provisions of 2.05.

(c) Contributions on his behalf have been continually received by the pension fund since January 1, 1955, if then an employee of an Employer, or if not, then since

the beginning as an employee of an Employer, subject to the provisions of 2.05.

(d) He makes written application to the pension fund (in the form approved by the trustees) for normal retirement pension within 30 days of the date he intends to retire, or claim normal retirement benefits.

2.02 *Disability Retirement.* (a) An employee is eligible for a disability retirement pension if he meets all of the following conditions:

(1) He has been an employee of an Employer for at least 15 consecutive, continuous and uninterrupted years immediately preceding the commencement of his disability, subject to the provisions of 2.05.

(2) Contributions on his behalf have been continually received by the pension fund since January 1, 1955, if then an employee of an Employer, or if not, then since the beginning as an employee of an Employer, subject to the provisions of 2.05.

(3) He retires because of a disability, and after retirement that disability continues for a period of at least 26 consecutive weeks.

(4) He makes written application to the pension fund (in the form approved by the trustees) for a disability retirement pension within 7 months after his disability commenced.

(b) The employee shall furnish the trustees as proof of disability evidence satisfactory to them from the Social Security Administration that the employee is entitled to a disability insurance benefit under the federal Social Security Act. If such proof is not available to the employee, the trustees may in their sole discretion require the employee to submit to a physical or mental examination and may require the employee to furnish additional proof as they deem appropriate. The trustees' decision whether the employee is disabled is final and binding on the employee and all others.

(c) No disability pension shall be due or payable to or for an employee who has either not retired, or who has retired because of a disability but who dies before he has met the requirements of both ¶2.02(a) (3) and (4).

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2.03 *Vesting.* (a) An employee not otherwise eligible for a pension who retires after July 1, 1971, and meets all of the requirements of ¶2.01(b) and (c) and ¶3.03, is eligible to receive a pension beginning on the first day of the month next following his 65th birthday, or following the date his application is received by the pension fund, whichever is the later. Spouse and dependent children of an employee who retires under these circumstances are not entitled to benefits for the spouse and dependent children.

(b) At the time the employee retires, he shall request that the pension fund (in the form approved by the trustees) issue him a certificate of eligibility for a vested pension which certificate will be in the form approved by the trustees from time to time.

(c) Application for receipt of the pension benefit shall be made to the administrator (in the form approved by the trustees and in accordance with ¶3.03) and shall be accompanied by the certificate issued to the employee when he retired. The trustees may require such additional evidence that the retired employee is qualified to receive this pension benefit as they deem necessary, and their decision as to eligibility shall be final and binding.

(d) If an employee has received a certificate of eligibility under subparagraph (b) and thereafter returns to covered employment, he shall not accumulate any pension credits or be entitled to receive any pension benefits other than the vested pensions. The period of discontinued service and contributions is not subject to the benefit of ¶2.05.

2.04 *Pension for Survivors When Death Occurs Before Retirement.* (a) If an employee dies on or after July 1, 1971 and meets all of the requirements for a normal retirement pension except that he has not retired or made application, then his surviving spouse shall receive a pension for 120 months or until the spouse's death, whichever is earlier, beginning in the calendar month following the employee's death; provided that the spouse was married to the employee for at least 1 year immediately preceding the employee's death.

(b) If the deceased employee is not survived by an eligible spouse, or if the surviving spouse dies before receiving 120

monthly payments, then the monthly payments described in subparagraph (a), or the balance thereof, as the case may be, shall be paid only to the dependent child or children. In no event shall the pension fund be obligated to pay out on behalf of the deceased employee to any and all eligible recipients more than an aggregate total of 120 monthly payments. If there is only one dependent child, he shall receive the entire monthly pension until no longer a dependent child at which time all pension benefits stop. If there are two or more dependent children, each shall receive an equal share of the monthly pension, and when each is no longer a dependent child, his share will be apportioned to or among the other dependent child or children.

(c) Notwithstanding any provision in the pension plan to the contrary, the surviving eligible spouse, or dependent child or children if there is no surviving spouse, shall elect whether to receive the survivor's pension or the death benefit payable under the Local 705 International Brotherhood of Teamsters Health & Welfare Fund, and there shall be no duplication of benefits. The election of the surviving eligible spouse shall be final and binding on the spouse, the dependent child or children, if any, and all other persons, and shall release and discharge the trustees and the pension fund from all liability whatsoever. If there is no surviving eligible spouse, but only a dependent child or children, the trustees in their sole discretion shall decide whether to pay this pension benefit, or not to pay it and thereby permit the dependent child or children to claim the death benefit from the Health & Welfare Fund, and the decision of the trustees is final and binding on the dependent child or children and all others.

2.05 *Continuity of Employment.* (a) Service as an employee with an Employer which is followed immediately by service as an employee with another Employer shall be considered as being an employee of one Employer.

(b) If after January 1, 1970 employment of, and contributions for, an employee are discontinued by the Employer because of layoff or any other reason beyond the employee's control (such as illness or military service but not including discharge for just cause or receipt of a certificate of eligibility for vested pension under 2.03) and if employment and contributions are resumed at a later date, the employee may apply to the trustees (in the form approved by the trustees) for re-

instatement of that period of continuous employment which occurred immediately prior to the discontinuance of employment and contributions. The trustees shall approve the application only if:

(1) The period of discontinuance of service as an employee and the discontinuance of payment of contributions was less than 24 consecutive months (subject to the limitation in subparagraph (4) below); and

(2) The subsequent period during which he is continually an employee of an Employer and for which contributions are continually received is at least 3 years, except that the 3 year requirement is waived if either death or disability occurs more than 6 months after his return as an employee and resumption of payment of contributions; and

(3) Application is made not later than 90 days after the expiration of the 3 years in subparagraph (2) above, except if death shall occur within the 90 day period.

(4) The trustees shall not grant more than 2 such applications to any employee, nor shall the total of breaks in service and contributions exceed 24 months. The period(s) of discontinued employment and contributions shall not be credited as year(s) of service or contributions for any purposes.

(c) Whenever an employee represented by another local of the International Brotherhood of Teamsters or Chicago Truck Drivers Union (Independent), which has a collective bargaining agreement with an employer requiring the employer to make contributions to a pension fund on behalf of the employee, becomes an employee of an Employer covered by this plan solely because the Employer acquired the former employer, then the service as an employee with the former employer which is followed immediately by service as an employee of an Employer shall be considered employment and contributions under 2.01 (b), (c) and 2.02 (a) (1) and (2). The same service and contribution credits may be given where the employee obtains covered employment because his local union is absorbed into or merged with the Union. The Trustees may accept employees into the plan under this subparagraph on such terms and conditions as they deem proper

to preserve the integrity and actuarial soundness of the pension fund.

(d) *Large Scale Area Lay-offs.* In the event of extensive lay-offs affecting large numbers of employees, the trustees shall have the power to waive contributions for regular participants for a maximum period of sixty (60) calendar days from the date of lay-off. It is intended that this waiver not be used on a regular basis but not more frequently than once every three to five years, depending on the severity of economic conditions.

2.06 *Death Benefit Amount.* (a) The pension fund will pay a $1,000 funeral benefit upon the actual and not presumptive death of a normal or disability retirement pensioner, or an employee who was eligible to receive normal retirement pension benefits immediately prior to his death. Upon presentation to the administrator of proof of actual and not presumptive death, a certified copy of a death certificate, and an undertaker's bill, the pension fund shall pay $1,000 or the cost of the burial, whichever is less, to either:

(1) The undertaker if his bill for internment is unpaid, or

(2) The person who paid the undertaker's bill upon presentation of a paid bill. Payment based upon presentation of a purported paid bill shall release and discharge the pension fund from all liability.

(b) The balance remaining after the payment of the funeral expenses shall be paid to the following survivors of the deceased employee or pensioner in the following order:

(1) Spouse

(2) Children, including legally adopted children

(3) Parents

(4) Brothers and sisters.

The order of payment is not mandatory and the payment of the aggregate death benefits to any person named in subparagraph (a) or (b), or to the legal representative of the decedent's estate, shall be binding on all persons and shall automatically release and discharge the administrator, trustees, and pension fund from all liability or obligation.

(c) If an employee or pensioner dies and leaves no survivors listed in subparagraph (b) (1)-(4), the pension fund shall

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not pay a death benefit but may take charge of the funeral and pay its reasonable expenses up to $1,000, and the pension fund shall be entitled to benefits from the Social Security Administration.

(d) The death benefit shall not be paid if a death benefit is payable under the Local 705 International Brotherhood of Teamsters Health & Welfare Fund unless the person entitled thereto has waived the right to the benefit or otherwise.

(e) No beneficiary designation by will or otherwise is binding on the pension fund.

2.07 *Eligibility Depends on the Employee or Pensioner.* The eligibility of any person to receive the benefits provided in this plan is conditioned upon the eligibility of the employee or pensioner (as the case may be), and the right to receive these benefits does not separately accrue to anyone other than the employee or pensioner.

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PENSION PAYMENTS

3.01 *Pension Payments for Employees Who Retire Under Normal Retirement.*

(a) *Retirement prior to April 1, 1965:*

An employee who retired and qualified for pension before April 1, 1965, shall be paid one hundred fifty dollars ($150.00) per month during his lifetime, commencing with the monthly payment to be made December 1, 1965 (except that the one hundred fifty dollars ($150.00) is increased to two hundred fifty dollars ($250.00) with respect to payments due after November 30, 1969. If the death of the pensioner occurs before he has received one hundred twenty (120) monthly payments, and if he is survived by a spouse to whom he was married at the time of his retirement, then monthly payments shall be continued to be made to her until either an aggregate of one hundred twenty (120) monthly payments shall have been made since the pensioner's retirement, or until the spouse dies, whichever is the earlier.

(b) *Retirement on and after April 1, 1965 but before January 1, 1969:*

An employee who retired and qualified for pension on and after April 1, 1965, but before January 1, 1969, shall be paid during his lifetime the sum of two hundred fifty dollars ($250.00) per month during the first sixty (60) months of his entitlement, and one hundred fifty dollars ($150.00) per month thereafter (except that the one hundred fifty dollars ($150.00) is increased to two hundred fifty dollars ($250.00) with respect to payments due after November 30, 1969. If the employee dies before he has received one hundred twenty (120) monthly payments and if he is survived by a spouse to whom he was married at the time of his retirement, then monthly payments shall continue to be made to the spouse until either an aggregate of one hundred twenty (120) monthly payments shall have been made since the employee's retirement, or until the spouse dies whichever is the earlier.

(c) *Retirement on and after January 1, 1969, but before January 1, 1971:*

An employee who retired and qualified for pension on and after January 1, 1969, but before January 1, 1971, shall be entitled to a monthly pension of two hundred fifty dollars ($250.00) per month for life. If the employee dies before he has received one hundred twenty (120) monthly payments and if he is survived by a spouse to whom he was married at the time of his retirement, then monthly payments shall continue to be made to the spouse until either an aggregate of one hundred twenty (120) monthly payments shall have been made since the employee's retirement, or until the spouse dies, whichever is the earlier.

(d) *Retirement on or after January 1, 1971:*

An employee who retires on or after January 1, 1971, and qualifies for a pension shall be entitled to a monthly pension for life determined in accordance with the following schedule:

Age on Date of Retirement	Monthly Pension
57	$250
58	300
59	350
60 or more	400

If the death of the pensioner occurs before receiving one hundred twenty (120) monthly payments and he is survived by a spouse to whom he was married at the time of his retirement, then monthly payments shall continue to the surviving spouse until an aggregate of one hundred twenty (120) monthly payments shall have been made since the employee's retirement, or until the spouse's death, whichever is the earlier, except as provided in subparagraph (e) below.

(e) If the employee retires on or after July 1, 1971, and dies before receiving one hundred twenty (120) monthly payments and is not survived by an eligible spouse, or such surviving spouse dies before one hundred twenty (120) monthly payments have been made, payments shall continue for the balance of the one hundred twenty (120) month period to the employee's dependent child or children, if any, except that no payments shall be made after all children have ceased to be dependent children. If there is only one dependent child, such child shall receive the entire monthly amount. If there are two or more dependent children, each shall receive an equal share of the monthly amount and, when each child ceases to be a dependent child, his or her share shall be apportioned among the other dependent children.

3.02 *Pension Payments for Disabled Employees.* (a) If an employee retired because of disability prior to January 1, 1971, and qualified for a disability pension under the Rules as in effect at the time of his retirement, he shall be entitled to a pension which is computed and payable in accordance with the provisions of ¶3.01.

(b) An employee who retires on or after January 1, 1971, and qualifies for a disability pension under this plan, shall be entitled to a pension for life of two hundred fifty dollars ($250.00) per month beginning as of the first day of the calendar month following a period of disability of twenty-six (26) full and continuous weeks, or thirty (30) days after his written application for pension payments, whichever is later. If the disability pensioner dies before receiving one hundred twenty (120) monthly payments and he is survived by a spouse to whom he was married for a period of at least one (1) year at the time of his retirement, then monthly payments shall continue to the surviving spouse until an aggregate of one hundred twenty (120) monthly payments

shall have been made since the pensioner's retirement, or until the spouse's death, whichever is the earlier, except as hereinafter indicated.

(c) If the employee retires on or after July 1, 1971, and dies before receiving one hundred twenty (120) monthly payments and he is not survived by an eligible spouse, or such surviving spouse dies before one hundred twenty (120) monthly payments have been made, payments shall continue for the balance of the one hundred twenty (120) month period to the employee's dependent child or children, if any, except that no payments shall be made after all children have ceased to be dependent children. If there is only one dependent child, such child shall receive the entire monthly amount. If there are two or more dependent children, each shall receive an equal share of the monthly amount, and when each child ceases to be a dependent child, his or her share shall be apportioned among the other dependent children.

3.03 *Pension Payments for Vested Employees.* An employee who qualifies for a vested pension shall be entitled to a pension of two hundred fifty dollars ($250.00) per month under ¶2.03 with payments beginning on the first day of the month next following his 65th birthday and continuing for life, provided that an application has been made for such pension in accordance with the following provisions. An application which is received earlier than six months prior to the applicant's 65th birthday shall be of no effect. An application which is received after attainment of age 65 shall not entitle the applicant to any retroactive payments and, if an application is not received prior to age 70, the applicant shall forfeit his right to a pension.

3.04 *Effective Date of Plan.* Except as otherwise provided, this plan, as amended, shall become effective January 1, 1973. Pensioners, their spouse and children shall be governed by the rules in effect at the time of the pensioner's retirement except as otherwise specifically provided by an amendment adopted after retirement.

3.05 *Non-Duplicating Pensions.* Nothing contained in this plan shall be construed as permitting any person to be entitled simultaneously to more than one type of pension under this plan.

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REVISION AND STOPPAGE OF PAYMENTS

4.01 *Revision of Payments.* (a) All pension payments and eligibility requirements shall be subject to modification, extension, revision, curtailment, or other conditions which the trustees may impose or promulgate from time to time, provided that such conditions shall be uniform in application to all eligible employees or pensioners similarly circumstanced. The trustees may, from time to time, establish other and different plans and rules affecting employees who may be employed by a single Employer or group of Employers when circumstances in the sole discretion of the trustees warrant such action.

(b) If a pensioner who is receiving a pension returns to employment with an Employer and thereafter retires again, he shall receive only the pension benefit in effect on the date that he first retired.

4.02 *Stoppage of Payments.* (a) No pension shall be paid for any period when a pensioner is directly or indirectly engaged in the trucking or cartage industry individually or as an employee, associate, member, partner or an officer in any firm, association, partnership, or corporation. The trustees may in their sole discretion:

(1) Designate other employment which a pensioner may not engage in and continue to receive pension payments.

(2) Upon application by a pensioner (in the form approved by the trustees), permit the pensioner to work for a trucker or hauler except he shall not be authorized to perform work or services similar to those performed by the pensioner for an Employer immediately preceding retirement, or which in any way conflicts with the business or interests of any of the pensioner's former Employers.

(b) The benefits to a disability pensioner shall stop if before reaching normal retirement age the trustees decide that he is no longer disabled. For determination of normal retirement and vested pension requirements, the period of disability shall be considered as consecutive, continuous and uninterrupted years of employment with an Employer. If a

pensioner is no longer disabled and qualifies for a pension, he shall receive only the pension amount in effect on the date that he retired because of the disability.

(c) If a pension benefit is returned to the pension fund, future payments will stop until the eligible recipient furnishes it with a correct address. If a correct address is not received within 12 months from the date the first payment was returned, the recipient shall automatically lose all rights to past pension payments.

4.03 *No Assignment or Attachment of Benefits.* Plan benefits shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, including any such liability which is for alimony or other payments for support of a spouse or former spouse or for any relative of the employee prior to actually being received by the person entitled to the benefit under the terms of this plan, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits hereunder shall be void. The pension fund shall not in any manner be liable for or subject to the debts, contracts, liabilities, engagements or torts of any person entitled to benefits hereunder.

4.04 *No Title or Interest.* No person, other than the trustees shall have any right, title or interest in or to any of the income or property of any character received or held by or for the account of the pension fund, and no person shall have any vested right to the benefits provided by the pension fund except as provided in ¶2.03 and ¶3.03 of this plan.

5
ADMINISTRATOR'S DUTIES AND APPEALS TO THE TRUSTEES, TRUSTEES POWERS

5.01 *Sumbission to Administrator.* (a) All questions or controversies of every nature in connection with the pension fund or this plan, or their operations, including but not limited to claims for benefits from an employee, pensioner, spouse, or other person, construction of the terms of the trust agreement, plan, rules and regulations, writing, decision, or acts, shall be first submitted to the administrator for decision and action. The action or decision of the adminis-

trator shall be final and binding unless appealed within the time and in the manner specified in ¶5.02. The administrator may refer any matter directly to the trustees for decision.

(b) The administrator and trustees are entitled to conclusively rely upon any facts appearing in the records of the pension fund or instruments on file with it or on file with the Union or Employer, (or certified by either of them), any facts which are public record, or any other evidence pertinent to the issue involved.

(c) All submissions to the administrator shall be in writing to:

Louis F. Peick
Administrator
Local 705 I. B. of T. Pension Fund
300 South Ashland Boulevard
Chicago, Illinois 60607

5.02 *Appeal to the Trustees.*

(a) Within 10 days after the decision of the admministrator, an aggrieved person may appeal the administrator's decision or action to the trustees. The appeal shall be in writing directed to the administrator and received by him within the 10 day period. The administrator shall refer the appeal to the trustees for decision, and if the aggrieved person in his appeal requests an opportunity to appear before the trustees at a meeting to present his case, the trustees shall permit the person to appear himself or by a representative. The trustees may adopt rules and regulations governing the conduct of the hearings.

(b) The decision of the trustees on all matters before them whether by way of appeal or otherwise shall be final and binding on the Union, Employer, employee, pensioner, spouse, dependent children, and all other persons who are claimants or are affected by the trustees' decisions or otherwise.

5.03 *Sole Determination by Trustees.* Only the administrator (subject to appeal) and the trustees have the authority to determine eligibility for benefits and the right to participate in the pension fund, and to exercise all the other powers specified in this plan. No officer, agent or employee of the Union, or Employer, or any other person, is authorized to

speak for, or on behalf of, or to commit the trustees or administrator, on any matter relating to the pension fund or plan.

6
CONTRIBUTIONS

6.01 *Amount of Contributions.*

(a) The Employer shall pay to the Fund on behalf of each regular employee per week the sum specified in the collective bargaining agreement between the Union and the Employer for any week in which the employee performs any services for the Employer including service not within the collective bargaining agreement.

(b) An Employer shall pay to the Fund on behalf of each non-regular employee, including replacements for absentee employees, for each day worked an amount equal to 20% per day of the sum required for a regular employee.

6.02 *Duration of Employer Contributions.*

(a) *Non-occupational illness or injury.* If an employee does not perform services for an Employer because of a non-occupational injury or illness, the Employer shall continue to pay the required contributions for a period of 4 weeks, or until the employee is fit to return to work, whichever is the sooner. After the Employer has paid 4 weeks of contributions, the Employer and employee are not required to make further contributions for an additional period of 11 months, or until the employee is fit to return to work, whichever is earlier, and that period shall not be considered as a break in the employee's period of continuous, consecutive, uninterrupted years of service

(b) *Occupational illness or injury.* If an employee does not perform services for an Employer because of an occupational injury or illness, the Employer shall continue to pay the required contributions for a period of 12 months, or until the employee is fit to return to work, whichever is the sooner.

(c) *Expiration of collective bargaining agreement.* The Employer shall make the required contributions after the expiration of the collective bargaining agreement until a new agreement is consummated.

6.03 *Leave of absence.* All leaves of absence, when granted by the Employer, in addition to the requirements of the parties, shall be conditioned upon the Employer and the employee making satisfactory arrangements for paying the weekly payment to the Fund, and at all times the payment shall be made by the Employer for the period of such granted leave of absence.

6.04 *Employee Contributions.* Whenever an Employer is not obligated to make payment to the pension fund for an employee (such as after the 12-months in 6.02 (b).) then the employee shall make the required payment, for a period not to exceed 3 months. The employee may appeal for an extension of time to the trustees.

6.05 *Date of Contributions.* Contributions must be received by the pension fund by the tenth day of the month immediately following the Employer's payroll period based on the number of Saturdays in the previous month.

6.06 *Place of Payment.* All payments required to be made to the pension fund shall be made payable to Local 705 I. B. of T. Pension Fund, 300 South Ashland Boulevard, Chicago, Illinois 60607, or at such other address as the pension fund may from time to time, in writing, direct, and shall be accompanied by an original copy of remittance in the form approved by the trustees.

7
SAVING CLAUSE

7.01 *Construction.* This plan shall not be deemed an amendment or modification of the trust agreement and shall be so construed, interpreted and applied so as not: (1) to be incompatible or in conflict with the trust agreement, or (2) invalid under any applicable law, or (3) to impair any preferred treatment or disqualify any exempt status which the pension fund may enjoy under the Internal Revenue Code as amended.

7.02 *Invalidity of Any Provision.* If any provision of this plan or the application thereof to any persons or circumstances shall be adjudged invalid, then the remainder of the plan and the application to persons and circumstances other than those to which it is held invalid shall not be affected thereby. The trustees may suspend the operation of any pro-

vision adjudged invalid or inoperative during the period of its invalidity and substitute in its place and stead a provision which will meet the objections to such invalidity and which will accord with the intent and purpose of the invalidated provision if that can be done legally.

8
AMENDMENTS

8.01 The trustees by majority vote of those present and voting at a meeting where a quorum is present may amend this plan which amendment shall be reduced to writing and may be effective prospectively or retroactively. All amendments are subject to the limitations of the trust agreement and to applicable law and administrative regulations.

Availability of Plan Descriptions and Annual Reports Filed With The U.S. Labor Department

The Trustees of the Pension Plan are required to file with the U.S. Labor Department a comprehensive description of the Plan in a manner calculated to be understood by all Plan participants. Such a description has been filed and is available for your inspection at the Fund Office between the hours of 10:00 a.m. and 4:00 p.m. Monday through Friday, except holidays. Also available for inspection during the same hours is the latest annual report which is required to be filed each year with the U.S. Labor Department.

Both, a copy of the Plan description and a summary of the annual report, are available by mail upon a written request to the Fund Office.

Copies of Plan amendments are also available for inspection at the Fund Office or upon written request.

Local Union No. 705
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
300 South Ashland Boulevard
Chicago, Illinois 60607

Secretary-Treasurer: Louis F. Peick

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Form 811-P—20M—5-73

Exhibit 1G

Letter of July 23, 1974

(See Opposite) ☞

EXHIBIT 1 G

Counsel

Address any reply to: 17 N. Dearborn St., Chicago Ill. 60602

Department of the Treasury

Phone Contact: P. Fetyko
Phone Number: 353-1252

District Director

Internal Revenue Service

Date: JUL 23 1974 | In reply refer to: File # 5581

Board of Trustees of Local 705
International Brotherhood of
Teamsters Pension Fund
300 S. Ashland Blvd.
Chicago, Ill. 60607

Gentlemen:

Name of Plan: Local 705 International Brotherhood of
Name of Trust: Teamsters Pension Trust Fund Pension Plan
Application Form: 4577 Dated: 3/13/74
Date Adopted: Date Amended: 5/6/74

Based on the information supplied, we have made a favorable determination on your application identified above.

Continued qualification of the plan will depend on its effect in operation as well as its present form. See section 1.401-1(b)(3) of the Income Tax Regulations. The enclosed Publication 794 describes some events that could occur after you receive this determination letter that would automatically nullify it without specific notice from us. The publication also provides information about filing requirements, the effect of determination letters and plan operations, and the deductibility of contributions. The status of the plan in operation will be reviewed periodically.

If your application covered an amendment only, this letter is an opinion only as to whether the amendment submitted affects the existing status of the qualification of the plan and exemption of the trust. It is not a determination on the continued qualification of the entire plan.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Please keep this letter in your permanent records.

E1.16

Form L-328 (Rev. 6-73)

EXHIBIT 1 G

You should furnish annually a new list of participating employers similar to the schedule submitted, indicating, however, those employers who have adopted the plan during the year and those employers who have ceased to be members of the plan. You should also furnish annually information similar to that described in Revenue Ruling 70-257, IRB No. 1970-21.

This opinion, however, is not to be taken as an indication that the Internal Revenue Service is in any way passing upon the actuarial soundness of the plan or on the reasonableness of the actuarial computations.

Very truly yours,

Charles F. Miriani

Charles F. Miriani
District Director

Favorable Determination Letter

EXHIBIT 1 G

Publication 794 (6-73)

Effect Under Sections 401, 405(a), or 501(a) of the Internal Revenue Code

This publication describes some events that could nullify the favorable determination letter.

Operation of the plan in subsequent years

Rev. Proc. 72-6, 1972-1 C.B. 710, 712, and Rev. Rul. 69-24, 1969-1 C.B. 110, 111, provide, in part, that:

". . . While a favorable determination letter may serve as a basis for determining deductions for employer contributions thereunder, it is not to be taken as an indication that contributions are necessarily deductible as made. Such determinations can be made only upon an examination of the employer's tax return, in accordance with the limitations and subject to the conditions of section 404 of the Code. . . ."

". . . A determination letter issued with respect to the qualification of a plan under section 401(a) of the Code, is based on the information furnished by the employer. . . . The wording contained within the four corners of a written document may spell out a theoretically qualified plan which may or may not materialize in actual operation. For example, a plan may be open to all employees who have one year of service and who will be entitled to pensions commencing at normal retirement age 65 only if they remain with the employer until that age and have at least 10 years of service at retirement.

Such provisions have been found acceptable in certain cases, and favorable determination letters have been issued. . . . A high rate of service separations, however, may leave relatively few of the lower paid employees but practically all of the officers, shareholders, supervisors, and highly compensated employees in the plan, resulting in discrimination in favor of the latter group. Thus, in operation, such a plan does not meet the requirements of section 401(a) of the Code for some part or all of the period of its operation. . . ."

In view of the above, if coverage is based on the percentage requirement of section 401(a)(3)(A) of the Code and this requirement is not met in some years following issuance of the favorable determination letter, the taxpayer may no longer rely on the letter.

Similarly, if coverage is based on the requirement of section 401(a)(3)(B) of the Code and the coverage of employees in the lower and middle compensation ranges is reduced materially in any subsequent year from that in your application, our favorable determination letter will not apply.

A plan will be considered as meeting these coverage requirements during the whole taxable year if on any one day of each quarter it satisfies these requirements.

If employee turnover results in the allocation of forfeitures principally to the benefit of officers, shareholders, supervisors, and highly compensated employees, our favorable determination letter will not apply.

These few examples are not the only developments in operation that could cause a plan to lose its qualified status.

General

If the determination was made from a copy of the plan or amendment and the copy was not signed or dated, you must furnish us a signed and dated copy for the determination letter to be effective.

To determine whether your plan falls within the general wage and salary standards, see the regulations issued by the Cost of Living Council under the authority of the Economic Stabilization Act of 1970, as amended. If you have any questions, our Economic Stabilization Section will be pleased to help you.

Requirements for filing returns

Employers must file Form 4848, Annual Employer's Return for Employees' Pension or Profit-Sharing Plans, and required attachments.

The fiduciary must file Form 990-P, Annual Return of Fiduciary of Employees' Pension or Profit-Sharing Trust, and required attachments. In addition, the following forms may also be required:

Form 990-T, Exempt Organization Business Income Tax Return, if unrelated business income was realized.

Form W-2P, Statement for Recipients of Annuities, Pensions, or Retired Pay.

Form 1099R, Statement for Recipients of Lump-Sum Distributions from Profit-Sharing and Retirement Plans.

Form W-3, Transmittal of Income and Tax Statements.

For W-3P, Annual Report by Certain Payors of Annuities and Lump Sum Distributions.

The part of the insurance premiums paid for life insurance protection is considered income to the employee in the year in which the premium is paid and must be reported on Form 1099R, if paid by the fiduciary or on Form W-2, if paid by the employer.

Every fiduciary and trust is required to have an employer identification number, regardless of whether it has any employees. This number should be entered in the space provided on all Federal returns filed and referred to on all correspondence with the Internal Revenue Service. If the fiduciary or trust does not have such a number and has not applied for one, Form SS-4, Application for Employer Identification Number, should be filed with the appropriate Internal Revenue Service Center.

Exhibit 1H

Letter of June 11, 1971

(See Opposite) ☞

LOCAL 705
I. B. of T.

LOUIS F. PEICK, Sec'y-Treas.

EXHIBIT 1 H

HEALTH & WELFARE AND PENSION FUNDS

300 SOUTH ASHLAND BOULEVARD • Telephone 738-2800 • CHICAGO, ILL. 60607

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June 11, 1971

To the Members of Local 705, I. B. of T.

Dear Sir and Brother:

I am pleased to report that the Boards of Trustees of the Local 705 I. B. of T. Pension Fund and the Local 705 I. B. of T. Health and Welfare Fund have voted to make substantial improvements in benefits.

This report is a summary of the changes approved by the Union-Employer Boards of Trustees. The full, official details of the improvements will be included in a new booklet now being prepared. We present this preliminary information to let the members know what has been accomplished.

The action of the Trustees continues the record of progress made in the benefit structure for eligible employee-members and dependents. The Trustees worked long and hard to find the best possible use of the funds, always making sure that the plans are financially sound. We had the constant advice of one of the nation's most expert actuaries—specialists in figuring how money for pensions and health and welfare benefits can buy the best possible coverage.

We believe that the Local 705, I. B. of T. Pension and Health and Welfare Plans stand up well against any other plan covering workers in our general wage bracket. Our goal, as always, is security for the members and their dependents, and safety of the funds for the future. We know you share our pride in what the Trustees have done.

Here is an explanation of the changes . . .

MONTHLY NORMAL RETIREMENT PENSIONS EFFECTIVE JANUARY 1, 1971

The monthly normal retirement pensions to be paid to those retiring *on or after January 1, 1971*, under the eligibility standards set by the Board of Trustees are as follows:

YEARS OF COVERED SERVICE	AGE AT RETIREMENT	MONTHLY PENSION
20	57	$250.00
20	58	300.00
20	59	350.00
20	60 or over	400.00

EXAMPLE: A covered member who retired February 1, 1971 at age 61 with at least 20 years of service will receive a check covering the increase from $250.00 to $400.00 per month, or $150.00 for each month since February 1, 1971.

PLEASE DO NOT CALL OR WRITE THE PENSION FUND HEADQUARTERS ABOUT YOUR RETROACTIVE CHECKS. THEY WILL BE PAID TO THOSE ELIGIBLE AS SOON AS POSSIBLE.



Ex. 1H

SHIP BY TRUCK

S.F.14202-8000-6.72

EXHIBIT 1 H

PERMANENT PHYSICAL DISABILITY RETIREMENT

EFFECTIVE JULY 1, 1971

Covered members with at least 15 years of continuous service who are permanently disabled on or after July 1, 1971, and therefore unable to work will be entitled to a pension of $250.00 per month, *regardless of age*. Previously, the disabled member had to be at least 45 years of age to be eligible for a disability pension.

WIDOWS' and DEPENDENT CHILDREN'S BENEFITS

EFFECTIVE JULY 1, 1971

A covered member who dies while still employed, after at least 20 years of service (or 240 months) and having reached a retirement age (minimum, 57 years) will be treated as if he had retired on the day before his death. The widow, if she had been married to the member for at least one year before his death, can take these options:

1. Receive the $5,000 death benefit provided under the Health and Welfare Plan plus the $1,000 death benefit provided by Local 705, a total of $6,000, and waive all rights to pension benefits . . . or

2. Receive 120 months (10 years) of certain benefits at the rate which would have prevailed if the member had retired the day before his death, plus the $1,000 death benefit from the Pension Fund and the $1,000 death benefit from Local Union No. 705.

***EXAMPLE:* Member on payroll of firm under contract with Local 705, I. B. of T. with at least 20 years of service, dies at age 59, leaving a widow with no minor children will receive monthly payments of $350.00 for 120 months (10 years), or a total of $42,000.00. If she dies before the 120 payments are made, the benefits stop.**

If the covered member dies while employed and leaves no widow, the benefits will be allocated equally to the dependent children of the deceased member.

(A dependent child is entitled to benefits if under age 18, unmarried, or under age 23, unmarried, if attending an accredited institution of learning.)

***EXAMPLE:* Member (widower) on payroll of firm under contract with Local 705, I. B. of T. with at least 20 years of service, dies at age 58, and there are three children: one, age 19, is in college; the other children are ages 14 and 12. If the member had retired the day before his death, he would have been entitled to a pension of $300.00 per month.**

Each child would receive a benefit of $100.00 per month, until reaching age 18 or age 23 if still a full-time student in an accredited institution of learning, or until the 120 payments (10 years) have been used up, or until the dependent children are married.

If the wife who decides to take the pension benefit dies before receiving 120 months of benefits, the balance of the benefits will be equally divided among the dependent children and paid so long as each is dependent, or to the balance of the unused months of benefits.

***EXAMPLE:* Member on payroll of firm under contract with Local 705, I. B. of T. with at least 20 years of service, dies at age 60, leaving a wife and two children. The widow dies after drawing benefits for 2 years. The children at time of her death are 10 and 8.**

Here is how it would work:

Wife drew benefits for 2 years (24 months) at $400.00 per month	**$ 9,600.00**
Child A (10 yr. old) 8 yrs. at $200.00 per month	**19,200.00**
Child B (8 yr. old) 8 yrs. at $200.00 per month	**19,200.00**
	$48,000.00

EXHIBIT 1 H

VESTING

EFFECTIVE JULY 1, 1971

A covered member with at least 20 years of service but younger than retirement age who leaves the craft on or after July 1, 1971, will be vested with a pension benefit of $250 per month payable for life starting at age 65. This is the only pension benefit provided.

Widows and dependent children of persons leaving the craft under these circumstances are not entitled to benefits for surviving widows or dependent children as described above.

RIGHTS OF MEMBERS WHO HAVE BREAKS IN SERVICE
EFFECTIVE JANUARY 1, 1970

An employee who has had no more than two (2) breaks in service may apply to the Board of Trustees to have his previous service reinstated upon the following conditions

1. The breaks in service were involuntary; and
2. The total length of the two breaks in service did not exceed 2 years, and
3. Upon return to employment, the employee has worked for a contributing employer for at least 3 consecutive years; provided, however, that for purposes of a disability pension and widow or dependent children benefit the length of time shall be six consecutive months.

The break in service shall not be counted as years of service for pension credit purposes.

No employee shall be eligible for any benefits during the break in service.

IMPROVEMENTS IN HEALTH AND WELFARE BENEFITS
EFFECTIVE JULY 1, 1971

1. Hospitalization benefits are increased to $60.00 per day to a maximum of 60 days.
2. Normal maternity maximum benefits are increased from $350.00 to $500.00.
3. Caesarian delivery maximum benefit is increased from $500.00 to $650.00.
4. Unmarried children up to the age of 23, attending an accredited institution of learning on a full-time basis will be covered under the Health and Welfare Plan as "dependent children." All other children will become ineligible for Health and Welfare Plan benefits at age 18, or at marriage, whichever occurs first.

The Trustees are examining the entire Health and Welfare Plan to develop additional improvements in benefits where possible. They will be included in the new booklet now being prepared.

We are deeply grateful to the Boards of Trustees for their efforts in making these improvements in the Pension and Health and Welfare Plans. The loyalty, cooperation and the patience of the membership makes possible these gains for the members and their families.

Sincerely and fraternally yours,

Louis F. Peick

Louis F. Peick, Secretary-Treasurer
Local Union No. 705, I. B. of T.

For your information, as explained at the meeting, the formal amendments will be included in the new booklet.

Exhibit 11

Letters of March 18. 1974 and April 11, 1974

(See Opposite) ☞

EXHIBIT 1 I

March 18, 1974

U.S. Department of the Treasury
Internal Revenue Service
17 N. Dearborn Street
Chicago, Illinois

Attention: Pension Trust Section

Re: Local 705 International Brotherhood of Teamsters
Pension Fund

Gentlemen:

As counsel for the Local 705 International Brotherhood of Teamsters Pension Fund, pursuant to a power of attorney previously filed with you, I am requesting a determination that the Plan continues to meet the requirements of Section 401(a) of the Internal Revenue Code; that the trust is still entitled to exemption under Section 401(a); and that the employer contributions are deductible subject to Section 404. To that end I am enclosing:

1. Original Application for Determination (Form 4577) with attachments consisting of the actuarial methods, factors, and assumptions used, a P.S. 64 Certification, and a current list of contributing employers.

2. A summary of amendments enacted on August 29 and December 3, 1973 which are the subject of this application.

3. A copy of Joint Council No. 25 Reciprocal Agreement for teamster pension funds which was adopted and executed by the Board of Trustees on August 29, 1973.

4. A copy of the actuarial valuation as of July 31, 1973

Ex. 1 I

EXHIBIT 1 I

proposed by A.S. Hansen Inc., and adopted by the Board of Trustees.

5. A copy of the July 1, 1973-March 31, 1976 Joint Area Cartage Agreement and the November 1, 1973-October 31, 1976 Oil Drivers Agreement, which constitute the collective bargaining agreements covering substantially all of the participants.

If there is anything further you wish please contact me.

Very truly yours,

CARMELL & CHARONE, LTD.

Sherman Carmell

SC:imd
Encl:
c.c: Mr. Feick
Mr. Frank Baker
Mr. Don Brothers

EXHIBIT 1 I

April 11, 1974

U.S. Department of the Treasury
Internal Revenue Service
17 N. Dearborn Street
Chicago, Illinois

Attention: Mr. Feikel, Pension Trust Section

Dear Mr. Feikel:

Pursuant to our telephone conversation I am enclosing a copy of the formal amendments to the pension plan which reflect the actions of the board of trustees on August 29 and December 6, 1973 pursuant to our initial submission. Article 3 (pension payments) of the plan, as amended to January 1, 1973, has been amended to reflect the new increased pension benefits, and a new Article 9 has been inserted to provide for the Teamsters Joint Council No. 25 Reciprocal Agreement. These formal amendments will be adopted at the next trustees meeting which is scheduled for May 1974. I am also enclosing the plan booklet effective January 1, 1969 which was the immediate codified predecessor of the January 1, 1973 pension plan.

Very truly yours,

CARMELL & CHARONE, LTD.

SC:imd
Encl:

Sherman Carmell

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "IBT") separately answers the allegations of the complaint in the above entitled proceeding, as they relate to this defendant, as follows:

COUNT I

1. This defendant denies the allegations contained in paragraph 1 of Count I.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of Count I, and on that ground denies such allegations.

3. This defendant denies the allegations contained in paragraph 3 of Count I.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of Count I, and on that ground denies such allegations.

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

5. This defendant denies that plaintiff is a proper representative of all members of IBT, Local 705 and all other affiliated locals. This defendant further denies that plaintiff or any member of the alleged class which plaintiff purports to represent purchased or acquired an interest in a Teamster pension plan.

6. This defendant denies that plaintiff is a proper representative of all members of IBT, Local 705 and all other affiliated locals. This defendant further denies each of the remaining allegations contained in paragraph 6 of Count I.

7. In answer to paragraph 7 of Count I, this defendant admits that it is a national labor organization. This defendant denies that it is properly named and sued herein as a representative of all local Teamster union organizations throughout the United States, but admits that it has a contractual relationship with local Teamster union organizations throughout the United States in that the Constitution of the IBT constitutes a contract between the IBT and local organizations and refers to the provisions thereof for the terms of said contractual relationship. The remaining allegations contained in paragraph 7 of Count I are denied.

8. This defendant admits that Local 705 is a labor organization which has a contractual relationship with IBT as alleged hereinabove in answer to paragraph 7, but denies that Local 705 is properly named and sued as a representative of all local Teamster union organizations throughout the United States. All of the remaining allegations contained in paragraph 8 of Count I are denied.

9. In answering paragraph 9 of Count I, this defendant admits that Louis Peick is a Trustee of the pension trust

fund of Local 705 and that Louis Peick is an officer of Local 705. This defendant denies that Louis Peick is a proper representative of all Trustees of all Teamster pension funds. This defendant further denies that Louis Peick is a proper representative of all officers of IBT and of all local Teamster union organizations throughout the United States.

10. This defendant denies each of the allegations contained in paragraph 10 of Count I.

11. This defendant denies that it negotiates labor contracts with companies across the United States for the benefit of its members who are employed by such companies. It admits that local Teamster union organizations do negotiate labor contracts with companies across the United States for the benefit of their members and others who are employees of such companies. All the remaining allegations contained in paragraph 11 of Count I are denied.

12. In answer to paragraph 12 of Count I, this defendant admits that various collective bargaining agreements provide, in part, for contributions to be paid into various pension trust funds by employers when work is performed thereunder, and admits that the monies contributed by employers to such pension trust funds are customarily held in trust and invested by trustees of such fund; but this defendant denies that any such contributions are paid into any IBT pension fund. All the remaining allegations contained in paragraph 12 of Count I are denied.

13. This defendant denies each of the allegations contained in paragraph 13 of Count I.

14. This defendant denies each of the allegations contained in paragraph 14 of Count I.

15. On information and belief this defendant admits that moneys contributed to the pension trust funds referred to in paragraph 15 of the complaint are invested by trustees, but is without knowledge or information sufficient to form a belief with respect to any reasonable expectancy as to the growth of such investments. Defendant is without knowledge or information sufficient to form a belief as to the provisions of all pension plans adopted pursuant to the aforesaid pension trusts, except that, on information and belief, defendant alleges that there is a wide variation among said plans with respect to pension eligibility requirements. Defendant therefore denies the remaining allegations contained within paragraph 15.

16. This defendant is without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 16 of Count I, and on that ground denies such allegations.

17. This defendant denies each of the allegations contained in paragraph 17, and subparagraphs A(1), (2), and B(1), (2), (3), (4), (5), (6) and (7) thereof, of Count I.

18. This defendant denies each of the allegations contained in paragraph 18 of Count I.

19. This defendant denies each of the allegations contained in paragraph 19, and subparagraphs (a), (b), (c) and (d) thereof, of Count I.

20. This defendant denies each of the allegations contained in paragraph 20 of Count I.

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

COUNT II

1-18. In answer to paragraphs 1-18 inclusive of Count II, this defendant incorporates by reference its answers to paragraphs 1-18 of Count I, as set forth above.

19. This defendant denies each of the allegations contained in paragraph 19, and subparagraphs (a), (b), (c) and (d) thereof, of Count II.

20. This defendant denies each of the allegations contained in paragraph 20 of Count II.

COUNT III

1-18. In answer to paragraphs 1 through 18 inclusive of Count III, this defendant incorporates by reference its answers to paragraphs 1-18 of Count I, as set forth above.

19. This defendant admits each of the allegations contained in paragraph 19 of Count III.

20. This defendant denies each of the allegations contained in paragraph 20 of Count III.

21. This defendant denies each of the allegations contained in paragraph 21, and subparagraphs (a), (b) and (c) thereof, of Count III.

22. This defendant denies each of the allegations contained in paragraph 22 of Count III.

23. This defendant denies each of the allegations contained in paragraph 23 of Count III.

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

COUNT IV

1-18. In answer to paragraphs 1-18 inclusive of Count IV, this defendant incorporates by reference its answers to paragraphs 1-18 of Count I, as set forth above.

19. This defendant denies each of the allegations contained in paragraph 19 of Count IV.

COUNT V

1-18. In answer to paragraphs 1-18 inclusive of Count V, this defendant incorporates by reference its answers to paragraphs 1-18 of Count I, as set forth above.

19. In answer to paragraph 19 of Count V, this defendant denies that it is the exclusive representative of plaintiff and members of the alleged class for the purposes of collective bargaining and accordingly denies the allegation of its duty as contained in said paragraph. This defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 19 of Count V, and on that ground denies the remaining allegations.

20. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of Count V.

21. This defendant denies each of the allegations contained in paragraph 21 and subparagraphs (a), (b) and (c) thereof, of Count V.

22. This defendant denies each of the allegations contained in paragraph 22 of Count V.

23. This defendant denies each of the allegations contained in paragraph 23 of Count V.

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

SEPARATE AND AFFIRMATIVE DEFENSES

1. This court does not have subject matter jurisdiction with respect to the allegations contained in Counts I and II under Section 22(a) of the Securities Act of 1933, 15 U.S.C. §77v(a) or Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

2. Counts I and II of the complaint fail to state a claim upon which relief can be granted under Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q or Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

3. This court does not have subject matter jurisdiction with respect to the allegations contained in Count III under 28 U.S.C. § 1337, § 301(a) of the National Labor Relations Act, 29 U.S.C. § 185(a), or § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a).

4. Count III of the complaint fails to state a claim upon which relief can be granted under § 302(c)5 of the National Labor Relations Act, 29 U.S.C. § 186(c)5.

5. The court lacks jurisdiction of the subject matter of the pendent claims under Counts IV and V of the complaint.

6. The court lacks jurisdiction of the subject matter of the complaint in that plaintiff has failed to exhaust his administrative remedies before the Department of Labor, under 29 U.S.C. § 308.

7. Plaintiff is not a proper class representative of the alleged plaintiff class under Rule 23, F.R.C.P.

8. Defendant I.B.T. is not a proper class representative of the alleged defendant class of all local teamster affiliate unions under Rule 23, F.R.C.P.

9. Defendant Local 705 is not a proper class representative of the alleged defendant class of all local affiliates of the Teamsters International similarly situated under Rule 23, F.R.C.P.

Answer to Complaint filed by Defendant International Brotherhood of Teamsters ("I.B.T.")

10. Plaintiff has failed to join necessary and indispensable parties, pursuant to Rule 19, F.R.C.P., including the Local 705 International Brotherhood of Teamsters Pension Fund, and the individual members of the Board of Trustees of the Local 705 Pension Fund.

11. The complaint alleges violations of law with respect to which relief is barred by applicable statutes of limitations.

WHEREFORE, defendant I.B.T. prays that plaintiff takes nothing by its complaint, that the complaint be dismissed in its entirety, that defendant recover its costs of suit and for such other and further relief as the Court deems proper.

DATED: November 29, 1974.

DICKSTEIN, SHAPIRO & MORIN

By /s/ SIDNEY DICKSTEIN
Sidney Dickstein
1735 New York Avenue, N. W.
Washington, D. C. 20006

GOTTLIEB AND SCHWARTZ

By /s/ BERNARD WEISBERG
Bernard Weisberg

/s/ JACK B. SCHMETTERER
Jack B. Schmetterer
120 South La Salle Street
Chicago, Illinois 60603

Counsel for Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Motion of Defendant I.B.T. to Dismiss Counts I and II

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

MOTION OF DEFENDANT
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS TO DISMISS COUNTS I AND II

The defendant INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, by its attorneys, moves the Court pursuant to Rule 12(b) F.R.C.P. to dismiss Counts I and II of the Complaint herein on grounds that this Court does not have subject matter jurisdiction and those Counts of the Complaint do not state claims upon which relief can be granted under either the Securities Act of 1933 or the Securities Exchange Act of 1934, as alleged in those Counts.

/s/ BERNARD WEISBERG
Bernard Weisberg

/s/ JACK B. SCHMETTERER
Jack B. Schmetterer

Gottlieb and Schwartz
120 South La Salle Street
Chicago, Illinois 60603
Telephone: 726-2122

/s/ SIDNEY DICKSTEIN
Sidney Dickstein
Dickstein, Shapiro & Morin
1735 New York Avenue, N.W.
Washington, D. C. 20006

Counsel for Defendant
International Brotherhood of Teamsters

Corrected Amendment to Complaint (Count VI)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

CORRECTED AMENDMENT TO COMPLAINT

Plaintiff hereby makes a corrected amendment to his Complaint in the above entitled action by adding thereunto the following Count VI:

COUNT VI

1.–18. Plaintiff herein realleges the allegations of Paragraphs 1 through 18 of Count I.

19. The jurisdiction of this Court to hear Count VI of this Complaint is based on the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U.S.C. Section 1337, and on Section 302(e) of the National Labor Relations Act, 29 U.S.C. Section 186(e) (hereinafter referred to as "NLRA"), and as hereinafter set forth, this action involves violations of Section 302(c)(5) of the NLRA, 29 U.S.C. Section 186(c)(5).

20. The pension plans and pension trust funds established by the Teamsters International, Local 705, and all other local affiliates of Teamsters International and established, managed and administered by Defendant Peick and

all other Trustees of all Teamster pension funds have been established pursuant to statutory authority and the statutory requirement that such pension trust funds and all contributions thereto shall be for the sole and exclusive benefit of the employees. Section 302(c)(5) of the NLRA, 29 U.S.C. Section 186(c)(5).

21. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendant Peick and all other Trustees of all Teamster pension funds have violated Section 302(c)(5) of the NLRA through the establishment, management and use of:

a) Arbitrary and unreasonable actuarial bases for the determination of benefits to a Teamster union member from a local Teamster affiliate or Teamsters International pension fund;

b) Arbitrary and unreasonable length requirements as part of the vesting provisions of local Teamster affiliate or Teamsters International pension plans; and

c) Arbitrary and unreasonable continuity requirements as part of the vesting provisions of local Teamster affiliate or Teamsters International pension plans.

23. As applied to Plaintiff and the other members of the class he represents, the effect of the establishment, management and use of such arbitrary and unreasonable actuarial bases and length and continuity requirements is to preclude the payment of any pension benefits from such local Teamster affiliate or Teamsters International pension plans to any or most of the members of the Plaintiff class and to benefit Defendants and others. As a result, the establishment, management, and use of such actuarial

bases and length and continuity requirements constitute violations of Section 302(c)(5) of the NLRA.

24. Defendant labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendant Peick and all other Trustees of all Teamster pension funds have violated Section 302(c)(5) of the NLRA through their diversion of, or their acquiescence in the diversion by others of, funds held in trust for local Teamster affiliate or Teamster International pension funds from their lawful purposes and to the benefit of Defendants or to the benefit of others, or to enhance Defendants' position, status, or prestige, or to enhance the position, status, or prestige of others.

25. As a direct and proximate result of Defendant's labor union organizations Teamsters International, Local 705, and all other local affiliates of Teamsters International and Defendants Peick and all other Trustees of all Teamster pension funds, violation of Section 302(c)(5) of the NLRA, Plaintiff and all other members of the class he represents have sustained substantial loss and injury.

WHEREFORE, Plaintiff prays that this Court:

a) Make a determination that the named Plaintiff represents all other Teamster union members in the United States as a class as heretofore alleged;

b) Find that Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated; and

Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds have violated Section 302(c)(5) of the NLRA, 29 U.S.C. Section 186(c)(5).

c) Order that all pension fund agreements of the Teamsters International and all local Teamster affiliate unions be reformed by deleting therefrom all arbitrary length and continuity requirements of all vesting provisions in such pension fund agreements.

d) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization and Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Louis Peick, by himself and as representative of all Trustees of all Teamster pension funds, in an amount equal to all pension benefits unlawfully denied Plaintiff and all other members of the class he represents, with interest thereon;

e) Enter judgment against the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a labor union organization, by themselves and as representatives of the class of all local Teamster affiliate unions similarly situated, and Louis Peick, by himself and as representative of all Trustees of all Teamsters pension funds in an amount equal to all those funds held in trust for local Teamster affiliate or Teamsters International pension funds

which have been unlawfully diverted from their proper purposes; and

f) Grant such other and further relief as this Court deems to be fair and equitable under the circumstances.

Respectfully submitted,

/s/ PETER J. BARACK
PETER J. BARACK

/s/ LAWRENCE WALNER
LAWRENCE WALNER

LAWRENCE WALNER & ASSOCIATES, LTD.
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PETER J. BARACK, ESQ.
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Answer of Defendant I.B.T. to Corrected Count VI

In the

United States District Court

For the Northern District of Illinois

Eastern Division

[Title Omitted]

Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "IBT") separately answers the allegations of corrected Count VI of the Complaint filed herein with leave of court, as those allegations relate to this defendant.

Count VI

1-18. In answer to Paragraphs 1 to 18 inclusive of Count VI, this defendant incorporates by reference its answers heretofore filed to Paragraphs 1 to 18 inclusive of Count I.

19. This defendant denies each of the allegations contained in Paragraph 19.

20. This defendant admits that the pension plans and trust funds established by Local 705 and other affiliates of IBT were established and managed pursuant to law, but denies that Paragraph 20 of Count VI accurately summarizes the requirements of law pertinent thereto and denies all other allegations thereof.

21. This defendant denies all allegations contained in Paragraph 21 of Count VI, and in subparagraphs (a), (b) and (c) thereof.

Answer of Defendant I.B.T. to Corrected Count VI

22. (No Paragraph 22 is contained in Count VI)

23. This defendant denies all allegations contained in Paragraph 23 of Count VI.

24. This defendant denies all allegations contained in Paragraph 24 of Count VI.

25. This defendant denies all allegations contained in Paragraph 25 of Count VI.

Separate and Affirmative Defenses

1. This Court does not have subject matter jurisdiction with respect to the allegations contained in Count VI under 28 U.S.C. §1337, or under §302(c) or §302(c)(5) of the National Labor Relations Act, 29 U.S.C. §186(c), §186(c)(5).

2. Count VI of the Complaint fails to state a claim upon which relief can be granted under §302(c)(5) of the National Labor Relations Act, 29 U.S.C. §186(c)(5).

3. The Court lacks jurisdiction of the subject matter of the Complaint in that plaintiff has failed to exhaust his administrative remedies before the Department of Labor, under 29 U.S.C. §308.

4. Plaintiff is not a proper class representative of the alleged plaintiff class under Rule 23, F.R.C.P.

5. Since a class of all local teamster affiliate unions as alleged in the Complaint is improper under Rule 23, F.R.C.P., defendant IBT is not a proper class representative thereof.

6. Defendant Local 705 is not a proper class representative of the alleged defendant class of all local affiliates of

the Teamsters International similarly situated under Rule 23, F.R.C.P.

7. Defendant Louis Peick is not a proper class representative of the alleged trustee class under Rule 23, F.R.C.P.

8. Plaintiff has failed to join necessary and indispensable parties, pursuant to Rule 19, F.R.C.P., including the Local 705 International Brotherhood of Teamsters Pension Fund, and the individual members of the Board of Trustees of the Local 705 Pension Fund.

9. Count VI of the Complaint alleges violation of law with respect to which relief is barred by applicable statutes of limitations.

10. Plaintiff has failed to exhaust his intra-union remedies.

WHEREFORE, defendant IBT prays that plaintiff takes nothing by its complaint, that the complaint be dismissed in its entirety, that defendant recover its costs of suit and for such other and further relief as the Court deems proper.

/s/ BERNARD WEISBERG
Bernard Weisberg

/s/ JACK B. SCHMETTERER
Jack B. Schmetterer

Of Counsel:

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/s/ SIDNEY DICKSTEIN
Sidney Dickstein

Of Counsel:

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Washington, D. C. 20006

Counsel for Defendant,
International Brotherhood of Teamsters,
Chauffeurs, Warehouseman and Helpers
of America

Motion for Plaintiff Class Action Certification

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

Now Comes the Plaintiff, John Daniel, in the above captioned proceeding by his attorneys, Peter Barack and Lawrence Walner, and respectfully moves this Court for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining that this action shall be maintained as a plaintiff class action against each of the Defendants and each defendant class and certifying the propriety of the class described as follows:

> All persons who are now, or who were, members of Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other local affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, other than the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America itself, and who have purchased or otherwise acquired for value an interest in, through a contribution to or on whose behalf a contribution has been made to, any Teamster pension fund, which requires for the payment of a full retirement benefit a total period of service in excess of ten (10) years.

Motion for Plaintiff Class Action Certification

Dated: October 8, 1975

/s/ PETER J. BARACK
PETER J. BARACK

/s/ LAWRENCE WALNER
LAWRENCE WALNER
Attorneys for the Plaintiff

LAWRENCE WALNER
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PETER J. BARACK
357 East Chicago Avenue
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649-8372

Motion for Defendant Class Action Certification

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

Now Comes the Plaintiff, John Daniel, in the above captioned proceeding by his attorneys, Peter Barack and Lawrence Walner, and respectfully moves this Court for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining that this action shall be maintained as a defendant class action with three defendant classes and certifying the propriety of each defendant class described as follows:

(1) All local affiliate unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, other than the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America itself, which sponsor, have established, or have a relationship with, direct or indirect, any Teamster pension fund established for the benefit of the members of such Teamster unions, which requires for the payment of a full retirement benefit a total period of service in excess of ten (10) years.

(2) All trustees of all Teamster pension funds, established for the benefit of the members of any or all local affiliate unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America, other than the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America itself, and which require for the payment of a full retirement benefit a total period of service in excess of ten (10) years.

(3) All officers of all local affiliate unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which sponsor, have established, or have a relationship with, direct or indirect, any Teamster pension fund, established for the benefit of the members of such Teamster unions, which requires for the payment of a full retirement benefit a total period of service in excess of ten (10) years.

Dated: October 8, 1975

/s/ PETER J. BARACK
PETER J. BARACK

/s/ LAWRENCE WALNER
LAWRENCE WALNER
Attorneys for the Plaintiff

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Amendment to Plaintiff's Motion for Defendant Class Certification

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

Plaintiff hereby amends his motion heretofore filed for certification of defendant classes by adding the following defendant class category:

All teamster pension funds established for the benefit of the members of any or all local affiliate unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, other than the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America itself, and which require for the payment of a full retirement benefit a total period of service in excess of ten (10) years.

LAWRENCE WALNER & ASSOCIATES, LTD.
and PETER J. BARACK,
Attorneys for Plaintiff

By: LAWRENCE WALNER
PETER BARACK (LW)

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PETER J. BARACK
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Second Amendment to the Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

Now comes the plaintiff, John Daniel, by his attorneys, Peter J. Barack and Lawrence Walner, and hereby amends the complaint by adding the following:

1. The following persons and entities are hereby added as defendants to the complaint and included in the caption: The Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Pension Fund, a trust fund, by itself and as representative of all Teamsters pension funds; Frank Kratky, by himself and as representative of the Local 705 Pension Fund and of all Teamsters pension funds and of all Trustees of all Teamsters pension funds and as representative of all Officers of all Teamster unions similarly situated; and Bruno Fillipini, Peter Janopolous, Frank Bridge, W. Eugene McCarron, Ralph Nieders, Sr. and M.W. Siewert, Jr., by themselves and as representatives of the Local 705 Pension Fund and of all Teamster pension funds and of all Trustees of all Teamster pension funds.

2. Paragraph 9 is amended to add the following: Defendants Frank Kratky, Bruno Fillipini, Peter Janopolous, Frank Bridge, W. Eugene McCarron, Ralph Nieders, Sr., and M.W. Siewert, Jr. are also Trustees of the Local 705 Pension Fund and are named herein as defendants by themselves and as representatives of the Local 705 Pension Fund and of all Teamster pension funds and of all Trustees of all Teamster pension funds. Defendant Kratky is also

Second Amendment to the Complaint

an Officer of Local 705 and is also named herein as a defendant as representative of all officers of Teamsters International and of all local affiliates of Teamsters International.

Defendant Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Pension Fund is a pension plan and trust fund organization.

3. All references in the complaint to Louis Peick shall be deemed to refer collectively to all of the individual defendants listed herein, both in their individual and in their representative capacities, and to the Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Pension Fund, both by itself and in its representative capacity.

JOHN DANIEL, for himself and on behalf of all others similarly situated, Plaintiff, by

LAWRENCE WALNER & ASSOCIATES, LTD. and PETER J. BARACK,
Plaintiff's Attorneys,

By: LAWRENCE WALNER

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Minute Order of March 1, 1976

(See Opposite) ☞

MINUTE ORDER OF MARCH 1, 1976
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND

Cause No. 74 C 2865 Date March 1, 1976

Title of Cause: JOHN DANIEL, etc., v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS OF AMERICA, etc., et al

Brief Statement of Motion: Motions by certain defendants to dismiss

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

ENTER MEMORANDUM OPINION AND ORDER. (DRAFT)

Defendants' motions to dismiss the complaint are denied in their entirety.

Kirkland, J.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Minute Order, Memorandum Opinion and Order Entered March 1, 1976

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

This matter comes before the Court on motions by certain defendants to dismiss the complaint. The action is in six counts and seeks relief under the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act"), the National Labor Relations Act ('NLRA") and pendent claims of common law fraud and deceit and breach of trust. Jurisdiction is invoked under 15 U.S.C. §§78a-78jj, 77a-77aa, 28 U.S.C. §§ 1337 and 185(a) and under principles of pendent jurisdiction.

Plaintiff is a resident of Illinois and a member of Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 705"). Defendants are International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT"), a labor union; Local 705; Louis Peick, a Trustee, and Officer of Local 705 Pension Fund; the Local 705 Pension Fund; and other Trustees of the Local 705 Pension Fund ("Trustees"). Moving defendants are IBT, Local 705 and Louis Peick. The Pension Fund and other named Trustees were added as defendants pending decision on these motions and no motions by those defendants are presently before the Court. The action is framed as a class action, both as to plaintiff and defendant classes.

Minute Order, Memorandum Opinion and Order Entered March 1, 1976

The complaint alleges that plaintiff worked for Local 705 covered employers for a total of twenty-two and one-half years. This employment was uninterrupted with the exception of a several month absence beginning in December of 1960. This absence, resulting from an involuntary lay-off, was the basis for a decision by Trustees of the Local 705 Pension Fund to deny plaintiff his pension benefits.

Plaintiff alleges that this action by the Trustees, as well as defendants' maintenance and administration of the Pension Fund, is violative of the antifraud provisions of the federal securities laws, and of certain requirements of the NLRA and is in breach of defendants' common law trust and fiduciary duty.

Defendant IBT has filed a motion to dismiss only as to Counts I and II. Defendants Local 705 and Peick (collectively referred to as "local defendants") have raised additional challenges. The Court will consider their arguments in sequence.

COUNTS I AND II

Counts I and II of the complaint seek relief for defendants' fraudulent and intentional misrepresentations and omissions with respect to the sale to members of the plaintiff class of interests in Teamster union pension funds, all in violation of Section 17(a) of the 1933 Act and Section 10(b) and Rule 10b-5 of the 1934 Act.

Local defendants argue that Counts I and II are barred by the statute of limitations. It is not disputed that the Seventh Circuit holding in *Parrent* v. *Midwest Rug Mills Inc.*, 455 F.2d 123 (7th Cir. 1972) provides that the applicable statute of limitations for an action for fraud under these sections is the three year period provided in the Illinois Securities Act, Ill. Rev. Stat. ch. 121½ §137.13(d) and that:

Minute Order, Memorandum Opinion and Order Entered March 1, 1976

> Under Illinois Securities Law, a buyer has three years to sue "not only from the date the right first accrues, but from the date the sale is completed". (455 F.2d at 128)

Plaintiff, however, argues that notwithstanding the three year statute of limitations, the federal tolling doctrine will delay running of the limitations period until the fraud is discovered "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party". *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1945). It was added in *Parrent* that the courts will:

> read into the three-year limitation applied in the Rule 10-b count the 'equitable doctrine' that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud 'remains in ignorance of it without any fault or want of diligence or care on his part . . .' (455 F.2d at 128)

Defendants initially argue that plaintiff has admitted to actual knowledge, as evidenced by the fact that the complaint alleges that misrepresentations and omissions of material fact began as early as 1955 and have continued until the present time.

The Court does not find this argument persuasive. Plaintiff's allegations that misrepresentation began twenty years ago cannot be construed as an admission that plaintiff had knowledge of those misrepresentations at the time they were made. The crux of plaintiff's complaint is that he first learned of the fraud perpetrated upon him when he was denied his pension.

Defendants argue at length that plaintiff in fact had actual knowledge of the break in service rule and its application and consequences for many years. In support

Minute Order, Memorandum Opinion and Order Entered March 1, 1976

of their claim, they state that the eligibility rule was passed in early 1955 and communicated to the employee-participants, including plaintiff, by letter in April of that year. Relevant information was compiled in booklet form and sent to each participant in 1958 and 1969, years in which plaintiff was a participant. Likewise, the eligibility requirements were set out in letters of May 19, 1971 and June 11, 1971. Finally, since 1959 the trust agreement itself has been available for inspection at the Local 705 Pension Fund office or would have been sent to plaintiff's home upon his written request.

At the outset, plaintiff contends that defendants have incorrectly determined when the sale was completed, and have thus incorrectly applied the *Parrent* rule to the facts. Plaintiff argues that the "sale" was completed within the three year period preceding the complaint. In particular, he argues that there was a continuing fraudulent offer to plaintiff dating from 1955 to the time of his retirement on December 1, 1973. Alternatively, plaintiff argues that there was a sale for each pay period when plaintiff's employer made a contribution to the fund on his behalf and that many such contributions were made within the statutory period.

Taking all of defendants' arguments as true, the most that can be said is that plaintiff was put on notice that twenty years of continuous service was required. These arguments go only to one of several misrepresentations alleged in the complaint.

Plaintiff has stated in an affidavit that he had no actual notice of the ongoing misrepresentation. The question, then, becomes whether he should have known of the fraud in the exercise of proper diligence or care on his part.

First, as plaintiff correctly observes, there is a fiduciary relationship between the parties. In such a situation there

is a lesser degree of inquiry demanded of the trusting, yet defrauded plaintiff.

> The concept of due diligence is not imposed within the frame of a rigid standard . . . . A fraud . . . convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship . . . bears heavily on the issue of due diligence.

Azalea Meats, Inc. v. *Muscat*, 386 F.2d 5, 9 (5th Cir. 1967). Accord, *Racine* v. *Essex Wire Corp.*, (69-70 Transfer Binder) CCH Fed. Sec. L. Rep. ¶92,746 at 99,247 (N.D. Ill. 1970). The Court takes special note of the argument that the state of mind of the defrauded plaintiff had been anesthetized and put to rest by the "fraternal"—if not paternal—proclamations of defendants relative to their concern for plaintiff's welfare.

Second, the reasonableness of the degree of inquiry expected is properly gauged against plaintiff's level of education and sophistication. Plaintiff states in his affidavit that he has an eighth grade education. He further states that whatever information was provided by defendants was obfuscated by many pages of small print and couched in ambiguous or technical language.

Here in effect defendants ask for summary judgment on the question of whether plaintiff had actual knowledge or should reasonably have known of the fraud. It was correctly stated in *Azalea Meats, supra*:

> Inevitably the factual issue of due diligence involves . . . the state of mind of the person whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment. (386 F.2d at 10)

The Court concludes that a genuine issue of material fact exists with respect to this issue. Certainly, this Court

cannot say that plaintiff can prove no set of facts in support of his claim that he did not have actual knowledge and that he remained in ignorance of the fraud without any fault on his part. This is particularly true in view of the potential vagaries of the disclosure material, the amount of material surrounding the alleged disclosures and the general level of education and sophistication of the plaintiff.

Defendants make much of the fact that, according to the terms of the trust agreement, plaintiff had an unqualified right to have the Trustees construe the service rule at any time. This argument does not meet arguments raised by plaintiff relative to his state of mind and the resulting reasonableness of his failure to seek such a ruling.

Because of the Court's holding relative to plaintiff's knowledge of the facts, the Court need not reach the question of whether plaintiff instituted his action within three years after the time that the sale was completed.

All defendants argue that this Court does not have subject matter jurisdiction with respect to Counts I and II of the complaint and that those counts do not state claims upon which relief can be granted under either the 1933 or 1934 Acts.

Plaintiff's theory is that, as a member of Local 705, he acquired an interest in the pension fund of that Local, which interest constituted a security; that defendants made misleading statements of material fact and omitted to disclose material facts regarding the length and continuity of service requirements of the Local 705 Pension Plan; and that he suffered loss and injury as a result of such misstatements and omissions. These misstatements are alleged to have violated Rule 10b-5 and Section 10(b) of the 1934 Act, and §17(a) of the 1933 Act, each of which prohibits fraudulent practices and inadequate disclosure of material facts in connection with the sale of securities.

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Defendants' arguments may be briefly summarized as follows:

1. Congress has viewed the securities laws as inapplicable to employee pension plans and has enacted other legislation designed specifically to deal with such funds; and

2. The Securities and Exchange Commission, ("SEC"), the agency charged with administration of the federal securities laws, has consistently ruled that no offer or sale of securities under the securities laws is involved in the establishment and operation of employee pension funds which, as here, are compulsory and non-contributory.

As pointed out by IBT, the overall purpose of the securities laws is to assure informed investment decisions by prospective purchasers of securities. This is accomplished by (a) requiring disclosures in registration statements and prospectuses where securities are offered to the public; (b) by periodic reports and proxy statements of publicly held companies; and (c) by antifraud provisions which broadly prohibit inadequate disclosure of material facts and other fraudulent practices in connection with sale of securities. Each of the two acts contains broad definitions of the terms "security", "sale" and "offer for sale".

Section 2(1) of the 1933 Act defines a security as follows:

> Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, *certificate of interest or participation in any profit-sharing agreement*, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, or, in general, any interest or instrument commonly known as a "security" . . . (emphasis added.)

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The definition found in Section 3(a)(10) of the 1934 Act is substantially the same.

Section 2(3) of the 1933 Act defines sale as follows:

> The term 'sale' or 'sell' shall include every contract of sale or *disposition* of a *security* or interest in a security, *for* value. The term 'offer to sell', 'offer for sale', or 'offer', shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value . . . . (emphasis added.)

Section 3(a)(14) of the 1934 Act contains a similar definition.

Defendants correctly observe that, apart from the general definitions set out above, the Acts, as originally enacted, offer no explicit answer to the question of whether the employee pension plans of the type referred to in the complaint involve an offer or sale of securities within the meaning of the federal securities laws. As originally enacted, neither Act contained any reference to such plans. Nor is any reference contained in their legislative history.

As a preliminary matter, the Court will consider the argument raised by defendants Local 705 and Peick that Section 17(a) of the Securities Act does not create a private cause of action. Defendants rely on *Welch Foods, Inc.* v. *Goldman, Sachs & Co.*, CCH Fed. Sec. L. Rep. ¶94,806 (S.D.N.Y. 1974) and *Ferland* v. *Orange Groves of Florida, Id.*, ¶94,821 (M.D. Fla. 1974).

The Court agrees with plaintiff in his assertion that Section 17(a) impliedly provides for a private cause of action. There are several cases arising out of this district so holding, as well as a Seventh Circuit opinion. See *Surovitz* v. *Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1975); reversed on other grounds, 383 U.S. 363 (1966). See also *Local 734 Trust* v. *Continental Illinois National Bank &*

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Trust Co., (73-74 Transfer Binder) CCH Fed. Sec. L. Rep. ¶94,565 at 95,963 (N.D. Ill. 1974). Those cases relied upon by defendants are distinguishable.

The first question to be considered is whether the Securities Acts are, by their own terms, applicable to employee pension plans. The Court is of the opinion that they are facially applicable, and nothing in the Acts' legislative history suggests that a contrary interpretation is required. Indeed, examination of legislative history and hearing testimony discloses both Congress' and the SEC's recognition of this fact.

In 1934 the Senate proposed amendments to the 1933 Act which would have exempted from registration certain offerings made solely to employees of an issuer. The amendment was rejected in conference for the stated reason that participants in such plans may be in as great need of such protection as other members of the public. See H.R. No. 1838, 73 Cong., 2d Sess., at 41 (1934).

In the hearings which accompanied proposed amendments to both Acts in 1941, SEC Commissioner Purcell observed with reference to the Congressional action of 1934:

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employee's plans which involve the sale of a security. Any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract". In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large.

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Hearings on Proposed Amendments to Securities Act of 1933 and Securities Exchange Act of 1934 Before House Committee on Interstate and Foreign Commerce, 77 Cong. 1st Sess. 907, 908 (1941) ("1941 Hearings").

The Court concludes, therefore, that to the extent employee pension plans in fact involve the *sale* of *securities*, the Securities Acts are by their own terms applicable to such terms.

The Court must next determine whether, as defendants suggest, enactment of specialized pension legislation disclosed Congressional intent that the Securities Acts, including the antifraud provisions, are inapplicable to pension plans, notwithstanding the fact that such plans may be securities within the meaning of those Acts.

Defendants devote many pages in their extensive briefs to discussion of the burgeoning field of pension legislation, including the Investment Company Act of 1940 ("1940 Act"), the 1958 Welfare and Pension Plans Disclosure Act ("1958 Act"), the Investment Companies Amendment Act of 1970 ("1970 Act") and the Employee Retirement Income Security Act of 1974 ("1974 Act"). They argue at great length that this massive body of legislation is indicative of Congress' belief that private pension plans were afforded no protection by the federal securities laws, and that such legislation filled a large gap in the law.

After examining defendants' arguments and the legislative history itself, the Court has ascribed a significance to this legislation which does not agree with defendants' view. At the outset, it should be noted that, except in those cases where recognized securities were offered by an employer for voluntary purchase by employees, the SEC acted on the assumption, consistent with existing legal thought, that employee pension plans were generally "non-contributory" and "involuntary", and therefore resulted in no sale and no nexus to the securities laws.

It follows then, that the SEC's position with respect to applicability of the securities laws to pension plans reflected this assumption, which is here challenged by plaintiff. As explained by Commissioner Purcell during the 1941 Hearings:

> [E]ven where the plan involves securities, registration is not required for the many cases where the employees pay nothing for the securities, but receive an interest in the investment fund by way of bonus from their employer; for, of course, a gift is not a sale, and the Securities Act is concerned only with sales of securities.
>
> Similarly, compulsory plans do not require registration. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved. The purpose of the registration provisions of the Securities Act is to disclose to prospective investors the essential facts about securities which they are asked to buy, and if the employees are given no choice as to whether to buy or refuse to buy there hardly seems any point in the registration process. As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan. (1941 Hearings at 907, 908, 950)

It is logical to conclude, then, that pension legislation was generated in part out of a conviction that the Securities laws did not protect pension plans because they did not involve sales, as well as recognition of the need for specialized treatment.

This latter factor is an important one. Assuming, *arguendo*, that pension plans are securities and come within

the purview of the Securities laws, their unique characteristics nonetheless give rise to a need for special regulation. This alone explains the proliferation of pension legislation. Indeed, the very fact of their recognition as securities could account for the extensive and detailed requirements relative to disclosure and administration of these plans.

In the 1970 Act Congress provided that certain types of pension funds or profit sharing plans, described in Sectio 3(a) as securities, which meet the requirements of Section 401 of the Internal Revenue Code would be exempted from registration under Section 5 of the 1933 Act. The Act also provided for a similar exemption to registration under Section 3(a)(12) of the 1934 Act. In any event, as is clear from the statutory language, Congress recognized such pension funds as securities.

Examination of the legislative history surrounding these various enactments of pension legislation leads to the conclusion that these Acts were designed to compl[e]ment the securities laws rather than displace them. Enactment of this legislation is in no way inconsistent with the view that Congress regarded pension funds as unique forms of securities which were not adequately regulated by the securities laws.

As was made particularly clear in the Congressional Reports accompanying enactment of the 1974 Act, that Act was concerned with ongoing administration of pension funds, rather than with any sales in connection therewith. Thus, both the Senate and House Reports expressed concern over the absence of effective federal legislation directed at assuring equitable and fair administration of all pension plans. Specifically, the lack of federal controls was seen with respect to protection of the employee's security in his pension rights, rather than prevention of fraud in the sales or acquisition of that interest. Consis-

tent with this view, the 1974 Act imposed criminal sanctions for any attempt to interfere with any employee's attainment of rights under the Act. Similarly, as noted in these reports, the 1958 Act criminalized only malfeasance with respect to administration of such plans, including theft, embezzlement, bribery and kickback. See H.R. No. 93-533, 3 U.S. Code Cong. and Adm. News, 4639 (1974); S.R. No. 93-127, 3 U.S. Code Cong. and Adm. News, 4838 (1974).

It is significant to note that this entire body of pension legislation is concerned with administration of such funds, so as to protect the interest of its participants, rather than regulation of circumstances of entry into the plan.

This Court holds that Congress has not demonstrated, through extensive pension legislation or otherwise, any intent to make securities laws inapplicable to employee pension funds. Accordingly, this Court finds that, to the extent any employee pension plan involves a sale of a security within the meaning of the federal securities laws, those laws, including their relevant antifraud provisions, will apply.

Further, assuming *arguendo* that defendants are correct in their assertion that pension legislation disclosed Congressional intent that pension plans such as the Local 705 Pension Plan not be procedurally regulated by the Securities Acts, it does not necessarily follow that those plans are beyond reach of the antifraud provisions.

Both the 1958 Act and the 1970 Act contain savings clauses providing for the continued application of all other relevant legislation. The 1958 Act provided:

> The provisions of this [Act] . . . shall not be held to exempt or relieve any person from any *liability, duty, penalty*, or *punishment* provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans . . . (29 U.S.C. §309(b)). (emphasis added.)

The provision in the 1970 Act is essentially the same.

Further, the House Report accompanying the 1970 Act contained this explicit comment:

> [this section] should exempt . . . bank . . . administered . . . pension plans from the registration and reporting requirements of the Federal Securities Act, but it does not exempt them from the antifraud provisions of those acts.

H.R. No. 91-1382, 91st Cong. 2d Sess. at 10 (1970). See also S.R. No. 91-184, 3 U.S. Code Cong. and Adm. News, 4897, 4907 (1970). The Reports suggest that such plans were exempted from registration so as to ease potential hardship on small banks.

Nonetheless, those considerations which might justify a plan's exemption from registration or even its exemption from the procedural regulatory provisions of the securities laws do not operate to prevent application of the antifraud provisions. As stated by one commentator:

> Since these antifraud provisions do not impose an undue burden on anyone, there is no reason why they should not remain as remedies available to employees for use in cases where fraud of the kind covered by these sections has been committed.

Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 Law and Contemporary Problems, 795, 814 (1964).

The Court having determined that the antifraud provisions of the Securities Acts are applicable to those pension plans which involve sales of securities, the Court must next

ascertain whether plaintiff's acquisition of an interest in the Local 705 Pension Fund constituted a sale of a security within the meaning of those Acts. The operative antifraud provisions of both Acts require: (1) use of the jurisdictional means; (2) making of material misrepresentations, omission to state material facts or use of manipulative or fraudulent devices, in connection with: (3) the *sale*—of a *security*. For purposes of determining applicability of the antifraud provisions, use of the mails as the jurisdictional means and omission to state material facts are not in dispute. The Court turns first to the question of whether plaintiff's interest in the Local 705 Pension Fund was a security.

Section 2(1) of the 1933 Act defines security in pertinent part as:

> . . . any . . . certificate of interest or participation in any profit-sharing agreement, . . . [or] investment contract . . .

The definition found in Section 3(a)(10) of the 1934 Act is substantially the same.

In *SEC* v. *W. J. Howey, Co.*, 328 U.S. 293, 299 (1945), the Supreme Court observed that federal securities legislation:

> embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and varied schemes devised by those who seek the use of the money of others on the promise of profits. (328 U.S. at 299)

Because the 1933 and 1934 "Acts were designed to protect the American public from speculative or fraudulent schemes . . . Congress defined the term 'security' broadly and the Supreme Court in turn has construed the definition

liberally." *SEC* v. *Glenn W. Turner Enterprises, Inc.*, (72-73 Transfer Binder) CCH Fed. Sec. L. Rep. ¶93,748 at 93,271 (9th Cir. 1973).

Plaintiff argues that in applying this definition of security to characterize his interest in the Local 705 Pension Trust Fund, the Court must:

> be guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure . . . In searching for the meaning and scope of the word "security" in the Act, form should be disregarded for substance and emphasis should be on economic reality.

Tcherepnin v. *Knight*, 389 U.S. 332, 336 (1967). See also *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963). Recognizing this need for a liberal construction of the word 'security', the courts have construed that word as bringing within the ambit of the Acts "many forms of transactions which, on their face, do not appear to be securities in the commercial sense of the word." Feldman & Rothschild, Executive Compensation & Federal Securities Legislation, 55 Mich. L. Rev. 1115, 1117 (1957).

Thus the courts have held such economic interests as self-improvement courses, *SEC* v. *Glenn W. Turner Enterprises, Inc., supra;* beaver farms, *Continental Marketing Corp.* v. *SEC*, 387 F.2d 466 (10th Cir. 1967); whiskey sales contracts, *Penfield Co. of Cal.* v. *SEC*, 143 F.2d 746 (9th Cir. 1944); pyramid sales schemes, *SEC* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); variable annuities, *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S.

65 (1959); and mineral leases, *Roe* v. *U.S.*, 287 F.2d 435 (5th Cir. 1961) to be securities.

Plaintiff characterizes his interest in the Local 705 Pension Fund as an investment contract within the meaning of the Securities Acts, a proposition only inferentially challenged by local defendants and unchallenged by IBT. The Supreme Court in *SEC* v. *W.J. Howey Co., supra,* defined an investment contract to mean:

> A contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interest in the physical assets employed in the enterprise. (328 U.S. at 288, 289)

See *Koscot Interplanetary, Inc., supra.* Here plaintiff argues that the Local 705 Pension Fund contains all elements of the *Howey* rule, in that money is invested in a common enterprise, management of which is committed to a third party and from which income and profits are expected.

First, plaintiff characterizes the Local 705 Pension Fund which receives these contributions as the common enterprise. Plaintiff correctly observes that pension plan contributions are now uniformly recognized as part of employee wages. S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958). See also *Inland Steel* v. *NLRB*, 77 NLRB 2 (1948), 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960 (1949). These bargained-for contributions represent a substantial economic portion of those wages and represent the employee's investment.

Second, the trustees have the sole power of control over the common enterprise and investment of all assets contained therein. See Amended Trust Agreement, Art. 4, Sections 1, 2 and 3.

Finally, profits are expected from the successful management of the funds in the form of retirement benefits. That such benefits are fixed does not eliminate the element of profits. Plaintiff analogizes this to the fixed interest rate on a bond or debenture. The total amount of expected payout for any member will exceed the aggregate of those contributions made on his behalf. This excess will constitute a profit in the form of capital gains, interest and dividends and other accumulated earnings realized from successful management of the trust. Also, there is no warranty that the trust will be able to fund the supposedly fixed benefits due to members of the plaintiff class, and the holders thus bear an element of risk in this investment of their wages. See *Silver Hills Country Club* v. *Sobieski*, 361 P.2d 906 (Cal. 1961).

The conclusion that a beneficial interest in Local 705 Pension Fund is a security finds further support in public policy underlying the remedial nature of the federal securities laws which are aimed at prevention of frauds in the sales of securities and protection of investors. In light of this special remedial purpose, one commentator has characterized a security as an interest distinguished from the generality of interests:

> "so as to create a need for the special fraud procedures, protections, and remedies provided by the securities laws." Coffey, the Economic Realities of a "Security": Is there a More Meaningful Formula, 18 West. Res. L. Rev. 367, 373 (1967)

Plaintiff points to the magnitude of the pension funds, now estimated to exceed 150 billion dollars, and their economic importance to over 30 million Americans who rely on such plans for their financial security. According to one recent Senate study, as few as eight percent of those

participants in pension plans with vesting requirements of eleven years or more will ever receive any pension benefits. Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92nd Cong. 2nd Sess., at 15,115-153 (1972).

Plaintiff argues, and the Court agrees, that there is a great need for the application of the special fraud provisions, protections and remedies of the Securities Acts to plans such as the Local 705 Pension Fund. This need is not met by either qualification under Section 401 of the Internal Revenue Code or by filings under the 1958 Act or other pension legislation. Disclosure under the Code "does not necessarily satisfy Securities Act disclosure standards which require that the facts must be disclosed in a form which is clearly understandable to the ordinary investor." Mundheim & Henderson, *supra* at 806. The primary purpose of the Code is not protection of the investor, but rather production of revenue and prevention of tax evasion.

Likewise, under the 1958 Act, the participant must take the initiative in seeking information to which that Act says he is entitled. That is because the Act is designed to regulate misuse of funds and disclosure rather than fraud. The Securities Acts, however, place the burden of disclosure on the seller of a security. This is in recognition of the fact that fraud, by its very nature is practiced upon the unknowing. An employee who is unaware of a fraud being perpetrated upon him is not benefited by a provision which requires disclosure only upon his request.

Accordingly, the Court holds that plaintiff's interest in the Local 705 Pension Fund is an investment contract within the meaning of the Securities Acts and further that this result is consistent with the remedial purpose of that body of legislation. That being so, the Court does not reach local defendants' argument that plaintiff's in-

terest cannot be described as an interest in a profit-sharing plan.

Finally, the Court must determine whether plaintiff's acquisition of an interest in the Local 705 Pension Fund constituted a sale within the meaning of the securities law. Sale is defined in Section 2(3) of the 1933 Act as

> Every . . . disposition of a security or interest in a security, for value.

The definition found in Section 3(a)(14) of the 1934 Act is substantially the same.

It is apparently conceded that whether the transfer involved a gift, sale or otherwise, there was a disposition and that the only issue here is whether this disposition was for value.

Defendants argue that the complaint itself discloses that the Local 705 Pension Fund is both "involuntary" and "non-contributory", in that it is funded by employer contributions and that members of the Local come under this plan automatically by reason of their union membership and employment, and not by any choice on their part. Such plans, defendants argue, have been consistently found by the SEC to lack the "sale" element.

According to defendants the SEC has declined to assume that an employee who participates in a pension plan which is an incident of his employment, and in exchange for which he pays no additional consideration, and to which he makes no contributions, decides whether or not to work because of the nature and terms of the plan. The employee in this situation is not an investor. It is particularly true, they argue, that there is no choice of whether or not to participate where, as here, the pension plans are typically negotiated on an industry-wide basis in the local area and every covered employer in that industry in that area contributes

to the same plan on the same basis for each employee who belongs to the union.

As has been earlier discussed in this opinion, the SEC has taken the position that with respect to those employee pension plans characterized as "involuntary" or "non-contributory", there is no sale within the meaning of the Securities Acts. In cases of non-contributory plans, the SEC has found that employees did not receive their security interests for value, but rather as gifts. Alternatively, in cases of involuntary plans, the SEC took the position that employees made no investment decision. Since the purpose of the securities laws was to assure informed investment decisions by prospective purchasers of securities, the SEC concluded that if no investment decision is being made, these laws do not logically apply.

Plaintiff responds that in this case there was a disposition for value. He argues that the value element was satisfied by the giving of services or, alternatively, by the contribution of a portion of wages. Plaintiff asserts that in view of the vast amounts of money contributed by employers to employee pension plans—now estimated to exceed 150 billion dollars—the only responsible view is that such monies are given in return for value rendered.

Further, the Local 705 Pension Fund is an object of collective bargaining. Both Congress and the courts have adopted the view that employer contributions to employee pension plans constitute a part of the total wage structure. See S. Rep. No. 1440, *supra*, and *Inland Steel*, *supra*. Thus plaintiff's consideration includes not only services rendered but a portion of wages received.

These bargained for employer contributions on behalf of the members of the plaintiff class represent a substantial economic portion of the wages given to employees in consideration of services performed. As part of the employee's contribution, they constitute the employee's giving of value

for his interest in the plan. The Court agrees with plaintiff that economically there is no distinction between the facts here and the situation whereby the employee first receives as part of his wages the employer contribution in cash and then pays such cash over to the pension fund.

This view that the employee has given value has already received support from the courts. In *Collins* v. *Rukin*, 342 F.Supp. 1282 (D. Mass. 1972) the Court held that plaintiff's performance of services satisfied the value requirements of a sale. The Court there stated:

> the broad design of the federal securities laws should not be frustrated by restrictive application of the purchase-sale requirements . . . [and] the wording of each definitional section warrants non-restrictive interpretation of the concept of "sale" . . . (342 F.Supp. at 1289-90).

See also *SEC* v. *Addison*, 194 F.Supp. 709 (N.D. Tex. 1961).

The Court, therefore, is of the opinion that plaintiff gave value for his interest in the Local 705 Pension Fund. Further, the Court is of the opinion that, contrary to SEC policy and defendants' assertion, plaintiff's acquisition of an interest in that Pension Fund was voluntary.

The employees must vote on the package negotiated by the union which makes a division of increased increment of income between salary and pension benefits. The Court is persuaded that few members would ever vote for an allocation to a pension increase in lieu of a greater salary increase if they knew at the time of the vote that they would have an eight percent or smaller chance of ever realizing any benefit from the increased pension allocation. The final decision of such allocation to pension rather than salaries is with the employees and they thereby make the contribution from the total wage package.

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This decision to accept or reject the package is, furthermore, a voluntary one. The fact that a majority vote may prevail does not negate the fact that this majority decision is but an aggregate of many individual decisions. Moreover, the fact that individuals of a contrary mind may be bound by the majority decision does not mean that such individuals lack voluntary participation in the plan.

To the extent that SEC policy results in a conclusion that there is no voluntary purchase, the Court finds that it comports neither to logic nor economic reality. Such a policy in effect singles out purchasers of one type of security, i.e., a pension fund interest, for special scrutiny by looking into their subjective state of mind to ascertain the "voluntariness" of the purchase, and therefore, the existence of an "investment decision". In no other circumstance does the SEC look behind the purchase for the state of mind of the investor, to determine whether in fact the purchaser "desired" to make the purchase. The investment decision is presumed from the act. Likewise, it must be presumed here.

The Court, consistent with the rule of *Tcherepnin* v. *Knight*, that form be disregarded for substance, finds that plaintiff gave value for his interest in the Local 705 Pension Fund, both in the form of services and a portion of his cash wages. This conclusion finds further support in the policy considerations alluded to in *Collins, supra*.

The Court makes no finding here beyond the narrow holding that the complaint alleges the sale of a security for purposes of application of the antifraud provisions of the Securities Acts, and that the complaint alleges violations of those provisions. The Court makes no finding with respect to applicability of any other section of those Acts to employee pension plans such as the one here litigated.

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COUNT VI

Local defendants next argue that Count VI should be dismissed because it is barred by the statute of limitations and because this Court lacks federal subject matter jurisdiction under Section 302(c)(5) and (e) of the NLRA.

As a preliminary matter, local defendants assert that Local 705 should be dismissed as to this count because Section 302 contemplates relief only against the Pension Fund. The Court rejects that argument as without support or merit.

Local defendants next claim that any action against the Trustees is barred by the applicable Illinois statute of limitations. Although the issue of whether a state statute of limitations should be applied in a federal court suit under Section 302(e) has not been decided, state limitation periods have been applied in federal court suits under Sections 301 and 303 of the NLRA. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 686 (1966); *Operating Engineers Union* v. *Fishbach & Moore, Inc.*, 350 F.2d 936 (9th Cir. 1965).

In *Hoosier* the Supreme Court held that the issue of timeliness in a Section 301 suit should be determined as a matter of federal law, by reference to the appropriate state statute of limitations. The Court stated that:

> characterization of the action for purposes of selecting the appropriate state limitations provision is ultimately a question of federal law. But there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy. (383 U.S. at 706.)

After analyzing the six-month statute of limitations found in Section 10(b) of the NLRA relating to unfair labor

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practice charges, the Court concluded that the provision reflected the federal goal of relatively rapid disposition of labor disputes.

Defendants argue that the same goal of prompt disposition of disputes should apply in a Section 302 action. With that standard in mind, they attempt to characterize the nature of the action. Defendants urge that because of the importance of these pension funds to many people, any challenge to the fund's structure should be made at the earliest time.

The parties discuss in their briefs the appropriate characterization of this action, so as to determine the proper period of limitations. In the opinion of this Court, this action could be characterized either as a breach of trust action or one to enforce a statutory right. In either event the five-year period of limitation found in Ill. Rev. Stat. Ch 83, §16 (1973) would apply, and this Court so holds. Notwithstanding that determination, regardless of how the action is characterized, it is not time-barred.

The essence of plaintiff's affidavit is that he had no actual knowledge of defendant's wrongful acts which are alleged in the complaint. For those reasons, more fully set out in the preceding discussion of the limitations question relative to Counts I and II, the Court holds that there is a genuine question of material fact as to whether plaintiff actually knew or should reasonably have known of the existence of facts giving rise to this cause of action.

Accordingly, defendants' motion to dismiss Count VI based on the statute of limitations is denied.

Local defendants next challenge this Court's jurisdiction to hear Count VI, which alleges a violation of Section 302 (c)(5) of the NLRA requirement that all union pension funds shall be for the sole and exclusive benefit of the employees.

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First, according to defendants, the interpretation and application of the "for the exclusive benefit of employees" provision is within the primary jurisdiction of the Internal Revenue Service which approved the plan and its amendments. Defendants argue that Local 705's service rule has been an integral part of the plan since its inception in 1955 and that it was considered and approved by the IRS in granting the Pension Fund's original qualification and exemption under Sections 401 and 501 of the Code. Section 401(a) of the Code, like Section 302(c)(5) of the NLRA contains a "for the exclusive benefit of" employees requirement. Therefore, argue defendants, Local 705 Pension Fund's exemption from income taxes immunizes its eligibility rule from suit under the NLRA via the doctrine of primary jurisdiction.

The Court dealt with and rejected a similar argument in the case of *Smith v. Peick*, No. 72 C 2968 (N.D. Ill., June 30, 1975). The Court rejects it here for like reasons as not warranting further discussion.

Second, defendants argue that Count VI does not state a claim for relief under Section 302(c)(5). It must be noted at the outset that this same argument was presented to this Court in *Insley* v. *Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1972). In that case Judge Will held that a pension fund's eligibility requirements may violate Section 302(c)(5) of the NLRA as not being for the "sole and exclusive benefit of the employees," at least to the extent of surviving a motion to dismiss for lack of subject matter jurisdiction or failure to state a claim.

He reasoned that the ambiguous language of Section 302 and its ambiguous legislative history supported the conclusion that a "structural" violation of Section 302(c)(5) occurred where a pension plan excludes "a sizeable number of union members, with no reasonable purpose behind their

exclusion . . ." Judge Will stated that the standard to be applied is whether the eligibility requirement is "arbitrary and capricious", a standard which "would appear to be litigable only in the Federal courts." 330 F.Supp. at 1233-4.

As an example of how such an eligibility requirement could violate the "exclusive benefit" provision of Sub-Section (c)(5), the Court hypothesized that the Local's pension fund's "break-in-service" rule:

> might primarily be designed to strengthen the union by encouraging employees to work only . . . [for contracting employers] and to penalize employees who work or who have worked for other truckers . . . . If the purpose and effects behind this provision are thus primarily to benefit the union and penalize employees, we clearly are presented with a trust fund that possesses the structural deficiency of not being solely for the benefit of employees. (330 F.Supp. at 1234).

This Court adopted Judge Will's ruling in *Smith* v. *Peick, supra.*

Defendants argue that Judge Will was in error in that: (1) the legislative history makes it clear that Section 302(c) does not give federal courts jurisdiction over suits challenging trust fund eligibility provisions; (2) the decisional law does not support a finding that an eligibility provision constitutes a structural violation of Section 302; (3) the *Mine Workers Pension Fund* cases do not support the *Insley* holding; (4) the "sole and exclusive benefit of employees" provision is a traditional state law fiduciary concept; and (5) an eligibility provision which encourages longevity of service with contracting employers and thereby indirectly encourages union membership is not unlawful as a matter of law. Defendants further rely on *Cuff* v. *Gleason,* 515 F.2d 127 (2nd Cir. 1975) as controlling authority.

The Court remains in agreement with Judge Will's ruling in *Insley* and this Court's ruling in *Smith* v. *Peick, supra.* The case of *Cuff* v. *Gleason, supra* does not require a contrary result. In *Cuff* the Second Circuit approved the language of the lower court which had held that:

> [Section] 302(c)(5) of the LMRA would not confer federal jurisdiction where an application of a trust pension plan rather than a collective bargaining agreement, (cite omitted) was involved *and the specific requirements of §302(c)(5)* are met (cite omitted) (emphasis added) (515 F.2d at 128).

That section specifically requires that the trust fund be "established . . . for the sole and exclusive benefit of the employees of such employer."

The issue in *Cuff* as defined by the Court itself was "whether the application of rules of a jointly-administered pension trust to an individual claim was arbitrary and capricious." 515 F.2d at 128.

Here plaintiff challenges not the mis-application of a rule which is itself proper, but the legality of the rule itself. Here, as in *Insley,* "plaintiff has alleged and put into controversy an exclusionary eligibility requirement (viz., the . . . break in service rule) concerning the defendants' §302 trust." 330 F.Supp. at 1233. See also *Lugo* v. *Employees Retirement Fund of the Illumination Products Industry,* 366 F.Supp. 99, 102 (E.D.N.Y. 1973).

To the extent that *Cuff* stands for the proposition that a violation of Section 302 occurs only at the time of establishment of a rule and does not continue for as long as that rule is enforced, this Court declines to follow it. This Court adopts Judge Will's reasoning pertaining to Con-

Minute Order, Memorandum Opinion and Order
Entered March 1, 1976

gressional intent and legislative history as the better reasoned view.

Defendants' motions to dismiss the complaint are denied in their entirety.

ENTER: /s/ ALFRED Y. KIRKLAND
Alfred Y. Kirkland, *Judge*

DATED: March 1, 1976

Affidavit of Joseph E. Dean

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

AFFIDAVIT

JOSEPH E. DEAN, being duly sworn deposes and says:

My name is Joseph E. Dean. I am an actuarial consultant for the Wyatt Company in Washington, D.C. I submit this affidavit in support of the IBT Memorandum in Opposition to Plaintiff's Motion for Plaintiff and Defendant Class Action Certification and Determination in the above-captioned case.

1. I am a member of the American Academy of Actuaries and have served as a consultant for the Wyatt Company since 1966. The clients for whom I perform consulting services include unions, corporations, multiemployer pension plans, trade associations, federal government agencies and local governmental bodies. Those services consist of consultation on all aspects of pension plan design problems and actuarial valuations regarding such plans. I am thoroughly familiar with the Employee Retirement Income Security Act ("ERISA"), which is the most recent and comprehensive federal legislation pertaining to employee benefit plans. I am enrolled by the Joint Board for Enrollment of Actuaries to perform actuarial services under ERISA. Prior to 1966 I was employed for twelve years by New York Life Insurance Company in essentially similar work.

2. Among the clients of the Washington office of the Wyatt Company are the Central States, Southeast and Southwest Areas Pension Plan, and several other multiemployer plans. I therefore have a general familiarity, not only with the many plans for which I have performed consulting services during my twenty-two years in the profession, but I am also acquainted with the substantive provisions and workings of multiemployer pension plans including Teamster pension plans.

3. Although the consulting services that I perform differ markedly with regard to any particular plan, the following is illustrative of the manner in which the substantive provisions of a typical multiemployer pension plan are constructed.

(a) I am advised by the trustee or administrator of the level of contributions, the amount of funds available, and the general types of benefit provisions that should be included in the plan. Additionally, I am provided with a list of the members' dates of birth, length of service, and other pertinent data. From the above-listed information, I determine the nature and amounts of benefits that can be provided and make appropriate recommendations to my clients.

(b) The first order of priority is usually to provide benefits to those individuals with long periods of service who have reached a particular age such as 65 years in order to provide security to members at normal retirement age. If the plan is to provide that past service will constitute credited service, some members will immediately become eligible for benefits. This and other factors must be considered in light of the funds available.

(c) When subsequent negotiations produce contribution levels in excess of those needed to provide adequate pensions for those members with long years of covered service

who have reached retirement age, the next task is to decide the cost factor for providing additional benefits such as vesting, early retirement, disability pensions, survivors' pensions, and continued eligilibity during periods of layoff, military service and disability. The provisions of the plan are thereby structured in accordance with the wishes of the trustees representing the plan participants.

4. There are many factors which must be considered in formulating the substantive provisions of a plan constructed in accordance with sound actuarial practice. The following are some of those factors.

(a) The cost factor for a particular retirement benefit is related to the length of service requirement. For example, a 50 cent contribution for each hour worked may yield adequate funds to allow the trustees to provide a $400 monthly benefit at age 60 after 20 years of service; i.e., 12½ cents per hour is required for each $100 of monthly pension. If, however, retirement is allowed at age 60, but with 10 years rather than 20 years of service, the same funds (i.e., produced by the 50 cents per hour contribution), may only allow for a benefit of $360 per month. The cost factor is now about 14 cents per hour for each $100 of monthly benefit given a 10 year service requirement as opposed to 12½ cents per hour for each $100 monthly benefit given a 20 year service requirement.

(b) If for a given level of contribution, the age for a full retirement benefit is reduced from 60 years to 55 years, then there must be a correlative actuarial reduction in benefits. The factors that are considered in such a reduction are the following:

(1) during the 5 year period between ages 55 and 60, members not yet retired would have contributions made into the fund on their behalf;

(2) those additional contributions would earn interest during that period; and

(3) certain members not yet retired would die between the ages of 55 and 60, thereby reducing the size of the class eligible for a full retirement benefit.

(c) Break-in-service is also a factor which is taken into consideration in the determination of a benefit formula. For example, one plan may provide that a member loses no credit as long as his break-in-service is no greater than 5 years, while a second plan may provide for the payment of benefits only if the member has uninterrupted service credits. The former plan would result in a greater number of persons retaining eligibility compared to the "uninterrupted service" plan. As a result, a greater amount of funding would be required in order to yield the same monthly benefit.

5. As a result of knowledge that I have obtained from performing actuarial services for certain Teamster pension funds and as a result of knowledge of Teamster pension funds that I have obtained from contact with such funds during my twenty-two years in the profession, the following observations can be made regarding Teamster pension funds.

(a) All services that I perform are in accordance with sound actuarial principles.

(b) Each plan is established so that it can function as an entirely autonomous unit under the control and direction of the particular trustees and administrators.

(c) There are marked differences in the funding media. For example, trustees of some plans make investments either directly themselves or through their agents while the investment function for other plans is performed by

insurance or investment companies, or a combination of both methods.

(d) There are marked differences in the substantive provisions of the various pension plans.

(e) Each trust agreement provides that its provisions should be interpreted in accordance with the law of a particular state. Usually the law of the state where the trust was created is the governing law.

(f) Members are usually informed of the provisions contained in the various plans by distribution of informational booklets. Each such booklet is different in substance and form. Additionally, the role I play in the formulation of the booklets differs markedly, depending upon the wishes of the particular trustees and administrators. For example, some trustees and administrators ask that I actively participate in the formulation of the booklet while others request that I review the final draft.

6. I have been apprised by IBT counsel of the general allegations contained in the complaint and other moving papers in the above-captioned case. With regard to plaintiff's claim that the mailings and communications to Teamster members do not disclose "the actuarial likelihood that any Teamster member will *ever* receive any pension benefit" (Plaintiff's Memorandum in Support of Class Action Certification, p. 4), I make the following observations.

(a) The foregoing statement of actuarial likelihood is misleading because of the erroneous inference likely to be drawn that the statement of probability refers to a particular member's likelihood of receiving benefits. Such a statement cannot be made because probabilities may be calculated only with regard to the entire group. Therefore, the likelihood that a *particular* Teamster member will receive a benefit is impossible to calculate.

(b) I have never seen *any* pension booklet, Teamster or otherwise, which contains such a statement.

(c) Based upon the speculative and misleading nature of calculating the "actuarial likelihood that any Teamster member will ever receive any pension benefit," it is my opinion that the inclusion in a pension plan informational booklet of such a statement would not be advisable.

7. ERISA was enacted on September 2, 1974. Under ERISA, plans in effect on or before January 1, 1974 need not comply with the substantive provisions affecting eligibility, breaks-in-service, length of service, and vesting (among other things) until the plan anniversary beginning after December 31, 1975. I have been advised by IBT counsel that the Local 705 plan is in this category and that its plan year begins on February 1 and ends the following January 31. Therefore, the date on which it must have complied with these provisions was February 1, 1976.

8. Based upon the data provided to me by IBT counsel, if Mr. Daniel had been employed under a plan subject to the vesting and break-in-service rules of ERISA, he would have qualified for a full retirement benefit for the following reasons:

(a) *Break-in-Service:*

(1) Under the break-in-service provision of ERISA, Daniel probably did not incur a break-in-service in 1960 and thus all of his years of service must be counted to determine the percentage of the full retirement benefit in which he is vested;

(2) Even if Daniel did incur a break-in-service in 1960, all of his years of service prior to and after 1960 would have to be counted to determine the percentage of his full retirement benefit in which he is vested.

Under the break-in-service rules of ERISA, a member of a plan is credited with a full year of service if he has completed at least 1,000 hours of service in a 12 consecutive month period. If the member completes less than 1,000 hours of service but more than 500 hours of service, the member has not yet incurred a one year break-in-service. A one year break-in-service is incurred only if the member completes 500 or less hours of service.

Even if a member incurs a one year break-in-service, the years of service prior to such break must be credited to the member unless the number of consecutive one year breaks-in-service equals or exceeds the aggregate number of years of service of the member prior to his break-in-service. Accordingly, either because Daniel did not incur a break-in-service in 1960 or because his years of service prior to 1960 exceeded his one year break-in-service for 1960, all of his years of service must be counted to determine the percentage of his full retirement benefit in which he is vested.

(b) *Vesting:* Under any one of the three minimum vesting standards set forth in ERISA, Daniel's age and years of service would qualify him for the full retirement benefit payable under the plan; i.e., he would be vested in 100 percent of his retirement benefit.

9. At the request of IBT counsel, I constructed a hypothetical group which would be generally representative of Teamster pension funds. The data upon which the hypothetical group is based is representative of the Teamster pension funds for which I performed actuarial services and other pension funds with similar characteristics. It was assumed that at age 60, a member with 20 years of service would receive a monthly benefit of $100. It was further assumed that the fund assets are equal to the liabilities for pensions being paid. This is about the mini-

mum fund level expected for a plan that has been in existence for some time. Unfunded liabilities were assumed to be amortized over 40 years, the maximum period permissible under ERISA.

I was then asked by IBT counsel to calculate the effect on other members of the fund if a man were entitled to a full retirement benefit ($100 per month) after 10 years of service.

(a) *Pensioners.* A man receiving full retirement benefits would continue to receive such benefits. However, the future security of that pensioner might be affected if this liberalization causes more active members to go on the pension rolls. A large influx of new retirees could easily wipe out this margin and additional margins resulting from expected additions to the fund. If the plans were discontinued under these circumstances, some pensioners could lose at least some of their benefits because pensions which were not being paid for at least five years would not be fully insured by the Pension Benefit Guaranty Corporation, an agency set up by ERISA.

(b) *Members.* A man with 19 years 11 months of credited service would normally be eligible for a full retirement benefit of $100 per month after one additional month of credited service if he retires at age 60. However, if a member were entitled to a benefit at any time after 10 years of service, his monthly benefit would be reduced from $100 to $27 assuming the plan was constructed on the basis set forth in paragraph 4 above using sound actuarial principles. A decrease in the period of time that contributions are made must correspond to a correlative decrease in benefits at the time of eligibility. All other members of the fund would suffer a similar benefit reduction upon reaching eligibility.

10. If the hypothetical pension plan were to provide the same level of benefits to members ($100) after 10 years

of credited service rather than after age 60 and 20 years, and if levels of contribution were not increased accordingly, it is my considered judgment that all funds would be dissipated within a matter of 4 years.

11. If the hypothetical pension plan were to provide the same level of benefits to members after 10 years of credited service rather than after age 60 and 20 years, and if the fund were constructed on the basis set forth in paragraph 4 above using sound actuarial principles, it would be necessary to increase levels of employer contributions almost four-fold to provide a benefit of $100 per month.

12. At age 60, based upon modern mortality tables, the average life expectancy of a male is approximately 20 years. Therefore, a 57 year old male member of the Local 705 Fund eligibile for a pension of $425 per month can expect to receive a total of over $100,000 in pension benefits during that 20 year period.

/s/ JOSEPH E. DEAN
Joseph E. Dean

Subscribed and sworn before
me this 8th day of April,
1976.

/s/ RICHARD L. JOHNSON
Notary Public
My Commission Expires Sept. 30, 1978

Motion of Local 705, etc. to Vacate or Amend Order of March 1st

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

FILED

APR 13 1976

H. Stuart Cunningham, Clerk
United States District Court

Motion of Defendants Local 705 and Louis F. Peick to Vacate the March 1, 1976 Order and Dismiss Counts I & II of the Complaint, or to Amend the Order to Certify Pursuant to 28 USC §1292(b)

COME NOW defendants Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Louis F. Peick (herein "the local defendants"), by Sherman Carmell, one of their attorneys, who state:

1. On March 1, 1976 the court entered a memorandum opinion and order, *inter alia*, denying the local defendants' motion to dismiss Counts I and II of the complaint (herein "the securities laws counts") for lack of jurisdiction. The order was based on erroneous findings of fact and conclusions of law, as are more fully set out in the local defendants' brief filed contemporaneously with this motion, and the order should be vacated and those securities laws counts dismissed.

2. Alternatively, the local defendants request that the court amend its order to certify pursuant to 28 USC §1292 (b), the denial of the motion to dismiss as to Counts I and II. The court has recognized that its decision is the first to hold that the antifraud provisions of the Securities Acts apply to an employer funded fixed benefit pension fund and is contrary to the position of the SEC. The result of the decision is, *inter alia*, to raise a question of law which furnishes a substantial ground for difference of opinion. That question of law is controlling in determining the nature and standard of proof required to sustain the complaint, relevant to the propriety or nature of the plaintiff and defendant classes, and the extent to which the Securities Acts supersede, conflict, or are consonant with ERISA's statutory scheme.

Smith v. *Peick*, cited by and pending before this court, involves a class action under 29 USC §186 wherein the plaintiff claims to be the representative of all employees disqualified by the local defendants because of pre-fund and post-fund breaks in service. If the securities laws counts are dismissed, a serious issue as to plaintiff Daniel's class standing is raised in view of *Smith* v. *Peick*.

By reason of the above, and because the securities laws counts create a protracted case rather than a case under 29 USC §186 which involves entirely different considerations, an immediate appeal from the order may materially advance the ultimate determination of this litigation. This jurisdictional issue raised by the court's decision is of national importance as witnessed by the spate of media and trade commentary, facts which the court may judicially notice, Rules of Evidence, Rule 201(b),(c).

WHEREFORE, the local defendants request that the court:

A. Reconsider and vacate its March 1, 1976 order, as it relates to Counts I and II of the complaint, and to dismiss those counts; or

Motion of Local 705, etc. to Vacate or Amend Order of March 1st

B. Amend its March 1, 1976 order to the extent of certifying the questions of law raised under Counts I and II pursuant to 28 USC §1292(b).

/s/ Sherman Carmell
Sherman Carmell, one of the attorneys for the local defendants.

Dated: April 13, 1976

Carmell & Charone, Ltd.
39 South LaSalle Street
Chicago, Ill. 60603
(312) 236-8033

Motion of I.B.T. to Reconsider and Vacate, or Amend Order of March 1st

In the

United States District Court

For the Northern District of Illinois

Eastern Division

[Title Omitted]

FILED

Apr 13 1976

H. Stuart Cunningham, Clerk
United States District Court

Motion of International Brotherhood of Teamsters I. To Reconsider the Court's Order of March 1, 1976, Re Counts I and II, to Vacate That Order and Enter An Order Dismissing Said Counts;

II. Or, Alternatively, to Amend Said Order to Provide for Certification Pursuant to 28 U.S.C. §1292(b)

Now comes the defendant International Brotherhood of Teamsters, and for the reasons to be set forth in a supporting Memorandum to be filed within five days hereof under the Local Rule, moves the Court:

I. To reconsider the Court's Order of March 1, 1976, and to vacate that order, as to Counts I and II, and

Motion of I.B.T. to Reconsider and Vacate, or Amend Order of March 1st

to enter an order dismissing the said Counts of the Complaint as Amended;

II. Or, alternatively, to amend the said order of March 1, 1976, so as to certify therein pursuant to 28 U.S.C. §1292(b) that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation; and thereupon, that these proceedings be stayed pending application for such appeal and pending such appeal if permitted.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant

By /s/ JACK B. SCHMETTERER
One of Its Attorneys

Jack B. Schmetterer
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Attorneys for International Brotherhood of Teamsters

Transcript of Proceedings on April 13, 1976

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[TITLE OMITTED]

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. ALFRED Y. KIRKLAND, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, April 13, 1976, at the hour of 10:00 o'clock, a.m.

APPEARANCES:

LAWRENCE WALNER & ASSOCIATES
22 North LaSalle Street
Chicago, Illinois 60601
By: MR. LAWRENCE WALNER,

and

MR. PETER J. BARACK
208 S. LaSalle Street
Suite 1130
Chicago, Illinois,

appearing on behalf of the Plaintiff;

MESSRS. GOTTLIEB & SCHWARTZ
120 South LaSalle Street
Chicago, Illinois
By: MR. JACK B. SCHMETTERER,

and

MR. SHERMAN CARMELL
39 South LaSalle Street
Chicago, Illinois,

appearing on behalf of the Defendants.

The Clerk: 74 C 2865, John Daniel v. International Brotherhood of Teamsters, defendants' motion to extend briefing schedule and dismiss Counts I and II of the complaint.

The Court: Let me say briefly, gentlemen, it might save time were I to briefly tell you my inclination and if there is strong disagreement, I will certainly hear from everyone on the question of whether the Court reviews and reconsiders or gives its permission for the case to go up on appeal. We have had time to study and consider your motion and some of the authorities cited. In the opinion of my law clerks and myself, it would not change our position. We spent more time preparing this opinion than any opinion since I have been on the bench. It is going to continue on to the Circuit Court of Appeals and the Supreme Court, regardless of what any of us do. So my inclination would be to permit you to take an appeal at this time rather than entertain a motion to review or reconsider. I do not want to be arbitrary, but as I say I am sure we logged between 50 and 100 hours in researching and in writing the opinion. In our opinion, rightly or wrongly, there is nothing in the motion recently filed that would change our thinking. I am not suggesting that we are right. I am just suggesting that we have exhausted our ability in the preparation of this opinion.

Mr. Schmetterer: Jack Schmetterer on behalf of the Teamsters International.

The clerk has read Mr. Carmell's motion, which is a parallel of our motion for the Court, your Honor, to reconsider or for certification. My brief is ready to be filed

this morning. I hope you will take the opportunity to read our brief. I know we cite some Supreme Court cases which were not considered in your Honor's opinion, some of which were entered by the Supreme Court after our briefs were filed originally; and we feel the Court would want the opportunity to reconsider those Supreme Court decisions. There are several of them that were not considered in the original opinion. We know that you took a lot of time on the case and that your Honor knows how important this particular case is; and while it is very unusual to ask the Court to reconsider—I do not recall having done it before—I do ask your Honor to read our brief and reconsider. Then if you decline to vacate your order, then to certify.

The Court: Go ahead, Mr. Carmell.

Mr. Carmell: Sherman Carmell for the Local defendants.

Your Honor, I would only like to say this. I think that your Honor has acted in a most expeditious manner—and I appreciate that on behalf of the Local defendants—but rather than taking a great deal of time and prolonging the decision on this, we would request then that your Honor do amend his order as of March 1 to certify under 28 USC 1292(b).

That, of course, then gives us ten days in which to file a petition with the Circuit Court of Appeals. That is the position of the Local defendants at this time.

The Court: You represent the Local—

Mr. Carmell: Yes, your Honor.

The Court: And you represent the International?

Mr. Schmetterer: Yes, the International.

I respectfully request your Honor read the brief we are prepared to file and reconsider in the light of recent Supreme Court cases, which were not considered in the opinion.

Mr. Walner: Lawrence Walner for the Plaintiff and Peter Barack.

We are concerned, your Honor, if the matter is certified and goes up, that the discovery not be deferred dur-

ing that interim; and we feel with proper discovery, we have a reasonable chance on a motion for summary judgment in this matter, based upon the nondisclosures and other matters pertaining to the details of the plans, how they were devised and the communication or lack of communication with the members. So we are concerned with that: that discovery go forward during the pendence of any appeal.

It seems to me your Honor has pretty well made up his mind and certainly we are concerned with that.

The Court: Let me interrupt briefly.

If I took this under advisement and let that go forward, ultimately it would end up for review in the Circuit Court of Appeals and the Supreme Court.

Mr. Walner: I understand that, your Honor. The real novelty of this case, of course, is the security counts. I do not think there is any question but whether, with or without the security counts, that we have substantial other causes of action. So we are anxious to press forward with the discovery to the end that if our theory is upheld, we would be ready to have a motion for consideration of summary judgment either just before or just after the decision could be expected on appeal and that we do not want to have the proceedings at this level come to a grinding halt pending those decisions, because we would be delayed another year or a year-and-a-half, at least, regardless of the disposition on appeal. Even if the security counts should be challenged or reversed on appeal, I feel that the other counts would be viable.

Mr. Carmell: We are not asking for delays. In connection with the class certification briefs, all the Local defendants asked for was an extension to April 22 to file our briefs and affidavits on that.

The Court: Briefs and affidavits for review and reconsideration?

Mr. Carmell: No, briefs and affidavits on the class certification question. I would assume that the posture of the case would be that your Honor would deny the motion for reconsideration, would amend its order to certify the securities law counts; and in the meantime, we would go ahead with the next order of business which is, namely, the class certification issue. Those have to be briefed. The defendants' briefs and affidavits are due April 12. We came in today to ask until April 22. It would also allow us time to appeal the Blood Test case which was just filed in the Seventh Circuit. Our briefs would then be due the 22nd. I believe the Plaintiffs would have 30 days in which to respond and then there are, I think, fifteen or twenty days—

The Court: On the class action.

Mr. Carmell: And that discovery would continue so there would be no delay as far as proceeding along with the case. Depending upon the decision, depending upon first whether the Circuit Court of Appeals will take the 1292—assuming they do—when that decision comes down, that would basically frame the case. We will have the security law in or we will just have the 302-type of case and the related, pendant, common law fraud aspects.

The Court: It seems what counsel is saying would accommodate what you are contending for.

Mr. Walner: Yes, if we have the agreement and understanding that there is no delay with the balance of the proceeding.

The Court: I think that is what he is suggesting.

Mr. Walner: Yes, but I do not hear from Mr. Schmetterer.

Mr. Schmetterer: First, we are filing today—and I have served counsel with the first two affidavits in connection with the class question—we are asking only for a delay to the 22nd in filing the class briefs. We are not at present thinking of delay in connection with the class certification, but are proceeding on it.

I do urge the Court to accept and read the brief we are prepared to file this morning. We have spent a great deal of time on it, your Honor. In the original opinion, we cited Supreme Court cases. Your Honor did not—

The Court: Cases that have come down since?

Mr. Schmetterer: Since we filed our original briefs.

The Court: How about since the day we decided it, because we took our research substantially beyond the briefs.

Mr. Schmetterer: I do not believe we talked about Blue Chip decision and I do not believe we talked about Foreman.

Mr. Carmell: And Ernst & Ernst.

The Court: Let me say this: I reviewed thirty or forty cases and the fact that they were not cited, does not mean I have not considered them.

Mr. Schmetterer: Your Honor may have considered them. We did not know if you had considered them or not. We set them forth in our brief. We attempted to set forth that entire series. In view of the importance of this matter, I should think before it went upstairs that your Honor would want to read the brief and then if you say, "You are wrong," you can simply decline to vacate the order; but I would hope you would not make that decision.

The Court: I think what you are saying is that since the day we filed our opinion, you are not relying on the Supreme Court cases that have come down since that time. You are merely relying upon them for the context with respect to the emphasis that should be given to this case from other possible cases.

Mr. Schmetterer: One case that has come down since is Ernst & Ernst.

The Court: You feel that would be controlling?

Mr. Schmetterer: The Foreman and Blue Chip cases were not commented on by your Honor and were not commented on in the briefs filed, because they were filed considerably before your Honor was assigned this case. Therefore, we had no opportunity to argue them before the Court.

Mr. Walner: Your Honor, the Blue Chip case decision was issued some nine months before this decision and counsel has had ample time to bring the case to the attention of the Court. If he had felt it had any relevance to it, I am sure he would have done so.

The Ernst & Ernst case is a recent decision. I am sure your Honor at least has read about the decision and it had nothing to do with the issues before the Court. It really had to do with whether the 10(b)(5) broadly ascribed scienter to simple negligence. In our case it would be a matter of proof in the case if the application of the pension fund is a question of scienter. It has nothing to do with Ernst & Ernst. That case has absolutely no application to this.

Now if everyone briefs this and the case should go up—and we are of a mind to go along with that provided there is no stalling on the balance of all of the procedures—I would have suggested a different vehicle rather than a full-scale reconsideration such as is proposed. We feel it is a device more than anything to satisfy the 10-day requirement. We think, being just a device, it would be jurisdictionally defective as well, but I have not heard from Mr. Schmetterer on the agreement that the matter can go forward fully on discovery and, if we are ready for it before the Appellate decision, on the question of summary judgment. If we can have that agreement of counsel, my suggestion would be not to reconsider the opinion as they are suggesting, because they have submitted nothing in their briefs that has to do with this case at all.

The Court: I am going to cut this short, as important as it is, because we have got people that require only a

few seconds of the Court's time and this is developing into a full-blown hearing.

Without any disrespect, Mr. Schmetterer, I am going to let the appeal go forward at this time. If I read you gentlemen correctly as to the other matters unrelated to this appeal, you are willing to have the litigation continue on the trial level at this time. That is my understanding.

Mr. Walner: Including all discovery.

Mr. Schmetterer: There is only point I would like to present. First of all, of course, we cannot agree that summary judgment could go ahead with the two counts up in the Court of Appeals. That is only—

The Court: There is nothing filed as of this time regarding summary judgment.

Mr. Schmetterer: No, there is not.

Secondly, I would like leave to present you with an order that amends the order of March 1 to put this in the posture which I believe is necessary for a 1292(b) petition. We have a specific date, I recognize, but unless the order is amended we do not know when the ten days will begin to run.

The Court: I am not sure I have the mechanics all correct and proper.

Mr. Schmetterer: I would like the opportunity to present counsel with a draft order which I think he can approve as to form and which I could then present to your Honor to amend the order of March 1.

The Court: How many days would it take for you four counsel here to get together and see if you can agree?

Mr. Schmetterer: I would try to get it to them this afternoon.

The Court: Shall we say at a status call later this week? Suppose we have a status call on Thursday or Friday, whichever is your pleasure.

Mr. Schmetterer: I would appreciate Friday, if we could.

The Court: We will have a status call on Friday. In the interim, I am going to deny the motion to review.

Mr. Schmetterer: You cannot be persuaded? You have not had the benefit of our briefs or arguments.

The Court: I have decided. I am not at all persuaded that the cases that might have been overlooked, that might have been filed since then, would change my opinion. We can only do our best and I think to do otherwise would just prolong it. The decision has been made, with all due respect.

Now on the basis that the decision is made, could you four get together and hopefully give me an order Friday that would take care of all of the details?

Mr. Schmetterer: I believe so, your Honor.

I take it that leave to file the brief is denied? As far as my motion, I take it you are denying that motion?

The Court: For leave to file a brief in support, first I have denied that motion to review. That motion is denied.

Now inasmuch as that motion is denied, what is the purpose of filing a brief in support of it.

Mr. Schmetterer: May I have an extension on the class brief to the 22nd?

The Court: Is there any objection?

Mr. Walner: We are very unhappy with the extension. We have had plenty of time. However, we realize this is a major issue.

The Court: That motion to extend to the 22nd is granted. Now you want how much time for your reply brief?

Mr. Walner: Thirty days, your Honor.

The Court: Beyond that time?

Mr. Walner: Yes. If it is ready sooner, we will come in sooner.

The Court: Very well. We will take whatever business is before us on Friday when you return.

Certificate

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title Omitted)

I, Roscoe C. Giles, Jr., do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the HON. ALFRED Y. KIRKLAND, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on April 13, 1976.

/s/ ROSCOE C. GILES, JR.
Official Court Reporter
United States District Court
Northern District of Illinois

Minute Order of April 13, 1976

(See Opposite) ☞

MINUTE ORDER OF APRIL 13, 1976
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN — DIVISION

DOCKETED

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND

Cause No. 74 C 2865 Date APRIL 13, 1976

Title of Cause JOHN DANIEL, et. al. vs. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc. et. al.

Brief Statement of Motion TO SET APRIL 22 FOR FILING OF DEFENDANTS' BRIEFS AND PAPERS RESPECTING CLASS AND THE SECOND AMENDED COMPLAINT

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: SHERMAN CARMELL, 39 S. LaSalle Street, Chicago, IL, 60603

Representing: Defendants Local 705 and Louis F. Peick

Names and Addresses of other counsel entitled to notice and names of parties they represent:

SIDNEY DICKSTEIN, 1735 New York Ave., N.W., Washington, D.C. 20

JACK B. SCHMETTERER, 120 S. LaSalle, Chicago, IL 60603

Representing Defendant International Union

LAWRENCE WALNER, 221 N. LaSalle, Chicago, IL 60601

PETER J. BARACK, 208 S. LaSalle, Chicago, IL. 60604

Representing Plaintiff

Reserve space below for notations by minute clerk

Motions of defendants' for a review and reconsideration of Court's order entered on or about March 1, 1976 are denied. Defendant IBT denied leave to file its motion to review and reconsider. Defendants have until April 22, 1976 to file answer brief re class certification. Reply brief due 30 days thereafter. Cause continued to April 16, 1976 for submission of certain agreed order.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Minute Order of April 19, 1976

(See Opposite) ☞

MINUTE ORDER OF APRIL 19, 1976
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND

Cause No. 74C 2865 Date April 19, 1976

Title of Cause John Daniel
vs International Bhd of Teamsters

Brief Statement of Motion submit agreed order C

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

APR 19 1976

Reserve space below for notations by minute clerk

Motions of defendants for reconsideration of Courts Order of March 1, 1976 are denied. The alternative motions of defendants for amendment of Courts order of March 1, 1976 are allowed. Motion of defendant I.B.T. that proceedings herein be stayed pending interlocutory appeal is denied.

Draft

Hand, J

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Order Entered April 19, 1976

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

ORDER

This cause coming on to be heard on the motions of all defendants for reconsideration of this Court's order of March 1, 1976, and to vacate same and thereupon to dismiss Counts I and II of the Amended Complaint, and for leave to file memoranda in support thereof; and alternatively to amend this Court's order of March 1, 1976, so as to add thereto a certificate permitting application for immediate appeal under 28 U.S.C. 1292(b), and the Court having heard the argument of counsel

IT IS HEREBY ORDERED

A. The motions of defendants for reconsideration of this Court's order of March 1, 1976, and to vacate same and thereupon to dismiss Counts I and II of the Amended Complaint be and the same each are hereby denied, and the motions of defendants for leave to file memoranda in support of their said motions be and the same are hereby denied.

B. The alternative motions of defendants for amendment of this Court's order of March 1, 1976, so as to add thereto a certificate permitting application for immediate appeal under 28 U.S.C. 1292(b) be and the same are hereby allowed. Accordingly, the Memorandum Opinion and Order of this Court entered herein on

Order Entered April 19, 1976

March 1, 1976, be and the same are hereby amended by addition of the following finding which is hereby made by this Court:

> This Court is of the opinion that its Memorandum Opinion and Order of March 1, 1976, to the extent the same denied motions to dismiss Counts I and II of the Complaint as Amended, involved controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the said order denying dismissal of said Counts may materially advance the ultimate termination of this litigation.

C. The motion of defendant International Brotherhood of Teamsters that the proceedings herein be stayed pending interlocutory appeal under 28 U.S.C. 1292 (b), if the same be permitted by the Court of Appeals, be and the same is hereby denied.

Enter:

ALFRED Y. KIRKLAND
United States District Judge

Dated in said District and Division this 19th day of April, 1976.

Motion of Additional Defendants to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

Come now defendants Eugene W. McCarron, Frank Bridge, Ralph Niedert, Sr., M. J. Siewert, Jr., Frank Kratky, and Peter W. Janopolous, as trustees of the Local 705 International Brotherhood of Teamsters Pension Fund, and Frank Kratky, as president of Local 705, International Brotherhood of Teamsters, by Sherman Carmell, one of their attorneys, and pursuant to Rule 12(b) state:

1. With respect to the allegations contained in Counts I-III, inclusive, of the complaint:

(a) This court does not have subject matter jurisdiction, and the complaint does not state a claim upon which relief can be granted, under either §17(a) of the Securities Act of 1933, 15 USC §77q, or §10(b) of the Securities Exchange Act of 1934, 15 USC §78j(b), as more fully appears from the motions of the defendants to dismiss the original complaint, the pleadings, deposition and affidavits on file, which are incorporated by reference.

(b) The action is barred by the limitations provision of the Securities Act of 1933 and the Illinois Statute of Limitations.

(c) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "International Union"), Local 705, and other local unions affiliated with the International Union, or any pension fund other than

Motion of Additional Defendants to Dismiss

the Local 705 Pension Fund, are not proper parties defendant; and the defendants are not representative of any other person or defendant within the meaning of Rule 23.2.

(d) The plaintiff has not established the prerequisites for a class or representative action under Rules 23 and 23.2 FRCP.

2. In addition to the reasons stated in paragraph 1 of this motion, with respect to the allegations contained in Count III of the complaint concerning the breach of the duty of fair representation, the court lacks subject matter jurisdiction and the complaint does not state a claim upon which relief can be granted because:

(a) The plaintiff is a member only of Local 705; therefore, the claimed duty can run only from Local 705 to the plaintiff.

(b) The eligibility rule and alleged misrepresentations which the plaintiff challenges did not arise out of the relationship between a union and its member under §9(a) of the National Labor Relations Act, 29 USC §159(a).

(c) The plaintiff has failed to allege that he has exhausted his intra-union remedies.

(d) This court does not have subject matter jurisdiction under §301(a) of the National Labor Relations Act, 29 USC §185(a).

3. In addition to the reasons stated in paragraph 1 of this motion, with respect to the allegations in Count V of the complaint concerning violation of the "sole and exclusive benefit" of employees provision of §302(c)(5) of the National Labor Relations Act, 29 USC §186(c)(5).

(a) The plaintiff's action is barred by the Illinois Statute of Limitations.

Motion of Additional Defendants to Dismiss

(b) The plaintiff is estopped from benefiting from a challenge to the service rule or the alleged representations where he made no attempt for 13 years to request that the Local 705 Trustees waive or cure the break in service and contributions or to challenge the representations.

(c) The Internal Revenue Service has exclusive subject matter jurisdiction over the matters alleged in the complaint; has ruled contrary to the plaintiff's allegations; and the plaintiff has not exhausted his administrative remedies.

(d) Exclusive remedies are provided in the Employee Retirement Income Security Act of 1974, 29 USC §1001 *et seq.*

(e) This court does not have subject matter jurisdiction and the complaint does not state a claim upon which relief can be granted under §302(c)(5). The relief sought exceeds that permitted by §302(e), 29 USC §186(e):

Wherefore, these defendants pray that the second amended complaint be dismissed and for their costs.

Sherman Carmell
Sherman Carmell, one of the
defendants' attorneys

Dated: April 22, 1976

Carmell & Charone, Ltd.
39 South LaSalle Street
Chicago, Ill. 60603
(312) 236-8033

Opposition of Local 705 Defendants to Requested Class Certification

In the

United States District Court

For the Northern District of Illinois

Eastern Division

[Title Omitted]

Come now defendant trustees of the Local 705 International Brotherhood of Teamsters Pension Fund and the president and secretary-treasurer of Local 705 (herein the local defendants), by Sherman Carmell, one of their attorneys, and state:

1. The local defendants oppose the plaintiff's motion for requested plaintiff and defendant classes because they do not meet the prerequisites of Rule 23, FRCP, as more fully appears from the affidavit of A. S. Hansen, Inc., attached and incorporated as Exhibit 1, and the accompanying brief.

2. The local defendants request that the court conduct an evidentiary hearing if it cannot deny the requested class certifications based on the pleadings and accompanying papers.

Wherefore, the local defendants request that the court enter an order:

A. Denying the plaintiff's motion for a plaintiff class or defendant classes; or

Opposition of Local 705 Defendants to Requested Class Certification

B. To conduct an evidentiary hearing relating to the class issues.

SHERMAN CARMELL
Sherman Carmell, one of the local defendants' attorneys

Dated: April 22, 1976

CARMELL & CHARONE, LTD.
39 South LaSalle Street
Chicago, Ill. 60603
(312) 236-8033

Exhibit 1
Affidavit of A. S. Hansen, Inc.

(See Opposite) ☞

A. S. HANSEN, INC.

AFFIDAVIT

EXHIBIT 1

A. S. Hansen, Inc.

EXHIBIT 1

Richard I. Citron, being first duly sworn says:

I am a consultant with A. S. Hansen, inc. and I have participated in and supervised the preparation of this affidavit. I have been assisted in the preparation by: Stephen G. Singer, who is a Fellow of the Society of Actuaries, a Member of the American American Academy of Actuaries, a Fellow of the Canadian Institute of Actuaries, an Enrolled Actuary, and whose responsibility it is to manage the Actuarial Department in Lake Bluff, Illinois for A. S. Hansen, inc. Including the determination of the actuarial methods, procedures, and rates to be used in pension valuations; Carl D. Robst, who is a member of the American Academy of Actuaries and the Conference of Actuaries in Public Practice, and whose responsibility it is to directly manage members of the Actuarial Department in Lake Bluff, Illinois of A. S. Hansen, inc. including the preparation of the actuarial valuation for the Local 705 Pension Fund; Donald I. Brothers, who was formerly a consultant with and President of A. S. Hansen, inc. and is now the President and Chief Executive Officer of Administration/Systems/ Communications, inc. The facts contained in this affidavit are taken from our books and records kept in the ordinary course of business, those of the Local 705 International Brotherhood of Teamsters Pension Fund publications, and other documents, and are true to the best of my knowledge and belief.

Information Concerning A. S. Hansen, inc.

A. S. Hansen was founded in 1930 and now serves about 2,000 clients nationally. These clients represent various state public retirement systems, local governmental units, large and small corporations, labor organizations and jointly-managed trust funds. We employ over 400 people who possess a broad spectrum of professional and academic credentials and who serve as resources with respect to all areas of employee benefits. The current status of A. S. Hansen employees with respect to professional actuarial associations is as follows:

EXHIBIT 1

Society of Actuaries: 12 Fellows and 15 Associates

American Academy of Actuaries: 25 Members

Conference of Actuaries in Public Practice: 11 Fellows, 3 Members and 4 Associates

Canadian Institute of Actuaries: 5 Fellows

Fraterial Actuarial Association: 2 Fellows

Further, we have at least 50 individuals who are Enrolled Actuaries and are able to certify actuarial calculations per the requirements of ERISA.

Our firm offers a single source of comprehensive, impartial actuarial counsel on pension and welfare programs and a broad range of technical services, on a professional fee basis. Our total income is obtained directly from the Companies, Funds and Associations for which we work. We are a completely independent firm without any ties to any organization. From our inception, we have neither accepted nor paid commissions of any kind.

We believe that our function as consultants to joint labor-management funds is to coordinate our skills with those of the fund legal counsel, administrator and auditor in support of the Trustees. We will not accept an assignment as a fund administrator. We view our work with joint funds as an important part of our total activity, and are committed to a program of support and service to Trustees throughout the country.

A. S. Hansen offices, nationally and its international affiliates, are located in:

Atlanta, Georgia; Chicago, Illinois; Columbus, Georgia; Dallas, Texas; Denver, Colorado; Fort Worth, Texas; Houston, Texas; Lake Bluff, Illinois; Los Angeles, California; Memphis, Tennessee; Milwaukee, Wisconsin; Montgomery, Alabama; New York, New York; San Francisco, California; Tampa, Florida; Tulsa, Oklahoma; Wellesley, Massachusetts; Mexico City, Mexico; Toronto, Canada; Birmingham, England; Brussels, Belgium; Chichester, England; Dublin, Ireland; Frankfurt, Germany; Glasgow, Scotland; Johannesburg, South Africa; Leeds, England; Leicester, England; London, England; Manchester, England; Melbourne, Australia.

EXHIBIT 1

A. S. Hansen's Relation To The Teamsters Local No. 705 Pension Fund

A. S. Hansen, inc. and an acquired Firm have been performing actuarial services for the Teamsters Local No. 705 Pension Fund for all years since the Fund's inception, including those actuarial studies for the original development of the Plan. As actuaries and consultants, A. S. Hansen has had the opportunity, as professional advisor to the Trustees, to participate in the review of the total operation of the Fund since its inception.

A. S. Hansen, inc. has found that, for as long as we have been providing actuarial services, the Fund has met all the requirements of funding adequacy that were applicable from time to time. Based on our experience, it is our observation that the Fund has had an outstanding record of conservative and effective management of investments and administrative effort.

Actuarial Assumptions

A distinction should be made between the contribution requirements and the cost of a pension program. Over the long run, the costs of a pension plan are equal to the sum of benefits paid, plus administrative expenses, reduced by investment earnings of the pension fund. The cost is independent of the actuary's judgement, and can only be known in retrospect. How much a plan costs at any moment in time cannot be accurately determined; it can only be estimated. This estimate is used to compute the amount of periodic contributions to the pension fund so that funds may be accumulated systematically, in advance, to provide for the future payment of benefits as well as provide a measure of security to participants.

Contributions to a pension fund are calculated on the basis of estimates of relevant future events, called "actuarial assumptions". The projection of benefits to be paid from this Fund in the future is based on assumptions as to the rates of participant death, disability, withdrawal and incidence of turnover. One further assumption concerning the expected rate of investment earnings on the fund is utilized.

EXHIBIT 1

The American Academy of Actuaries in a recent exposure draft concerning actuarial principles and practice has stated that "The actuarial assumptions selected should represent the actuary's best judgement of future events affecting the related actuarial present value. They should take into account the actual experience of the covered group to the extent information is available and applicable, but in recognition of the nature of a pension plan, they should reflect long-term trends rather then give undue weight to recent experience."

If the actuary takes proper account of each of the factors affecting the cost of the plan, then the actual cost will turn out reasonably close to his estimate if the assumptions continue to hold true.

Actuarial Assumptions Related To Teamsters Local No. 705 Pension Fund

All actuarial valuations performed for the Teamsters Local No. 705 Pension Fund have considered only the actuarial experience and plan provisions of the Teamsters Local No. 705 Pension Trust. Determinations of the adequacy of the contributions to the Teamsters Local No. 705 Pension Trust have been made solely with regard to the contributions generated by the relevant collective bargaining agreements and the liabilities arising out of benefits payable or promised to be payable to and on behalf of such members in plan documents as adopted from time to time which were submitted to the membership. Neither the assets, liabilities or experience of any other teamster fund played any part in our determination.

Where sufficient data has existed, the actuarial assumptions (concerning the incidences of retirement, death, withdrawal, disability and rate of investment return) used to value the liabilities of this plan have been determined by reference to the actual experience which has emerged under this plan. As shown below, we have certified to the Internal Revenue Service per Revenue Ruling 70-257 as to the adequacy of the funding and the reasonableness of the Actuarial assumptions used.

EXHIBIT 1

CERTIFICATION OF QUALIFICATION UNDER
REVENUE RULING 70-257

We have made an actuarial valuation of the Local No. 705, International Brotherhood of Teamsters Pension Trust Fund as of January 31, 1975. On the basis of the current Fund assets, contribution rates under the existing labor contracts, and Pension Plan provisions, we hereby certify that our valuation demonstrates that present Fund assets plus expected contributions will not be less than the full cost of the pensions payable to employees expected to retire under the Plan during the term of the existing labor contracts, nor less than the normal cost plus interest accruing on the unfunded past service cost with respect to all employees covered by the Plan.

The actuarial assumptions and methods used in our valuation are in accordance with standard actuarial practices, and provide a reasonable basis for forecasting the costs of the pension benefits provided under the Plan.

Respectfully submitted

A. S. HANSEN, INC.

In addition, we have submitted, from time to time, the actuarial assumptions to the Internal Revenue Service.

Plantiff's Probability Of Receiving A Benefit

We have been told that it has been alleged that only a small percentage of members who participate in this Fund will ever receive benefits. According to the actuarial assumptions used to determine the adequacy of the Plan's funding, we estimate that

an average member who enters the plan at Mr. Daniel's original entry age of 40 years will have a probability of 50% of realizing a retirement, disability or vested benefit from the plan. This probability increases geometrically for each year that the member is still active. This probability takes into account the plan provisions as they were in effect before compliance with liberalizations required by ERISA.

Actuarial Funding Method

The method of funding used in the Teamsters Local No. 705 Pension Fund is termed the Entry Age Normal Cost Method. The basis of the funding method is to estimate what the annual level costs would have been had the pension plan been in effect in prior years, and the cost for each member calculated on the basis of when he was first hired, that is his entry age. The annual level cost so estimated is the normal cost of the program. Hence, the entry age normal cost method. Where benefits are based on service, this cost is usually expressed as a level dollar amount per participant.

At the time a pension plan starts, all of the members will have been working for a participating employer varying amounts of time for which no funds have been set aside to meet pension obligations. In fact, during 1955, the first year of the Fund's operation, 47 members retired with benefits. Therefore, it is necessary to make arrangements to put aside money to take care of the plan participants for the service they have performed prior to the commencement date of the plan. This amount is termed initial past service liability of the plan at the time it is established.

The initial past service liability (or Unfunded Past Service Cost) is the amount to which the normal cost would have accumulated if the plan had been in effect since the employment date of the longest service participant in the plan. Prior to February 1, 1976, in order for the plan to remain qualified with the Internal Revenue Service, it was necessary to at least pay interest on the unfunded past service cost in addition to paying the normal cost each year. This total cost is termed the current cost of the plan. ERISA will require the unfunded to be amortized over a 40-year period.

While the ideal goal of a pension plan should be to become fully funded, it must be recognized that, in practice, this goal will probably never be fully achieved. Suppose, for example, the plan calls for liquidating the past service liability in 40 years. It would be unthinkable that within that 40-year period benefits would not be increased and that other provisions of the plan would not become more liberal. This has certainly been the case with respect to the Teamsters Local No. 705 Pension Fund as shown in later sections of this affadavit.

It is important to realize that each improvement will create an additional unfunded liability for all service perf med prior to the date of the change. Nevertheless, a plan may be "actuarially sound" even if it is not fully funded. The plan need only recognize all of the costs and make provisions for meeting these costs over a reasonable period of time in order to be on actuarially sound program.

As stated previously, the plan has met all requirements of funding adequacy that were applicable from time to time. Further, we have found that the plan provisions and the negotiated contribution, in effect on January 31, 1975 would result in compliance with the minimum funding requirements of ERISA. Currently, contributions are not sufficient to meet the liberalized benefit provisions required by ERISA and maintain the minimum funding requirements of ERISA. However, it is expected that results of the collective bargaining agreement now being negotiated will result in additional contributions sufficient for the plan to be able to conform to ERISA.

Accumulated Contributions and Value Of Benefits Received

The plan has, from the beginning, credited members with service prior to the time the plan began in determining amounts of benefits and eligibility. For all members who have retired to date, the value of the amount of the expected benefits at retirement has exceeded the contributions made on their behalf to the Fund. The following table relates the total amounts of contributions received on behalf of a member, accumulated without and with an annual rate of interest at 6%, to the value of their retirement pensions assuming they retired at the earliest possible age:

Year of Retirement	Accumulated Contributions Without Interest	With Interest	Value of Retirement Benefit
1955	$ 104	$ 107	$ 8,394
1960	730	862	11,192
1965	2,289	2,930	23,262
1970	4,893	6,924	34,089
1975	9,510	14,542	57,951

The value of the retirement benefits shown is based on the value of the retirees expected retirement pension and does not include the value of any increases in benefits that had been granted to retirees after they began receiving benefits. That is, if a man retired in 1965, the value calculated is based on the $100 a month pension he was expecting. However, in 1965 his pension was increased to $150 a month and in 1969 it was increased again to $250 a month. The benefit value does not include the effect of these additional increases.

Fund Statistics As Of January 31, 1975

It should be noted that the benefits are paid to a large number of members and beneficiaries. As of the last actuarial valuation, January 31, 1975, there were 2,587 individuals receiving benefits from the Fund. This number represents 16.4% of the total number, 15,732, of active participants as of January 31, 1975. Benefits at that time were paid at the rate of $840,000 per month. The total actuarial value of the pensions payable to those receiving benefits on January 31, 1975 was $89.6 million, compared to the total market value of the assets of the fund on that date of $91.5 million.

The following table briefly summarizes the distribution of the total 15,732 active participants as of January 31, 1975.

	Number of Participants	Percentage of Total Group
Eligible for Immediate Monthly Benefits of $525	278	1.8%
Eligible for Immediate Monthly Benefits of $425	782	5.0
Eligible for Immediate Retirement Benefits	1,060	6.8%
Eligible for Deferred Vested Pension of $250 at Age 65 (20 or more years of service, less than age 57)	1,431	9.1
Eligible for Benefits	2,491	15.9%
Participants with 10 or More Years of Service But Less than 20 Years of Service	3,794	24.1
Remaining Participants	9,447	60.0
	15,732	100.0%

Plantiff's Request Concerning Benefit Eligibility

We have been told that the Plantiff has requested that retirement benefits be made available after 10 years of service. Since we were not made aware of other qualifications for benefit eligibility, there are several possible interpretations of the request as related to us.

1. Allow retirement after 10 years of service with full monthly benefits commencing immediately upon retirement.

2. Allow retirement after 10 years of service but defer the commencement of full monthly benefits until attainment of age 57.

3. Allow retirement upon attainment of age 57 with at least 10 years of service with full monthly benefits commencing immediately. Participants who terminated with at least 10 years of service but prior to attaining age 57 will be paid a prorata benefit upon attainment of age 57.

Objective Of A Pension Fund

The best way to view a pension fund is to establish a grasp of its objectives. Retirement plans are undertaken for numerous reasons such as personnel efficiency objectives and tax incentives. However, the basic objective of the Teamsters Local No. 705 Pension Fund is to provide for the economic needs of its participants under the major hazards facing them; namely, superannuation, disability and death.

Within this basic objective is the primary purpose of the pension fund — to provide income after a participant has outlived his normal productive period. While there is no precise age at which this occurs, the most common age currently in use in private pension plans is age 65, the age at which unreduced Social Security benefits are first payable.

Many public systems permit retirement with full benefits at age 60 or after a minimum period of 35 years. Union negotiated pension plans have recently been reducing the age requirement for full benefits to age 60 or 62 or after a minimum of 30 years of service.

Lowering the normal retirement age and providing benefits at lower ages without an actuarial reduction involves substantial outlays since the period of payment is lengthened and the period of accumulation is reduced. For example, using actuarial rules of thumb, if a member who enters a program providing a pension of 2% a year at age 35 is permitted to retire at age 55 rather than 60, the cost of his pension rises 15% because of the longer expected period of payment, and an additional 39% due to the shortening of the accumulation period from 30 to 25 years. The resulting compounded 60% cost increase is only offset by the fact he will receive a 50% pension

rather than a 60% — yielding a net increase in costs of 33%. If the same level of benefits, 60%, were still to be granted than the costs would indeed increase by approximately 60%.

Estimated Costs Of Providing The First Interpretation

We have estimated the contribution requirements if the Teamsters Local No. 705 Pension Fund was to allow retirement after 10 years of service with benefit payments commencing immediately upon retirement. If the January 31, 1975 level of benefits in the Teamsters Local No. 705 Pension Fund was the amount payable upon retirement after 10 years, the weekly contribution rate would be $106 rather than the existing weekly contribution rate of $24 representing an increase of 342%.

If the contribution rate is not increased to $106, then the benefits payable to the present active members under this provision would be $96 per month rather than $425 at age 57 or $525 at age 60. This would result in a substantial deviation from the present benefits and contributions. In fact, approximately 7% of the January 31, 1975 active membership (those eligible for immediate retirement) would incur immediate expected benefit losses ranging from $429 per month to $329 per month.

These cost estimates were estimated using the assumption that all individuals would retire immediately upon attaining 10 years of service. This was done since these individuals would have earned the maximum pension, payable immediately, and could find employment outside the industry. This would be necessary since the retirement income from the Local No. 705 Pension Fund would not provide an adequate "retirement" income. In such cases they would still remain active employees in another industry, probably earning credit for another pension, and would be collecting "retirement" benefits from Local No. 705 Pension Fund. Based on this assumption, if the benefits were not reduced, the January 31, 1975 assets of the Fund would be exhausted in less than four years.

Estimated Costs Of The Second and Third Interpretations

Although these interpretations would allow full and unreduced benefit payments to commence at age 57, the contention granting full benefits after 10 years of service is in violation of basic pension design. Once again, we state that the primary purpose of a retirement plan is to replace a portion of an employee's pay when he is no longer able to work. The most important provision of the plan, therefore, is the pension formula (or benefit). The benefit should be designed to provide an income to a career employee, including Social Security benefits, which would ensure that the benefit he receives are adequate in terms of the cost of living at the time he retires.

Although the definition of a career employee varies from industry to industry, upon reaching normal retirement age it is fairly common to see full benefits paid to employees with 30 or more years of service and prorata benefits for employees with less than 30 years of service.

The Local No. 705 Pension Fund will provide full benefits to those employees attaining retirement age who have at least 20 years of service. To provide full benefits, per the January 31, 1975 plan provisions, at age 57 and 60 to those employees with 10 years of service as assumed in the third interpretation would once again represent a substantial cost deviation from sound pension policy.

In the case of the second interpretation, there is no prorata benefit for those participants who terminated with at least 10 years of service but prior to age 57. These participants would have earned a full pension after 10 years, deferred to attainment of age 57 and, therefore, would have no incentive in the retirement area to continue working for a participating employer. Therefore, we could expect more "retirements" after 10 years of service since members could find employment elsewhere and obtain additional pension benefits.

We have calculated the estimated weekly contribution rate of these interpretations to be $51 for the second interpretation and $34 for the third interpretation as compared to the present $24 per week contribution requirements representing increases of 113%

and 71%. If these weekly contribution rates were not forthcoming, the benefits to those active members of the Local No. 705 Pension Fund would be reduced to $200 per month and $302 per month, respectively, for the second and third Interpretations.

Therefore, a portion of the present active participants would suffer an immediate reduction in benefits ranging from $325 per month to $123 per month under these Interpretations.

Further Comments Concerning Plantiff's Request

Unless the additional contributions were forthcoming to support any one of the three Interpretations of the Plantiff's request, the result would be substantial reductions in the amount of benefits to be received by participants, especially those eligible for immediate retirement. In such cases, the Internal Revenue Service would view the new provisions as, at least, a "curtailment". That is, any amendment which reduces benefits results in a curtailment and the Fund then must provide the Internal Revenue Service with the same information concerning the plan as would be required under a plan termination. It would also be possible for the Internal Revenue Service to view the results of the amendments as a termination of the plan in practice.

All of the weekly contribution rates necessary to support the various interpretations of the Plantiff are based on the minimum funding requirements of ERISA.

Requirements of ERISA

One other interpretation is possible from the Plantiff's claim and it is the one required by ERISA. Under one alternative of ERISA, pension plans must provide a benefit to those individuals who have at least 10 years of service. However, neither the full monthly benefits needs to be provided nor do the benefit payments need to commence, on an unreduced basis, earlier than the normal retirement age.

ERISA allows the full normal retirement benefit to be earned in accrued pieces, such as at a rate of 3% per year. Therefore, under ERISA, a participant who withdraws from the fund after 10 years is eligible for 30% of the normal retirement benefit, or $165 a month (the normal retirement benefit is $550 per month at age 65).

Further, the $165 per month benefit is first payable upon attainment of age 65. If payments are to begin at an earlier age, the ERISA allows a reduction in the amount to reflect the actuarial equivalency.

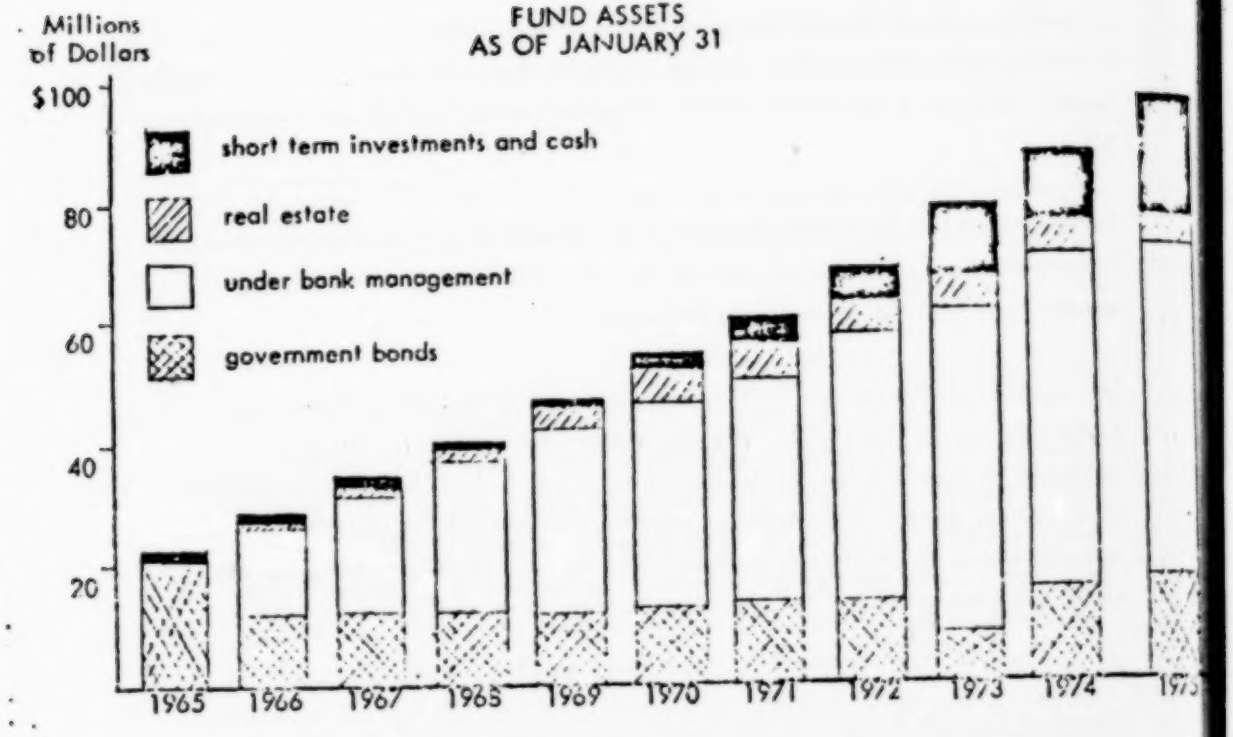
The Local No. 705 Pension Fund is in the process of conforming the plan's provisions to the requirements of ERISA. The additional weekly contribution requirement necessary to maintain the revised plan on a proper funding basis is estimated to be $4.00 per week. This amount is substantially below those estimated for the interpretations of the Plantiff's claim. Furthennore, as contrasted to the Plantiff's claims, the design of the ERISA provisions is based on sound pension policies.

Financial Position As Of January 31, 1975

The Local 705, International Brotherhood of Teamsters Pension Fund had assets as of January 31, 1975 of approximately $97.3 million at book value. The assets are and always have been conservatively managed. An approximate breakdown of the asset mix as of January 31, 1975 was as follows:

Cash and Certificates of Deposit	$19.7 million
Government Securities	17.7 million
Discretionary Trust Funds Invested by Major Chicago Banks	53.9 million
Real Estate	6.0 million

The following chart illustrates the growth of the Fund and the mix of investments since 1955. Prior to 1965, the Fund was invested exclusively in government securities and short-term investments.



It has been the policy of the Fund, since it began, to invest in either government or short-term securities on a self-administered basis, with a prudent addition of real estate limited to not more than 10% of the portfolio. All other funds have been invested by the trust departments of major Chicago banks. The past practice of Local No. 705 investment policy has, in our opinion, anticipated the prudent man fiduciary responsibilities as defined under the Pension Reform Act (ERISA). The Trustees receive from A. S. Hansen information which gives them a full understanding of payout requirements and mix of obligations between active and retired members.

Operating Results Fiscal Year End January 31, 1975

For the fiscal year ended January 31, 1975, contributions received from the employers for the members were approximately $16.1 million. In addition, the Fund received

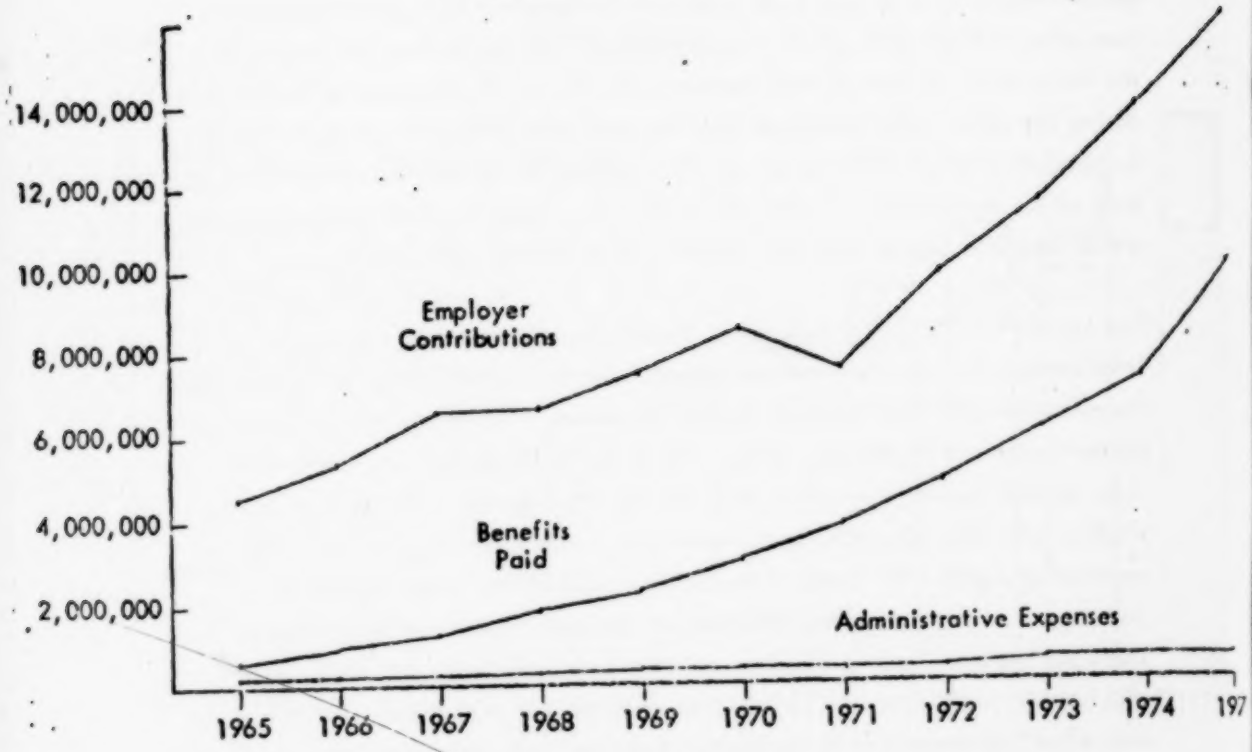
approximately $3.5 million from investment income and from monies transferred from other smaller funds which were merged into the Local No. 705 Fund during the fiscal year. Actual benefit payments to retirees were approximately $10 million during the year. Administrative expenses were only $468,000, or approximately 2.9% of the contributions received. The administrative expense included the fund office administrative costs, data processing support and all professional fees which included support from the auditor, legal counsel and the actuary.

The Local No. 705 Fund, by policy, has always operated with significant involvement of its professional advisors to help the Trustees determine their policies for effective administration and judicial decisions. The heavy use of professional advisors accounts for approximately .8% of the 2.9% of the administrative cost rate, so that the administrative costs for other than professional advisors is only slightly over 2%. Considering the effective, current and highly communicative approaches used by this fund, it probably has one of the lowest administrative cost rates as a per cent of contributions of any multi-employer fund in the U. S. The Fund has been host to a number of other interested funds and professionals who have wanted to review its approach because it is considered to be one of the most effective operations in the pension industry, both with regard to performance and cost.

Operating Results — From February, 1955 To January 31, 1975

The annual audit report as of January 31, 1975 provides an exhibit consolidating all revenue and expenditures from the inception of the Fund in February of 1955 through January 31, 1975. Approximately $115 million of contributions have been received from employers participating in the Fund. In addition, $7.5 million has been transferred from other smaller funds which have been merged into the 705 Fund over the years for more effective performance. Investment income totaling $19 million has been received over this period of time. Retired members and beneficiaries have received $42 million dollars in benefits. The cumulative administrative cost as a per cent of contributions received has been 2.01% over the entire period of the Fund's operation. The following chart illustrates the financial operation of the Fund since 1955.

EXHIBIT 1



In Hansen's experience as actuaries for a number of multi-employer funds and also based on government statistics published by the Department of Labor, the cumulative administrative costs as a per cent of contributions for the operation of this Fund have been less than half the average for funds of this size. (Smaller funds have an even higher per cent of administrative costs related to contributions.) The cumulative average has been lower than for the year ended January 31, 1976 because of the additional costs required due to ERISA.

Delinquent Contributions

One of the significant problems which occurs nationally for multi-employer funds is the problem of collection of contributions from all employers on a timely and appropriate basis. The Local No. 705 Fund has minimal problems in this area because of Trustee policies and the administrative approach used. Employer

EXHIBIT 1

contributions are due monthly based on amounts agreed upon under the collective bargaining agreements. The fund administrative office notifies any employer from whom contributions have not been received for the preceding month that it is delinquent on the 10th of each month. Each business agent of the union who has the assignment of communicating with delinquent employers is notified of the delinquency by the 20th of the month. Notice is given to each covered member by the 25th of the month if contributions have not been received for that member for the preceding month. Each member is given a monthly statement as to the amount of total contribution delinquency. This procedure is possible because of the computer technology used by the Fund as part of its administrative operation. This communication and control is performed within the low administrative cost parameters indicated above.

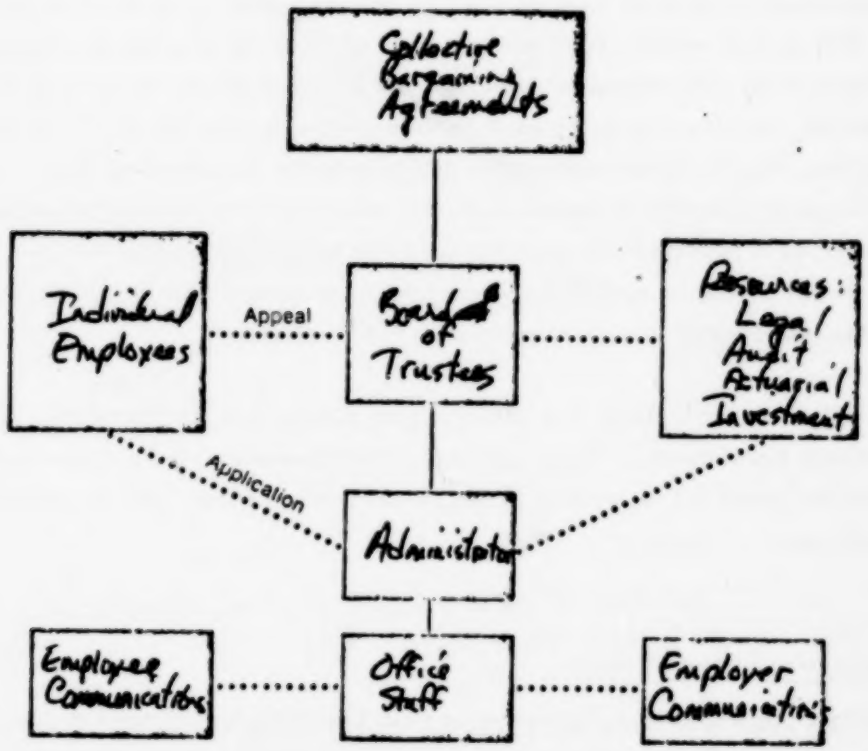
Accordingly, from a financial and administrative perspective, the Local No. 705, International Brotherhood of Teamsters Pension Fund performs at the highest level of responsibility under the supervision of the Trustees and on a very efficient and cost effective basis.

Communication To The Members

The policy of communication to the members has been to approach member education and understanding as one of the major responsibilities of the Trustees and, through the Trustees, of the administrative office. The fund organization is illustrated by the following chart which appeared in the 1974 Pension Fund Annual Report.

EXHIBIT 1

FUND ORGANIZATION AND OPERATIONS



To assure communication to the members in a way that is understandable, the following approach has existed since the Fund began. The Administrator and the Trustees are supported by a competent fund office staff which works directly with all employers and employees to maintain accurate records and to promptly resolve all questions and concerns. The office staff provides a high level of communication, both in writing and by telephone and is available for personal interviews with any member who wishes to have more information or resolve any question. All professional resources — legal counsel, certified public accountant, actuaries and investment agents — report both to the Administrator and the Board of Trustees. It has been the policy of the Trustees to have semi-annual audits and periodic actuarial valuations. Actuarial valuations have been made, generally, annually and at no time less frequently bi-annually.

Over the years, weekly employer contributions have increased through the collective bargaining process. Immediately after a change in contribution rate, actuarial valuations have been made to determine possible alternative benefit improvements. After review of the alternatives by the Trustees, the communication process proceeds as follows:

1. Alternative benefit possibilities have been presented to the membership at union meetings. Depending upon the degree of complexity of the alternatives, professional advisors to the Fund have appeared to aid in the communication of the possible alternatives. Presentations have been made verbally, by written summary and through the use of visual approaches to attempt to give the members a clear understanding of the alternatives. Based upon these presentations, the members have then voted as to the selection of benefit alternatives which they prefer. This has been an exciting experience in that a number of times the active members have foregone the level of benefit improvement which would otherwise be possible so that pension benefits can be improved for already retired members to aid them in having increased pension income to offset increased costs of living due to inflation.

2. After the union members have indicated their preference, the Trustees decide on the priority of benefit improvement choices considering the members' desires. A communication is then sent to the home of each member, indicating the benefit plan improvements in summary form adopted by the Trustees.

3. After preparation of the appropriate legal documents, submission to the IRS and other government agencies and government approval of the proposed changes in the plan (supported by formal actuarial valuations), a pension plan booklet is prepared.

This booklet has two sections: One section describes the revised pension plan in language designed to be understood by the average participant. The second section of the booklet includes the formal, IRS approved plan. The booklet clearly states the method by which a member can obtain information, apply for benefits, obtain interpretations of the plan or appeal any administrative decision. An example of this description which appears in the current booklet is as follows:

"Administrator, Trustees and Appeals

All questions or claims concerning eligibility or benefits or interpretation of the pension plan should be directed to:

Louis F. Peick, Administrator
Local No. 705, I. B. of T. Pension Fund
300 South Ashland Boulevard
Chicago, Illinois 60607

After you have received an answer from the administrator, you have ten (10) days to request that the trustees review that answer. The request must be made in writing to the administrator, if you ask to appear before the trustees you will then receive a notice when and where the trustees will consider your appeal and if you do not request a review within ten (10) days after receipt of the administrator's answer (or within an extension allowed by the administrator within the 10-day period), the decision will be final and binding.

Official Rules and Regulations. This booklet describes the main features of your plan. Your actual benefits will

be determined in accordance with the official pension plan which appears on the following pages. Please read the plan carefully and pay particular attention to the eligibility requirements of 2.01 through 2.07 and the appeal procedures in 5.01 through 5.03.

We shall strive to better these plans as the law and economic conditions may allow.

Fraternally yours,
LOUIS F. PEICK, Secretary-Treasurer"

4. The monthly statement to the employee concerning whether or not there are any contribution delinquencies occurring on his behalf is an integral part of the total communications program.

5. It has been the practice, from the beginning of the Fund, that any member who withdraws from the Fund should be counselled as to the effect of his withdrawal. The member signs a statement upon withdrawal that he understands that his rights to pension benefits terminate at the time of withdrawal or that his rights have vested based on the plan provisions because he has met the eligibility requirements.

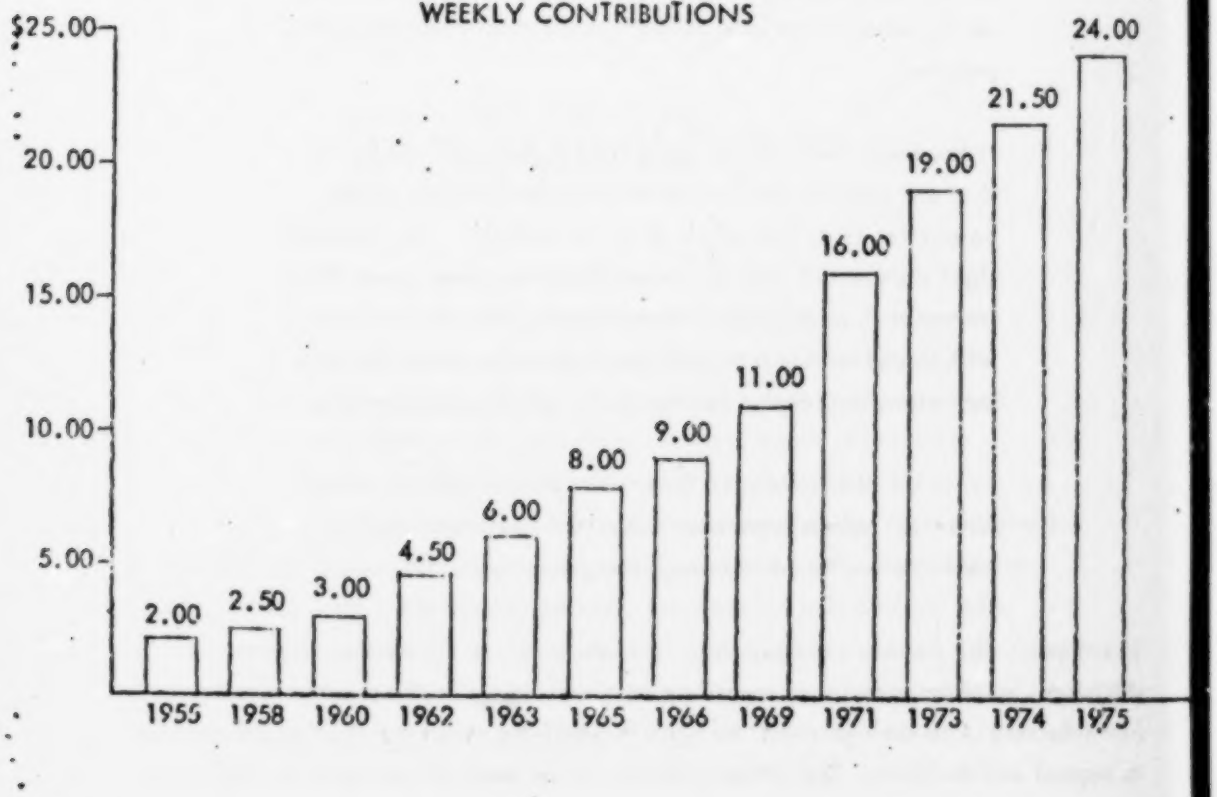
6. In recent years, prior to the requirements of ERISA, annual financial reports have been submitted to each member at his home and to each participating employer.

In summary, the member communication process involves the member in plan decisions, provides a series of repetitive communications to the member to keep him informed as to his rights and the ways in which he can obtain further information or appeal any decision. The office staff has always been instructed to be available

for any member inquiry. If the member is not satisfied with the staff results, he has an opportunity to meet personally with the administrator and, if dissatisfaction still exists, to appeal directly to the Trustees.

Contribution and Benefit Changes

The Fund began in 1955 on the basis of a $2.00 per week employer contribution. From the beginning, the amount of benefits available has been determined on the basis of actuarial valuations using census data of the active and retired members of the Fund. The following chart graphically illustrates the increuses in weekly employer contributions for the majority of members determined through collective bargaining. (There are some variations in contributions, particularly for groups which have been merged into the Fund in recent years.)



1965

Normal pensions increased to $250 a month for first five years, followed by $150 a month for life. Previous retirees' pensions increased to $150 a month.

1966

Retirement age reduced to 57. Disability retirement age reduced to 45. Normal pension payments continued to surviving widows until 120 monthly payments in all are made to the retired employee and his widow.

1969

Normal pensions increased to $250 a month for life. Previous retirees' pensions also increased to $250 a month.

1971

Normal pensions increased to $400 a month for retirement at age 60; $350 at age 59 and $300 at age 58; $250 at age 57 was unchanged. Disability retirement age requirement eliminated. Pensions vested after 20 continuous years of service. Pensions paid for 120 months to eligible survivors of active employees who have qualified for normal retirement.

1973

Normal pensions increased to $525 a month for retirement at age 60 and $425 at age 57-59. Disability pensions increased to $275 a month. Previous retirees' pensions increased by $25 a month.

The determination of choices of the form of each benefit improvement was made through the communications process described above including membership meetings as to alternatives, Trustee decisions and communication to the members and employees as to changes made.

(Signature)

(Title)

Subscribed and sworn to before me
this 13th day of April, 1976.

A. S. Hansen, Inc.

Notary Public, Dorothy W. Usa

Affidavit of Joseph W. Ballew

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title Omitted]

JOSEPH W. BALLEW, being duly sworn, deposes and says:

My name is Joseph W. Ballew. I submit this affidavit in support of the IBT Memorandum in Opposition to Plaintiff's Motion for Plaintiff and Defendant Class Action Certification and Determination in the above-captioned case.

1. I have acted as Administrative Assistant to the General Secretary-Treasurer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") since January 1975. From 1962 to 1975, I have served as Comptroller to the Western Conference of Teamsters. I have been a trustee of the Western States Teamsters Representatives Retirement Plan since 1969 and have also served a term as Advisory Director to the International Foundation of Employee Benefit Plans, the largest private foundation in the area of employee benefit plans. Based upon my experience, particularly with pension funds in the Western Conference, I have a familiarity with the general workings of many of the pension funds of organizations affiliated with the IBT covering employees under collective bargaining agreements (hereafter "Teamster pension funds"). Additionally, I am familiar with some of the methods by which Teamster members may learn of the substantive provi-

sions of their pension funds, and the role that members may play in shaping the terms of the funds to which they belong.

2. The IBT does not control the selection of trustees, administration, or nature of investment of the Teamster pension funds with which I am generally familiar.

3. Pursuant to federal law, officers of each local union in the IBT are elected by the members of each respective union. It is those elected local union officers, either themselves or through Joint Councils, who determine the selection of union trustees of the 230 Teamster pension funds. The trustees of each fund, both union and employer, are responsible for the formulation and workings of that particular fund. Each Teamster pension fund is therefore a wholly autonomous unit with no joint control, investments, or administration.

4. There are many differences among the 230 Teamster pension funds. While marked differences may be found between any two Teamster pension funds, the varintions in the methods of administration, the manner in which investments are made, and the law governing each fund may be illustrated by comparing the Western Conference Fund (covering in excess of 500,000 members) with administrative methods, investment function, and the law governing other Teamster pension funds.

(a) *Administrative and Investment Functions:*

Employer contributions to the Western Conference Fund are collected by an administrator and then turned over to the Prudential Insurance Company. These funds are held by Prudential under a contract issued to the Western Conference Fund. Some of these funds are invested by Prudential in group deferred annuity contracts, which guar-

antee the Fund a given rate of return on its investment. Other assets are put into one or more separate accounts which are managed by Prudential, including one account for real estate and another account for common stock.

The day to day investment function is performed by Prudential. The trustees of the Western Conference Fund may provide general direction to Prudential, such as suggesting how funds are to be allocated among the various accounts, but the Western Conference Fund trustees do not, on a daily basis, exercise control over the way in which the funds are invested.

The Western Conference Fund trustees do not hire their own staff to perform administrative functions for the Fund, such as the investment of assets and processing of claims. Rather, all work performed for the Fund is carried out by independent contractors.

Other Teamster pension funds may not retain an insurance or investment company such as Prudential to carry out the investment and administrative functions for the trustees. In such pension funds the day to day investment decisions are made by the trustees who may be assisted by a permanent salaried staff of administrators and/or investment advisors. Additionally, employees may be hired for the purpose of processing claims and acquainting plan members with the eligibility requirements of the particular plan.

Since each Teamster pension fund is an entirely autonomous unit, the methods of administration and the manner in which funds are invested may reflect a combination of any of the methods set forth above. Some fund trustees exercise day to day control over certain investment decisions while other decisions may be delegated. The fund may employ some salaried staff members but carry out other functions through independent contractors.

(b) *Governing Law:*

The Western Conference Fund, pursuant to the terms of the trust agreement, is governed by the law of the State of Washington.

It is common practice for the trust agreement of Teamster pension funds to state that the trust will be governed by the law of a particular state (usually the law of the state where the trust was created).

5. Members of each of the 230 separate Teamster pension funds may become acquainted with the eligibility requirements of their plan in a variety of ways. The following is illustrative of some of those informational sources.

(a) *Booklets.* It is common practice for the trustees to prepare or have prepared by their agents an informational booklet which may be revised periodically. These booklets vary markedly in format, style and general composition. Additionally, the manner of distribution may differ. For example, the Western Conference Fund provides to local unions a sufficient amount of booklets for distribution to all covered employees. The employer also receives a supply of descriptive booklets. All booklets are updated if changes are made in the trust agreement. Other funds may mail such booklets to individual employees and respond to requests for booklets from members.

(b) *Leaflets and Bulletins.* Some local unions post leaflets and bulletins at union headquarters, informing members of the terms of their particular pension plans or changes in the nature and extent of benefits.

(c) *Union Newspapers.* Local union newspapers may contain articles which discuss the workings of pension plans or changes in pension benefits.

Affidavit of Joseph W. Ballew

(d) *Information Distributed By Local Union Candidates.* Pursuant to law, all union officers are elected. The extent and nature of pension benefits is often an issue in such elections.

(e) *Oral Explanations.* It is not unusual for a covered member to receive oral explanations concerning the provisions of the pension plan from the trust administrators, local union officers, or local union employees. Although the local union may not properly make representations as the agent of the fund, members often seek the advice of their local unions if questions arise concerning eligibility requirements.

6. Teamster pension funds are constructed, controlled and directed by the trustees of the particular funds, consisting of one-half union and one-half employer representatives, as required by federal law. The individual Teamster member does have input regarding the selection of the union trustees. For example, trustees of the Western Conference Fund are selected by members of the Joint Councils. The members of the Joint Councils are elected local union officials. Therefore, if the majority of members are dissatisfied with the eligibility requirements or workings of the fund, they may elect union officials who will select trustees aligned with their position.

/s/ Joseph W. Ballew
Joseph W. Ballew

Subscribed and sworn before me
this 21st day of April, 1976.

/s/ Ann L. Sprague
Notary Public
Ann L. Sprague, Notary Public
District of Columbia
Residing at 25 Louisiana Ave., N.W.
Washington, D.C. 20001
My Commission Expires June 30, 1980

Order of U. S. Court of Appeals Granting Permission to Appeal

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

[Title Omitted]

From the

United States District Court

For the Northern District of Illinois

Eastern Division

(74 C 2865)

A True Copy:
Teste:

/s/ Donna Anezeli, Deputy
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

June 17, 1976

Before:

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circut Judge*
Hon. William J. Bauer, *Circuit Judge*

This matter comes before the court on the "Petition for Permission to Appeal Under 28 USC § 1292(b)" filed herein on May 3, 1976 by counsel for the defendants-petitioners. The plaintiff-respondent was today granted permission to file instanter his memorandum in response to the aforesaid

Order of U. S. Court of Appeals Granting Permission to Appeal

petition. Also as of this date, the National Coordinating Committee for Multiemployer Plans was granted permission to file an amicus curiae brief in support of the defendants-petitioners' petition for permission to appeal. Upon thorough consideration of all of the foregoing documents,

IT IS ORDERED that the defendants-petitioners' petition for permission to appeal from the interlocutory orders of March 1, 1976 and April 19, 1976 is hereby GRANTED.

Affidavit of Cramer M. Gilmore II

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

District of Columbia) *ss:*

AFFIDAVIT

CRAMER M. GILMORE II, being duly sworn deposes and says:

My name is Cramer M. Gilmore. I am Research Associate for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("IBT"). My principal place of employment is 25 Louisiana Avenue, N.W., Washington, D.C., headquarters of the IBT. I submit this affidavit in support of the IBT Memorandum in Opposition to Plaintiff's Motion for Plaintiff and Defendant Class action Certification and Determination in the above-captioned case.

1. I have served as Research Associate for the IBT since August, 1974. Among my duties as Research Associate, I am the person principally responsible for fringe benefits analysis. I therefore have the responsibility for researching and being aware of changes in matters relating to pension reporting and disclosure. Prior to my employment by the IBT, I served for approximately four years as Assistant Analyst for the Airline Pilots' Association in the retirement and insurance department.

2. In December 1974 I was requested by IBT counsel in the above-captioned case, to conduct a survey of all docu-

ments located in the IBT Research Department pertaining to pension fund service requirements of IBT-affiliate organizations.

3. The IBT does not exercise any central control over pension funds established by Teamster affiliate organizations covering employees under collective bargaining agreements. The administration of the funds, payment of benefits, distribution of information pertaining to the funds, and processing of claims are all carried out at the respective local levels with no participation by the IBT whatsoever. It is therefore difficult for the IBT Research Department to compile information concerning such pension funds, particularly because of the local autonomy of the many pension trusts. However, based upon the documentation available, I conducted the "Survey of Service Requirements for Retirement Benefits of Certain Teamster Pension Plans," attached hereto as Exhibit A.

4. The Survey was compiled from booklets pertaining to each of thirty-two Teamster pension plans. These booklets were gathered for the purpose of preparing demands for the negotiation of the 1973 National Master Freight Agreement and represented every document on file at the IBT Research Department at the time the Survey was conducted. According to the Register of Retirement Benefit Plans, reported under the Welfare and Pension Plan Disclosure Act (attached hereto as Exhibit B), there are a total of 229 pension funds of organizations affiliated with the IBT. Additionally, since the Register list was compiled, the Western States Food Processing Industry Employees Pension Trust was created, making a total of 230 pension funds of organizations affiliated with the IBT. Although the booklets used in the Survey pertain to thirty-two plans out of this total of 230 Teamster affiliated plans, they account for over half of the total membership of the IBT covered by such pension plans.

5. The thirty-two booklets contained information generally available to beneficiaries of the respective plans. Each booklet may not reflect the most current information on the provisions of each plan. However, the effective date of each booklet is noted in the Survey directly below the "Plan Name," and I am aware of no substantial changes that have occurred in any plan subsequent to those dates with respect to the service requirements.

6. During the course of the Survey I had the opportunity to review in detail each of the thirty-two booklets. Based upon that review I have noted the following:

(a) Each booklet is different in general format and style.

(b) Some booklets are in narrative form, some booklets in "question and answer form," while others are a combination of both forms.

(c) Some booklets contain the entire trust agreement, some booklets contain portions of trust agreements, while others contain no verbatim portions of trust agreements.

(d) Some booklets contain statistical examples while others do not.

(e) Some booklets contain bold caveats such as "Continuous Service is Important," while others do not.

(f) Most plans vary widely in the general definitions used.

(g) The minimum age requirement for full benefits differs substantially among the various plans.

(h) The number of years of credited service for normal retirement benefits differs substantially among the various plans.

(i) The formula used to determine years of credited service for full benefits differs substantially among the various plans.

(j) The benefit formula differs substantially among the various plans.

(k) The break-in-service provisions differ substantially among the various plans.

(l) The definition of covered employment differs substantially among the various plans.

(m) The plans differ substantially with regard to treatment of layoffs as a break-in-service.

(n) The plans differ substantially in their treatment of service in the armed forces, absence due to illness, and service under a non-covered collective bargaining agreement with regard to the overall length of the break-in-service and qualifying contributions subsequent to the break.

(o) Some plans allow for early retirement while others do not.

(p) Some plans allow for vesting while others do not. Those that allow for vesting differ substantially in the age provision and formula for such vesting.

(q) The employer contribution formula differs substantially among the various plans.

7. The differences among the plans and booklets, set forth in ¶ 6 above, represent only some of the differences among the various plans and booklets.

8. Each of these plans covers employees engaged in the trucking industry. Since the Teamster plans not represented in this Survey cover, to a large degree, members employed in diverse industries, including firemen, brewery workers, bacteriologists, school teachers, blacksmiths, seamstresses and egg candlers, it is fair to infer that the provisions of these other plans will differ more markedly than those examined in the Survey.

9. I was requested by IBT counsel to determine whether a person with the age and service qualifications of Mr. Daniel would be eligible for a full retirement benefit (as set forth in the "benefit formula" column of Exhibit A) based upon the booklets used in the Survey. Mr. Daniel's qualifications were as follows:

(a) 22½ years of credited service;

(b) Age 65; and

(c) 4 (or 7) month break-in-service during 11th year due to layoff.

10. Based upon the qualifications set forth above, Mr. Daniel would (except for the minimum service requirement of 25 years in 5 plans) be eligible for full retirement benefit under every plan except the Local 705 Plan.

/s/ Cramer M. Gilmore II
Cramer M. Gilmore II

Subscribed and sworn before me
this 9th day of April, 1976

/s/ Faith M. Johnson
Notary Public
My Commission Expires Aug. 31, 1978

Exhibit A

Service Requirements for Retirement Benefits of Certain Teamster Pension Plans

(See Opposite) ☞

SERVICE REQUIREMENTS FOR RETIREMENT BENEFITS

OF CERTAIN TEAMSTER PENSION PLANS

Exhibit A

INDEX OF SELECTED TEAMSTER PENSION PLANS

CENTRAL CONFERENCE

Name of Plan	Effective Date	Page No.
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Local 544	5/1/71	3-4
Local 705	1/73	5-7
Local 710	8/1/70	8-9
Central States, Southeast and Southwest Areas	5/1/71	10
Suburban Teamsters of Northern Illinois	8/1/70	11

EASTERN CONFERENCE

Name of Plan	Effective Date	Page No.
Local 37	1/72	12
Joint Council 84	4/1/68	13
Local 282	3/68	14
Local 445	10/1/66	15

EASTERN CONFERENCE

Name of Plan	Effective Date	Page No.
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Local 478	1/73	18
Local 491	12/14/72	19
Local 557	9/1/71	20-21
Local 639	7/1/72	22
Local 660	4/1/71	23
Local 701	1/1/72	24
Local 707	9/72	25
Local 805	1/1/71	26
Local 806	3/63	27
Local 816	10/1/72	28
Central Pennsylvania	9/1/72	29
Cumberland Maryland Area Teamsters	10/1/70	30

EASTERN CONFERENCE (CON'T.)

Name of Plan	Effective Date	Page No.
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New England Teamsters and Trucking Industry Pension Plan	11/1/71	32-33
New York Central	6/1/71	34
New York City Trucking Industry	10/1/72	35-36
New York State	9/1/67	37-38
Trucking Employees of North Jersey	3/1/72	39-40
Western Pennsylvania	7/21/71	41

WESTERN CONFERENCE

Local 85	1/1/71	42
Western Conference	11/1/72	43

TOTAL NO. OF PLANS:

CENTRAL CONFERENCE - 6
EASTERN CONFERENCE - 24
WESTERN CONFERENCE - 2
TOTAL: 32

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 142 6/1/68	60	20 yeanrs --at least 80 weeks of contribu-tions.	Contri-bution Rate (week) / Monthly Payment (1st 5 years) / There-after $10 / $350 / $140 $ 9 / $325 / $125 $ 8 / $300 / $110 $ 7 / $265 / $100 $ 6 / $180 / $ 90 $ 5 / $160 / $ 80 $ 4 / $140 / $ 70 $2.50 / $110 / $ 55	"Crediting of Service" An Employee shall receive Pension Credit for any period during which he worked in Covered Employment according to the following Schedule: Weeks Engaged in Covered Employment During Calendar Year — Amount of Pension Credits Less than 25 weeks — No Credit 25 but less than 35 weeks — ½ year of Credit 35 weeks or more — 1 yr. Credit Past Service Shall be granted to each Employee on the basis of Employer Contributions made on his behalf in accordance with the above schedule. Future Service Shall be granted to each Employee for whom an Employer Contribution has been made for the period of time prior to his Effective Date during which he was in Covered Employment on the basis of the crediting schedule outlined in this Plan. "Covered Employment" Prior to the Effective Date Employment within a Collective Bargaining Unit and within the jurisdiction of L. 142. After the Effective Date Employment by an Employer who is bound by the Trust Agreement. "Breaks in Covered Employment" The continuity of Covered Employ-	X		-	-	$2.50 to $15.00/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 142 (con't.)				ment shall be considered broken and all Pension Credits cancelled if an Employee fails to be employed at least one week in three consecutive calendar years, except that an Employee who has fulfilled the age and service requirements for a Normal or Reduced Pension shall not thereafter suffer a loss of Pension Credits there are "grace periods" for breaks in Covered Employment if an Employee (a) fails to be employed at least one week in 2 consecutive years due to total disability, (b) military service, (c) employment not covered by the Bargaining Agreement or full-time employment with the International Union, (d) employment in a category not covered by the jurisdiction of Local 142 provided the Employee had not less than 80 weeks of contributions paid to the Fund at the time such employment commences (e) employment in a job classification covered by a Collective Bargaining Agreement between an Employer and any other Local Union whc is a Member of Teamsters Joint Council #25, in which case a grace period of up to ten calendar years shall be granted provided the Employee returns to Covered Employment and thereafter accumulates 80 weeks of Employer Contributions.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	years of credited service	benefit formula	service requirement	EARLY RETIRM yes	no	VESTING rqrmts	formula	EMPLOYER CONTRIBUTION
Local 544 Transfer & Warehouse May 1, 1971	57	20 years of continuous service, 5 years under agreement; 80 weeks of contribution (120 wks. for employees enlisting between 7/1/67 & 4/1/70; 450 wks. for those enlisting thereafter)	A. $300/mo. for 5 years $200/mo. thereafter for life. (Transfer employees: retiring after Age 60 receive $350/mo. for life) B. Employees with less than 20 years of service at Age 65 -- benefits as follows: 10 years or more: Transfer - $3.75/month times number of years with participating Employer + $3.00 for each additional year with non-participating Employer; less than 10 years - $3.00/mo. times years of service. Warehouse: 10 years or more: $2.75/mo. times years of service; less than 10 years with more than one Employer: $2.20/mo. times years of service.	"Covered Employment" Prior to the Effective Date (5/1/71) (i) Employment within a classification of work and in an industry which was at the time of such employment normally covered by Teamster contracts . . . (ii) Employment in the same classification of work in which employee after the Effective Date under a Teamster contract and on which contributions have been made on behalf of the Employee . . . (iii) Employment requiring the usual Teamster skills in traditional Teamster industries at the time of such employment . . . (iv) Service in the armed forces . . . if service was entered from Covered Employment. Subsequent to the Effective Date (i) Employment . . . covered by Teamster contracts up to a maximum of five years . . . (ii) Continuous past employment with a Participating Employer prior to the date Employer contributions commence, provided the Employee was in employment on or prior to the Effective Date. . . (iii) Employment was covered by a Teamster contract with a Participating Employer at the time of such employment . . . (iv) Service in the armed forces . . . if service was entered from Covered Employment.	X		-	-	Transfer 35¢/hr. Warehouse 30¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 544 (con't.) .				"Year of Employment" Prior to 5/1/71 1,000 hours of Covered Employment or 25 weeks in the armed forces, one-half credit for 500/18 weeks. Subsequent to 5/1/71 35 weeks of contributions equals one year, one-half year equals 20-35 weeks of contributions. "Break in Service" Shall occur if an Employee is not in Covered Employment for a period of five consecutive years between 2/1/55 and 4/1/69 or for a period of three consecutive years after 4/1/69. The following do not constitute a break: --service in the armed forces --absence due to sickness or injury --absence due to layoff if at least 10 weeks of contributions each year (maximum 2 years) are paid. "Continuous Service" (a) In the trucking industry - accumulated years of employment prior to retirement calculated from the Employee's last employment or re-employment date following the last break in service. (b) Under a Collective Bargaining Agreement - accumulated years of employment prior to retirement . . . excluding years of service not covered under a Collective Bargaining Agreement. (c) with Participating Employers- accumulated years of employment. . . with the Participating Employer.. .					

PLAN NAME effect. dt.	NORMAL RETIREMENT				EARLY RETIRM		VEST		EMPLOYER CONTRIBUTION
	minimum age	minimum years of credited service	benefit formula	service requirement	yes	no	rqrmts	formula	
Local 705 January 1973	57 58 OR 59 OR 60 OR	20 20 20 20	$250/mo. for life $300/mo. for life $350/mo. for life $400/mo. for life	"Service" means the last period of continuous uninterrupted employment in a covered position with one or a succession of Employers having a Bargaining Agreement with this Union. In the following situations employment while represented by another Union may count as service provided that an Employer contributed to another Fund of the International Brotherhood of Teamsters, or Chicago Truck Drivers Union (Independent): you receive credit for service under the other Plan if your Employer's business was acquired by an Employer having a Bargaining Agreement with your present Union, and your Employer immediately began contributing to the 705 Pension Fund on your behalf. "Break in Service" Ordinarily, if employment and contributions stop you lose your service and begin over again when contributions resume. However, after 1/1/70, twice during your lifetime the Trustees may approve an application for reinstatement and restore the service you had when employment and contributions stopped, providing the total breaks in service and contributions do not exceed 24 months and only if:		X	After 20 years of service	At Age 65 $250/mo.	$16/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VEST rqrmts	VEST formula	EMPLOYEE CONTRIBUTION
Local 705 (con't.)				--contributions stopped because of a layoff or other reason beyond your control, such as illness or military service--but not discharge for just cause or receipt of vested pension certificate of eligibility. --service and contributions begin again within less than two years and continue for at least three more years (or six months in case of death or disability.) --you apply for reinstatement within 90 days after completing the additional three years. Continuity of Employment (a) Service as an Employee with an Employer which is followed immediatly by service as an Employee with another Employer shall be considered as being an Employee of one Employer. (b) If, after 1/1/70, employment and contributions for an Employee are discontinued because of lay-off or other reasons beyond the Employee's control (illness, military service but not just cause) and if contributions are subsequently resumed, the Employee may apply to the Trustees for reinstatement which shall be approved only if: (1) the period of discontinuance of service and contributions was less than 24 consecutive months; and					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VES rqrmts	VES formula	EMPLOYEE CONTRIBUTION
Local 705 (con't.)				(2) employment and contributions subsequent to the discontinuance are continuous for at least 3 years except for death/disability subsequent to 6 months after the return; and (3) application for reinstatement is made not later than 90 days after the expiration of the requirement for at least 3 years of service andcontributions subsequent to a discontinuance, except if death shall occur within the 90 day period; and (4) the total of breaks in service and contributions shall not exceed 24 months and the Trustees shall not grant more than 2 applications for reinstatement. Discontinued employment and contributions shall not be credited as years of service (for purpose of Pension Credit).					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 710 8/1/70	57	20 years in industry last 2 years under L. 710 Agreement 80 weeks of contributions.	At Age 57* --$300/mo. for life. At Age 60* --$400/mo. for life for retiree's after 5/1/70 *Age at retirement.	"Credit Service" Past Service (effective 5/1/66) Shall be credited to each Employee for whom a contribution has been made during the first two years after the earliest possible Effective Date by his Employer for the period of time prior to such earliest possible Effective Date during which he was in Covered Employment. No credit shall be given for any period of Covered Employment prior to an interruption of Covered Employment of more than 2 years. Future Service Shall be credited to each Employee at the rate of (1) year for each calendar year in which contributions on his behalf have been made for 35 weeks or more and at the rate of one-half a year for 20-30 weeks of contributions. "Covered Employment" (effective 5/1/67) Prior to the Effective Date of employment in a category over which the International Brotherhood of Teamsters has claims to have or jurisdiction . . . On and after the Effective Date employment by an Employer who has satisfied the requirements of participation and who is bound by the Trust Agreement.	X		--	--	$15/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	no	VESTING rqrmts	formula	EMPLOYEE CONTRIBUTION
Local 710 (con't.)				Loss of Credited Service (a) Subsequent to the Effective Date, an Employee will lose all his prior Credited Service in the event he is not employed in Covered Employment for a consecutive period of One Hundred Fifty-Six (156) weeks (except military service with re-employment rights and any time during which he was receiving a Retirement Benefit). (b) In the event an Employer ceases to be a contributing Employer each Employee of that Employer who is an Employee on the date the Employer ceases to be an Employer, shall lose all of his prior Credited Service, unless: 1. An Employee who has fulfilled the conditions for qualification for Retirement Benefit applies for a pension within six months after the date the Employer ceases to be an Employer, or 2. An Employee who has not fulfilled the conditions for qualifications for Retirement Benefits within six months again becomes an Employee by transferring his employment to a different Employer.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Central States, Southeast and Southwest Areas 5/1/71	57	20 years; 5 years under Agreement 80 weeks of contributions (120 wks. if Member between 7/1/67 1/1/69; 450 wks. if Member after 1/1/69)	A. Retiree after 60 yrs. - $300/mo. for life. B. Retire 57-59 - $300/mo. for 5 years and $200/mo. after for life.	"Credited Service" Past Service You will receive credit for years of service which you have accumulated in the Teamster industry as an Employee before you became a Member of the Plan. You will receive one year of past service credit for each calendar year in which you worked at least 1,000 hours and ½ year of credit for 500-1,000 hours of service. Current Service (Future) One year of Pension Credit for each calendar year in which payments have been made into the Fund for at least 35 weeks, and ½ year of Pension Credit for at least 20 but less than 35 weeks. "Continuous Service" Means accumulated years of employment prior to retirement, calculated from the Employee's last employment or re-employment date following the last break in service "Break in Service" Employee is not covered for a period of 5 consecutive years between 2/1/55 - 4/1/69 or for a period of 3 consecutive years subsequent to 4/1/69, except for sickness or injury and layoff during which contributions have been paid to the Pension Fund for at least 10 weeks each year up to a maximum of 2 years.	X		-	-	$14/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VES rqrmts	VES formula	EMPLOYEE CONTRIBUTION
Suburban Teamsters of Northern Illinois 8/1/70	60	14 years, 10 years under Agreement contributions for 70 wks. of any consecutive 104 weeks	Yrs. Service / 1st 5 yrs. (mo.) / Thereafter (mo.) 20+ / $415 / $207.50 19 / $385 / $192.50 18 / $360 / $180.00 17 / $335 / $167.50 16 / $310 / $155.00 15 / $285 / $142.50 14 / $260 / $130.00	"Credited Service" Past Service Prorated credit for prior continuous employment in the industry commencing when the Employer begins contributions. Future Service January 1, following the commencement of Employer Contributions on behalf of the Employee - 1 1/10th year of credited service for each 4 weeks of Employer Contributions. One full year of credited service equals 40 or more weeks of Covered Employment. Loss of Credited Service If no contributions are made for 156 weeks in a row unless you are already a "Vested Member" of the Plan. Credited Service is not lost if contributions have stopped due to military service and valid leave of absence from the Employer.	X		10 years service contributions made for 70 weeks out of any consecutive 104 weeks	Benefits begin at age could have retired with Normal Retirement Benefit equals Normal Retirement Benefit times actual years of service over yrs. of service at Age 60.	$16/wk maximum

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 37 January, 1972	65	10	$160/mo. for life (max. benefit with 25 years service) Number of years credited service up to 25 times 55 7/10¢ times average weekly contribution rates.	"Credited Service" Of an Employee includes all of his continuous service prior to his Employer's Admittance Date (Past Service) which was rendered as an Employee in a job classification covered by the Collective Bargaining Agreement. After such Admittance Date (this refers to credited service) Credited Service includes all continuous service for which contributions are payable to the Pension Fund. "Continuous Service" Continuous Service includes all regular, full-time employment with any Employers'. If there has been no break in service continuous service shall include regular, full-time employment with any Employers' since the most recent break in service. Continuous Service and Credited Service shall be counted in years and quarter years. A period of 45 days or more shall be counted as a quarter year and a period of less than 45 days shall be dropped. "Break in Service" A Break in Service shall occur whenever a person has four consecutive calendar quarters during which he was not at any time in the regular, full-time employment of an Employer except periods of absence due to sickness, disability and military service.	X		After 10 years credited service	Same as disability formula -- at Age 65	$8.50/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Joint Council 84 April 1, 1968	60	15	$10/mo. times the number of years of service up to 30 years; $300/mo. maximum benefit for life.	"Credited Service" Past Service equals total years and completed months of continuous service prior to entry, with all Employers having a Collective Bargaining Agreement with a Union whose bargaining contracts have provision for payments into the Employer-Teamsters Joint Council #84 Pension Fund. Future Credited Service "Continuous Service" in years and completed months upon entry into the Plan, commencing 1/1/57. "Continuous Service" Uninterrupted regular service with any Employer having a Collective Bargaining Agreement with a Union whose current contracts provide for payments to the Employer-Teamster Joint Council #84 Pension Fund except for transfers of employment (with certain restrictions), lay-offs not to exceed 2 years, military service, sickness/disability, authorized strikes, lockouts, or authorized Union duties not to exceed 2 years.	X		As of 9/1/71 Age 45; 15 years service	Benefits start at Age 60 Normal Benefit times years of service divided by yrs. of service at normal retirement age.	$14/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	 years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VESTING rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 282 March, 1968	65 OR -	25 25	$300/mo. for life. $300/mo. for life.	"Credited Service" Past Service Requirement equals 36 days of Covered Employment prior to 9/1/54, plus employment covered by a contract with the Union with an Employer who went out of business or discontinued his trucking operations before 9/1/56. Future Service Requirement (2 methods): (a) 25 days of Covered Employment per quarter after 9/1/54 and 36 days/quarter prior to 9/1/54. (b) 150 days of Covered Employment per year even though an Employee may have worked less than 25 days in one of the quarters. "Break in Service" A break in service shall be deemed to have occurred if an Employee lacks credit for eight consecutive Pension Quarters or if he has earned less than four quarters of credit within any period of twelve consecutive Pension Quarters. Exceptions to "break in service": disability and those quarters in which absence from credited employment was due to assignment by the Employer to employment not covered by the Pension Fund provided that the Employee has credit for at least 12 Pension Quarters subsequent to such non-covered employment.	X		-	-	56¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 445 October 1, 1966	65	25	$350/mo. for life	Requirements for service credit for periods before the Contribution Date: 1. Total of at least 1,600 hours of Covered Employment in the two-year period immediately preceeding the Contribution Date of his Employer. 2. At least eight quarters of service credits after the Contribution Date. Subsequent to the Contribution Date, a quarter year of service credit equals 400 or more hours of Covered Employment in a calendar year except no more than four quarters will be credited in any calendar year. "Break in Service" Results in loss of all Pension Credit and occurs when: 1. Failure to gain any credited service for 2 calendar years in a row. 2. Failure to earn at least 4 quarters of service in three consecutive years. (An important exception to the service break is an age factor of 45 and 15 years of service called Deferred Vested Benefit). In addition to the Deferred Vested Benefit, absences from Covered Employment due to disability (total) up to 12 quarters and work transfer where employment is not covered do not constitute a break in service.	X		Age 45, 15 years service.	At Age 65 Normal Benefit times number of years service divided by 25.	$20/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	 years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VEST rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 469 September 1, 1972	65 OR -	15 30	$14 times number years of credited service/mo. for life. (30 years of service maximum) 80% of Normal Benefit or 100% of Early Retirement Benefit (whichever is greater)	Past Service Prior to 1/1/65, an Employee shall be credited with a quarter year of Pension Credit for each calendar quarter in which he was employed in Covered Employment (includes periods of employment in a catagory of work not covered by a Collective Bargaining Agreement by an Employer contributing to the Fund as of its Admittance Date) Future Service (a) A year of credit for each calendar year during which he was employed 1,600 hours or more in Covered Employment or in quarter units as follows: Hours of Employment — Credit Less than 400 — 0 400 but less than 800 — 1 800 but less than 1,200 — 2 1,200 but less than 1,600 — 3 (b) The total number of hours worked by an Employee in Covered Employment during all years for which contributions were made in his behalf shall be divided by 500 to obtain the number of quarter-year units of Pension Credits, fractions disregarded.	X		10 years service	Normal Benefit at time of retirement.	55½¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTI rqrmts	VESTI formula	EMPLOYEE CONTRIBUTION
Local 469 (con't)				"Break in Service" Results if an Employee has failed to earn at least 2 quarters of Pension Credit in any period of 3 consecutive years except for total disability, (for a period of up to 3 consecutive calendar years for which the Employee failed to earn credit), assignment from Covered Employment, and Pension Credits earned by virtue of actual work in employment covered by a related Pension Plan. No Employee will lose his Pension Credit if the following conditions are met: 1. 10 years of Pension Credit subsequent to contributions on his behalf from the Employer on and after 9/1/72. 2. If the Employee has received 25 years of Pension Credit. 3. If the absence from Covered Employment is caused by his failure to pass a physical exam.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 478 January, 1973	- 64	30 OR 25	$380/mo. for life	"Credited Service" Past Service - prior to 1/1/57: An Employee shall be credited with a quarter year of Pension Credit for each consecutive 3-month period covered by a Collective Bargaining Agreement with Local 478. Future Service - Subsequent to 1/1/57 An Employee shall receive a full year of Pension Credit for each calendar year in which he works at least 1,600 hours in Covered Employment for which contributions are made to the Fund. If employment totals less than 1,600 hours the credit shall be prorated. "Break in Service" Means a failure to earn at least 2 quarters of Pension Credit in any period of 2 consecutive calendar years subsequent to 1/1/57. An Employee under covered employment after January 1, 1973 who sustains a "break in service" shall lose <u>all</u> Pension Credits. An Employee not actually covered on 1/1/73 with past Pension Credit who had earned Pension Credits prior to 1/1/73 and who does not return to Covered Employment prior to 1/1/75 shall lose all Past Service and Future Service Pension Credits. Breaks which started prior to 1/1/73 shall result in a loss of prior Future Service Credits but not Past Service Credits.	X		-	-	58½¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formuln	EMPLOYER CONTRIBUTION
Local 491 December 14, 1972	60	13	Monthly Benefit equals number of years of credited service times $13.30 for maximum of 25 years.	"Continuous Service" Uninterrupted service with one or more Employers under a Pension Agreement with Local 491. Also included in "continuous service" is employment under a Collective Bargaining Agreement with any Teamsters Local Union provided such employment occurs after your entry into the Plan. Uninterrupted Service means the Employee has worked for an Employer who has a Pension Agreement with Local Union No. 491. Interruption of service does not occur during the following absences from work: transfers of employment (maximum 3 months) among any Employers under a collective bargaining agreement with any Teamsters Local Union, layoffs not exceeding 2 years, authorized strikes, absences due to sickness or injury up to one year, and absences due to lockouts, Union duties, and military service (if employment commences within 90 days after termination).	X		After 1[illegible] years of service	Benefits start at 60--same formula as for Normal Pension.	$14.00/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 557 September 1, 1971	60	20	$170/mo. + $8/mo. for each year of service above 20 to maximum of 30 years.	Accumulation of Service Credit (Credited Service) Upon application for Pension Benefits, credit for past service is subject to 5 months of service credit (qualifications for past service credit) based upon contributions made to the Fund for work in Covered Employment on or after January 1, 1964. Subsequent to 6/1/64-monthly units based on periods of employment for which Employer contributions were made to the Fund on his behalf based upon the following schedule: 1,200 or more hours 12 1,100 - 1,199 11 1,000 - 1,099 10 900 --- 999 9 800 --- 899 8 700 --- 799 7 600 --- 699 6 500 --- 599 5 400 --- 499 4 300 --- 399 3 200 --- 299 2 100 --- 199 1 "Continuity of Service" Continuity is lost due to a break in service and the Employee shall lose credit for his service prior to the break. A Break in Service shall be deemed to have occurred if the Employee lacks credit for at least one full year of Service	X		Combination of 60 years age and service--i.e., 40 years old & 20 yrs. service; 50 years old & 10 years service; 45 years old & 15 years service, etc.		35¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 557 (con't.) .				Credit in any one of six consecutive calendar years. However, no break shall be deemed to have occurred provided the Employer has made a cumulative total of at least 36 months of Service Credit in any one period of six consecutive calendar years on behalf of the Employee.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Local 639 July 1, 1972	60	20 yrs. continuous service and (6-10 yrs. coverage under Plan depending on date of initial coverage 10 yrs. service if join Plan after 5/1/71.	$250/mo. for 1st 5 years. $110/mo. thereafter for participants prior to 5/1/71. Those becoming participants after 5/1/71; 1st 5 years benefit = 2% of contributions; thereafter 1.1% of contributions.	Year of Credited Service A calendar year prior to the Effective Date is 1,000 hours of Covered Employment for one year of credit and 500 hours for ½ year of pension credit. A calendar year subsequent to the Effective Date: 1,400 hours of contributions or 35 weeks for one year's credit and 800 hours or 20 weeks for ½ year of credited service. "Break in Service" Shall occur if an Employee is absent from Covered Employment for a period of more than 90 consecutive calendar days exclusive of illness for less than 36 consecutive months, leave of absence not to exceed 6 months, layoff not to exceed 104 consecutive weeks, and military service. "Continuous Service in the Industry" Accumulated years of credited service prior to retirement calculated from the Employee's last employment or re-employment date following the last break in service.		X At Age 60:	10 years service Years Service 10 12 14 16 18 20 * of Max. Benefit under Normal Retirement.	see below % of Benefit* 50 60 70 80 90 100	35¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	 years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VESTING rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 660 April 1, 1971	60 OR -	20 25	$412/mo. for 1st 5 years and $204/mo. thereafter for life.	"Credited Service" Past Service Prior to 9/1/52 Work under a Collective Bargaining Agreement of a local affiliated with the International Brotherhood of Teamsters. Service since 9/1/52 (Future Service) is credited entirely on the basis of work in Covered Employment (employment for which an Employer contributes to the Pension Fund.) Pension Credits may also be accumulated for employment while covered by a reciprocal Pension Fund which mutually recognizes transfer for Employees. "Break in Service" Shall occur when an Employee lacks credit for eight consecutive Pension Quarters or if he has earned less than four quarters within any period of twelve consecutive Pension Quarters (exceptions not listed in the booklet).	X		15 years service	Benefits start at Age 60 equal Normal Pension if 20 years service; if fewer than 20 years, benefits equal Normal Pension times years of service divided by 20.	63¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT				EARLY RETIRM		VES		EMPLOYER CONTRIBUTION
	minimum age	minimum years of credited service	benefit formula	service requirement	yes	no	rqrmts	formula	
Local 701 Mid New Jersey Trucking Industry January 1, 1972	65	25	$19/mo./yr./ service up to 25 years with added increment for service between Age 62 and 65; maximum benefit at Age 65 with 25 years service is $500/mo. for life.	"Credited Service" Prior to 1/1/58 One year for each year of accumulated seniority in Local 701 plus any seniority as of 1/3/53 transferred from another Teamsters Local Union, for full-time employment rendered in the employ of a participating Employer prior to the Effective Date or if subsequent to January 1, 1958. One year for each 2,000 hours of compensation or the nearest 1/10th year computed proportionately for less than 2,000 hours. "Break in Service" If you have a "break in service" you lose your credit for service before the break except for discharge, layoff, and leave of absence up to 24 months, leave of absence for Union business, military services or absences during which Related Pension Credits are earned. (A leave of absence starting within 165 compensable days of another leave is considered part of the same leave).	X		15 years service	Benefits start at Age 65. Minimum: 15 years service - $112.50/ month. Maximum: 25 years service - $175/mo.	$14.20/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	 years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VESTING rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 707 Freight Carriers September, 1972	65 OR - OR -	25 25 30	$375/mo. for life $300/mo. for life $375/mo. for life and $15/mo. for each year of credited service over 30	"Credited Service" Past Service - for the period 1/1/37 to 9/1/50. ¼ year of Pension Credit for each Pension Quarter in which he worked for at least 36 days in Covered Employment. Future Service Subsequent to 9/1/54 ¼ year credit per 25 days of Covered Employment. "Break in Service" Results in loss of credited service. A "break" occurs if an Employee lacks credit for 12 consecutive Pension Quarters except that an Employee has accumulated 15 years of Pension Credit. Other Exceptions to "Break in Service" 1. 12 quarters of non-contribution due to disability which is noncompensable under a Workman's Compensation Law. 2. Employee is assigned by the Employer to employment not covered by the Teamster Pension Funds. An Employee who ceases work in Covered Employment after accumulating 15 years of Pension Credit and who subsequently returns to work in Covered Employment shall be granted any additional credited service earned (a higher benefit level will only result when at least 12 consecutive Pension Quarters are earned).	X		After 15 yrs. of credited service.	At age 55 eligible for Normal Benefit for appropriate years of service	57½¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VESTING rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 805 January 1, 1971	65	15	$500/mo. for life.	"Credited Service" Past Service Employment in a classification of work and in an industry which at the time of employment was normally covered by a Collective Bargaining Agreement of the Teamsters. Current (Future) Service Is based on each calendar year of covered employment for which the Employer made contributions to the Trust Fund for at least 20 weeks. Additional Service (credit) Will be granted if: the Trustees approve of a leave of absence and the Employee returns within 30 days after the expiration of the leave; for military service and return to employment within 4 months after discharge; for disability not exceeding 30 months; and for disability arising from a compensable industrial accident. Loss of Credited Service If an Employee has been laid-off, or employment as a covered Employee has been terminated for a period of more than 30 months, employment prior to such loss does not count for Pension Credit.	X		-	-	$25/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	 years of credited service	benefit formula	service requirement	EARLY RETIRM yes	 no	VESTING rqrmts	 formula	EMPLOYER CONTRIBUTION
Local 806 March, 1963	65	15	Total of Past Service Pension plus Future Service Pension/mo. Past Service = 1.8% of average annual contributions times number of years past service credit. Future Service = 2.7% of total of all monies contributed on Employee's behalf.	"Credited Service" Past Service Will be computed to the nearest half-year for each year or portion thereof of his continuous employment within the jurisdiction of the Union. Future Service Forty weeks of contributions shall constitute one year of Pension Credit except that no more than one year of future credit shall be allowed for each period of 12 calendar months of elapsed time. "Participation" (same as "Covered Employment") An Employee shall become a participant in the Plan as of the first day on which a Contributing Employer becomes obligated to make a contribution to the Fund on behalf of such Employee except: -less than 20 weeks for one or more contributing Employer during any period of 2 successive fiscal years, excluding montal/physical inability established by medical evidence. -one period of military service not to exceed 6 years.	X		-	-	$74/mo.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPL CONTRI TION
Local 816 10/1/72 Note: This is the only Pension Plan Booklet available for Local 816	65	25	$350/mo. for life. $15/mo. increment for each year of service over 30.	"Credited Service" Past Service Prior to 1/1/59 One-quarter year of Pension Credit for at least 25 days in Covered Employment plus credit for prior employment not covered by contributions but for the period of time covered by a Teamster Collective Bargaining Agreement. Subsequent to 1/1/59 One-quarter year of Pension Credit per 25 days or more in Covered Employment. "Break in Service" Effective 10/1/72 All Plan Participants who earned Pension Credit through 9/30/70, a 3 year break in service is allowed if prior to 9/30/70 more than 5 years of service was accumulated prior to the break, then a 5 year break is allowed.	X		Any age after 15 years of service for reduced pension or 25 years for full benefits	-	$24.80/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Central Pennsylvania September 1, 1972	57	20	$350/mo. from Age 57-62 62 at retirement - $375/mo. 63 at retirement - $400/mo. 64 at retirement - $425/mo. 65 at retirement - $450/mo. Benefits are for life. If retire 57-62, following benefits paid after 1st 5 years.: 57 - $250/mo. 58 - $275/mo. 59 - $300/mo. 60 - $325/mo. 61 - $350/mo.	Past Service Equals a year of Pension Credit for each year of continuous service an Employee worked for a Member Employer before that Employer negotiated the Pension Plan. Current Service Is computed from the first month the Employer makes a contribution to the Central Pennsylvania Teamster Pension Fund. Each full year for which a contribution is made counts as one year of current service. "Qualifications for Employees who are separated from the Plan because they were fired, quit, or laid off:" 1. Separation from the Plan for more than 5 years amounts to a loss in benefits unless you have a vested interest. 2. Members who become management with any Member Employer may have their credits "frozen" for the period of time that they function in a supervisory capacity. 3. Members of the Fund who work for any Local Union will have their credits "frozen" as long as they work for the Local Union.	X		57 yrs. old + 10 yrs. membership in Fund.	At Age 57 gets accrued credits for past service.	$60.68/mo. maximum

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VEST rqrmts	VEST formula	EMPLOYER CONTRIBUTION
Cumberland Md. Area Teamsters Pension Fund October 1, 1970	60	15 5 years under Plan.	$214/mo. for life. OR $300/mo. for 1st 5 years and $165/mo. thereafter	Computation of Credited Service - 10 months contributions/year/participant. Prior Service - prior to 6/1/55 For each year during which Participant worked at least 10 months as an Employee on the payroll of an industry Employer is treated as a year of Credited Service. Prior Service before becoming a Participant but subsequent to June 1, 1955 - for each calendar year during which an Employee was carried for at least 10 months on the payroll of an Employer who became a contributing Employer after June 1, 1955. Current Credited Service A year of Credited Service equals each calendar year during which a Participant has worked at least 10 months and contributions are made on behalf of the Participant. (Credit for absence from work due to injury, sickness, layoff or legitimate business of the Union will be given if a contribution has been made). "Continuous Service" Must be maintained or previous credited service is forfeited except for certain job transfers, authorized strikes and lockouts, military service, periods of absence due to layoffs, sickness, and injury not to exceed 2 years, absence due to Union business, vesting rights with Pension beginning at age 60, and failure of the Employer to make the required contributions for more than 6 months.	X		Age 45; 15 years service; 5 years under Plan.	Benefits start at Age 60 per schedule according to age at termination.	$14/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
Hagerstown (Md.) Motor Carriers and Teamsters October 1, 1970	57	20	$300/mo. for 1st 5 years $170/mo. thereafter	"Continuous Service" Is uninterrupted regular service with any Employer having a Collective Bargaining Agreement whose current contract provides for payments to the Hagerstown Motor Carriers and Teamsters Pension Fund, except for transfers of employment (among any of the Employers having agreements with Local 992 with provision for payment to the Hagerstown Motor Carriers and Teamsters Pension Fund), layoffs not exceeding 2 years, authorized strikes, lockouts, military service, sickness or disability not exceeding 2 years, and absences due to authorized Union duties. "Credited Service" Past Credited Service: is granted if you enter the Plan at the same time as the Employer and is equal to the total number of years and completed months of continuous service, prior to September 1, 1958 with all participating Employers. "Future Service Equals continuous service in years and completed months subsequent to the Employee's entry into the Plan.	X		-	-	$13.99/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYEE CONTRIBUTION
New England Teamsters & Trucking Industry Pension Plan November 1, 1971	60	25 2 years under Plan.	$375/mo. for life	Past Service Credit In general, credit for years of employment in the past will be given if such employment was with an Employer who is a Contributing Employer to the Fund and if the work was in the jurisdiction of one of the Local Unions or for one of the Local Unions or for an Employer Association or Welfare Trust Fund which is a Contributing Employer. One year equals 135 days of Covered Employment in a job classification covered by a Collective Bargaining Agreement then in effect between a Local Union and Contributing Employer. Future Service Based on the following schedule: Hours Employment — Months Credit less than 150 — 0 150-300 — 1 300-450 — 2 450-600 — 3 600-750 — 4 750-900 — 5 900-1050 — 6 1050-1200 — 7 1200-1350 — 8 1350-1500 — 9 1500-1650 — 10 1650-1800 — 11 over 1800 — 12	X		Same as Early Retirement	Age 52; 15 years service.	$15/wk.
	OR -	30	75% of Normal Benefit.						

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VES[illegible] rqrmts	[illegible]ormula	EMPLOYER CONTRIBUTION
New England Teamsters & Trucking Industry Pension Plan (con't.)				"Break in Service" It shall be considered a break in Covered Employment and previous credit will be cancelled if an Employee leaves Covered Employment and subsequently fails to earn at least 8 months of Future Service in any one of six consecutive calendar years except that the cumulative contributions during the 6 consecutive years total at least 5,000 hours. Other exceptions: 1. For certain disability and armed service. 2. If a break in service is followed by an amount of Future Service credit at least equal to the amount not earned during the break.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
New York Central Teamster June 1, 1971	57	20 5 years under Agreement 450 weeks under Fund. (120 wks. if member between 7/1/67 - 1/1/69 80 wks. if member prior to 7/1/67)	At Age 57: $300/mo. for 5 years and $200/mo. thereafter. At Age 60: $350/mo. for life.	Past Service Years of service accumulated in the Teamster industry based on 1 year of credit for each 1,000 hours worked per year (before membership in the Teamster Plan). 500-1000 hours = ½ year credit. Current Service (Future) After you become a Member of the Plan, one year of credit for each calendar year for payments made to the Plan for at least 35 weeks, and ½ year credit for payments of more than 20 but less than 35 weeks Loss of Credited Service Non-Teamster employment for 5 consecutive years during the period 2/1/55 and 4/1/69 and three consecutive years after 4/1/69 will result in the loss of credits prior to that time except for military service, absence on account of lay-off with payment into the Fund for at least ten weeks per year, and sickness or injury.	X		-	-	$14/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VES rqrmts	VES formula	EMPLOYEE CONTRIBUTION
Pension Fund of NYC Trucking Industry October 1, 1972	65 OR -	25 OR 30	$350/mo. for life additional $15/mo. for each year of credited service over 30.	Accumulation based on quarter-year units. "Credited Service" Past Service prior to Sept. 1, 1950 An Employee shall be credited with one quarter-year of Pension Credit for each quarter in which he worked at least 36 days in Covered Employment (with a Collective Bargaining Agreement with Local 807) Future Service After September 1, 1950 Except for the period 9/1/50 through 11/30/54, one quarter year credit shall be given for at least 25 days worked in Covered Employment (Covered Employment shall include employment prior to the time contributions to the Pension Fund began but limited to employment covered by a Collective Bargaining Agreement with Local 807) but during the period 9/1/50 through 11/30/54 one quarter year credit shall be given for 36 or more days of Covered Employment. Non-Work Periods Credited Are credited if due to disability arising from Covered Employment for a period not exceeding 24 months compensated under the Workman's Compensation Law and military service provided the Employee makes himself available within 90 days after release from active duty or 90 days after recovering from a disability continuing after his release from active duty.	X		25 years service	normal Benefit	59¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT				EARLY RETIRM		VESTING		EMPLOYER CONTRIBUTION
	minimum age	minimum years of credited service	benefit formula	service requirement	yes	no	rqrmts	formula	
Pension Fund of NYC Trucking Industry (con't)				"Break in Service" Will result in loss of credited service prior to the break and will be deemed to have occurred if an Employee lacks credits for 12 consecutive Pension Quarters, except for disability not to exceed 12 such quarters (includes sickness), and Pension Quarters in which related credits were earned by virtue of actual employment covered by a Related Pension Plan.					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYER CONTRIBUTION
NYS Teamsters Conference - Pension & Retirement Fund 9/1/67	60	15	Monthly Benefit equals sum of number of years of service prior to 1/1/54 times $10 and 2.6% of aggregate of all contributions made in Employee's behalf but not less than $10/mo. for each year of participation in the Plan.	"Credited Service" Prior to 1/1/54 For time spent in the employment of one or more Participating Employers in contractual relations with the Union provided that contributions were made as of the Effective Date on behalf of the employee. Service Subsequent to 1/1/54 A Member who becomes a Member after 1/1/54 shall be entitled to credit . . . for time spent in the employ of one or more participating Employers in contractual relation with the Union provided contributions were made on behalf of the Employee. For purposes of calculating years of participation in the Plan, one year s credit shall be allowed for each Fiscal Year prior to 1961 during which $75 or more was contributed on behalf of the individual Member. Commencing 1/1/61, one year's credit is based on the following contribution schedule: 1961-1962-1963 less than 7½¢ $75.00 or more 7½¢ or more $120.00 or more 1964 on less than 7½¢ $75.00 or more 7½¢ but less than 12½¢ $120.00 or more 12½¢ but less than 17½¢ $180.00 or more	X		-	-	$14/wk.

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VE rqrmts	VE formula	EMPLOYEE CONTRIBUTION
NYS (con't.)				17½¢ or more $240.00 or more "Break in Service" A Member who ceases to be a Member and then again becomes a Member shall in no event be entitled to credit for service prior to the time he last becomes a Member, except in the case of a pensioner who is re-employed by a participating Employer and thereupon again becomes a Member. A member shall cease to be a member if, for any reason except illness, after January 1, 1954, he is not employed by a Participating Employer for a period of 2 years; and membership also ceases upon disability retirement, retirement, and death prior to retirement					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYEE CONTRIBUTION
Trucking Employees of North Jersey Welfare Fund, Inc. March 1, 1972	57 OR -	20 30	$360/mo. for 1st 5 years & $275/mo. for life. Normal Benefit. Benefits increase $16/yr. of service above 20 to maximum at Age 62 with 25 years of $440/mo. for 1st 5 years.	"Credited Service" Past Service Prior to September 1, 1952, an Employee shall be credited with a year of Pension Credit for 36 days per year of Covered Employment. Future Service After September 1, 1952, an Employee shall be credited with one quarter year of credit for each Pension Quarter in which he has worked for 25 days or more in Covered Employment. "Break in Service" A break in service shall be deemed to have occurred if an Employee lacks credit for eight consecutive Pension Quarters or if he has earned less than 4 quarters of Pension Credits within any period of 12 consecutive Pension Quarters, except for periods of disability (not to exceed a total of 12 quarters) military service, or absence of credit due to assignment of Employee to non-covered employment, (max. 12 quarters). An Employee who would be denied Pension Credits because of a "break in service" shall retain credit for such Pension Credits provided: (1) The sum of the years of Covered Employment prior to such break and subsequent to such break is not less than 15.	X		15 years service	Benefits at Age 57 Normal Benefit times the number of years of service divided by 20 if fewer than 20 years service	59¢/hr.

PLAN NAME effect. dt.	NORMAL RETIREMENT				EARLY RETIRM		VESTING		EMPLOYER CONTRIBUTION
	minimum								
	age	years of credited service	benefit formula	service requirement	yes	no	rqrmts	formula	
Trucking Employees of N. New Jersey (con't.)				(2) Employment during the break was continuous but contributions to the Pension Fund were not required by the Collective Bargaining Agreement. (3) The Employee has accrued at least eight quarters of Pension Credits subsequent to the date on which he would have had a "break in service".					

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VESTING rqrmts	VESTING formula	EMPLOYEE CONTRIBUTION
Western Pa. Teamsters & Employees July 21, 1971	60	15; 24 mos. of Employer contribution	$12/mo. times years of service up to 25 years for life.	Past Service An Employee shall be given credit from the date of his last employment by his present Employer or predecessor Employer(s) in the industry to the date the Employer joined the Pension Plan. Future Service Credit will be accumulated so long as the Employee is employed by any Employer in the Industry who is a party to the Pension Agreement with the Union. Terms under which an Employee shall lose all of his rights of credited service: 1. Lay-off for more than two yrs. (extendable during mitigating economic conditions) 2. Unrenewed leave of absence for non-occupational or occupational disability in excess of two years. 3. A period of more than one year between termination of service as a result of resignation or discharge with one Member Employer and employment with the same or another Member Employer.	X		45 yrs. old & 15 yrs. service	Pension start at 60th Birthday on same formula as Normal Benefit--Benefits may start at 55 under Early Retirement Reduction	$14/wk. - Maximum

PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VE... rqrmts	...rmula	EMPLOYER CONTRIBUTION
Local 85 January 1, 1971	65	-	For employment prior to 8/1/53 - $8.50/mo./yr. service. For employment after 8/1/53 - $8.50/mo./yr. service. No Maximum.	Past Service Note: Employment only as defined as employment with an Employer prior to 8/1/53 and after 8/1/53 for which contributions are made to the Plan. No minimum days/hours of employment is listed. Current Service A full year consists of 250 days, reduced proportionately to a minimum of 75 days in a year. Re-employment If the Employment of a Member of the Plan who has been such for one or more years is terminated, such Member shall remain in the Plan as an inactive Member and thereafter, if he again becomes an Employee of an Employer, within five Plan years following such termination, he shall accrue benefits for future Employment which shall be added to the benefits which he had previously accrued prior to the termination of his employment.	X		Age 45 10 years service.	Benefits begin at Age 65 same formula as Normal Benefits.	$2.60/day

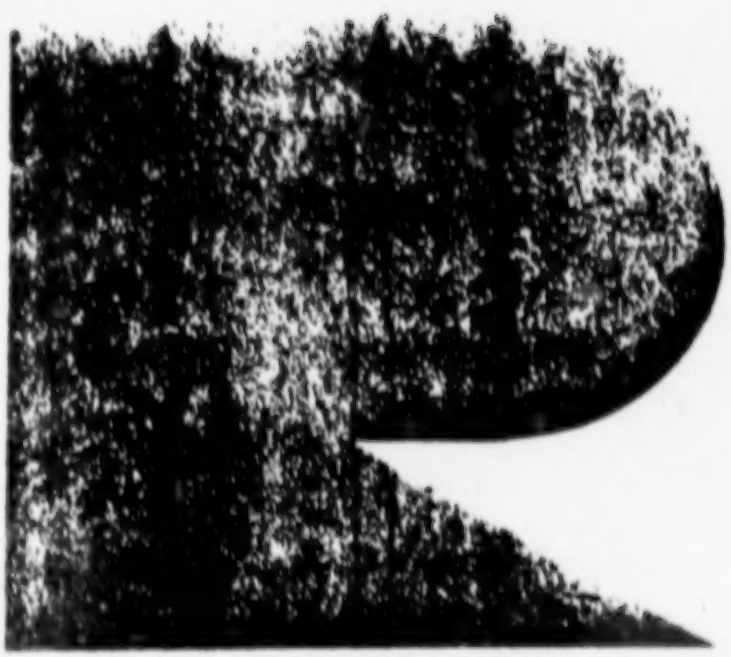
PLAN NAME effect. dt.	NORMAL RETIREMENT minimum age	minimum years of credited service	benefit formula	service requirement	EARLY RETIRM yes	EARLY RETIRM no	VE... rqrmts	...formula	EMPLOYEE CONTRIBUTION
Western Conference November 1, 1972	65	Age Retirement Benefit of at least $10 (per table) 600 covered hrs. of work in 2 consecutive years.	Product of Basic Retirement Credit and Contribution Ratio on date of Retirement. Credit equals sum of Future & Past Service Credit to maximum of $100 Future = $2.13/1000 covered hours. Past = $4/yr. to maximum of $78.33. Ratio = sum of 83% of the excess of contribution rate over 20¢ divided by 10¢.	Past Employment An Employee shall have Continuous Past Employment for all unbroken Employment with an Employer: (a) If he is in Covered Employment with such Employer on the date it becomes a Covered Employer with respect to the Collective Bargaining Unit of which he is then a Member; (b) If he is in Employment during May, 1955 with such Employer and if, prior to May 1, 1975 or the Employee's retirement under this Plan, whichever first occurs, such Employer becomes a Covered Employer with respect to the Collective Bargaining Unit of which he was a Member during May, 1955, provided such Employee has had no break in Past Employment between June 1, 1955 and the date of his first Covered Hour (an hour of employment covered by an Employer Contributions). "Breaks in Past Employment" If in 2 calendar years after employment he has a total of less than 600 hours of active employment. "Break in Service" After the first "Covered Hour" but less than 7,500 covered hours a break in service is constituted by a total of less than 600 hours in any two years provided that the end of the second year is at least two years beyond the first covered hour, except for certain causes such as disability, military service or service with an affiliate not covered by the Plan.	X		15 years service 3000 covered hour If under 45 get Cash Benefit; If over 45 either Cash or Vested Benefit	Lump Sum equals death benefit. Vested Benefit:	$14/wk. Age % Benefit 54 95 53 90 52 85 51 80 50 75 45 50 Payable in full at Age 65 or at reduced rate at Age 60.

Exhibit B

Register of Retirement Benefit Plans

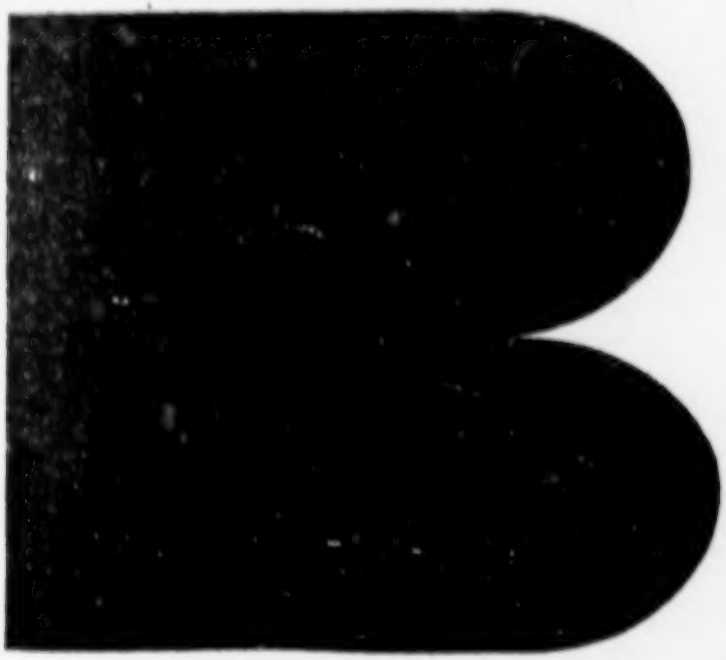
(See Opposite) ☞

EXHIBIT B



REGISTER OF RETIREMENT BENEFIT PLANS

REPORTED UNDER THE WELFARE AND PENSION PLANS DISCLOSURE ACT





U. S. DEPARTMENT OF LABOR/Labor-Management Services Administration Washington, D. C. 20210

File No.	Employer, Employee Association, Employee Organization or Plan	City and State	Plan	Employees Covered	Advisory Letter
216707	TAPE MARK COMPANY, THE	WEST SAINT PAUL, MINN	02	01	01
184776	TAPE CRAFT INCORPORATED	ANNISTON, ALA	02	01	01
199227	TAPPAN COMPANY, THE	LOS ARGELES, CALIF	02	01	01
068082	TAPPAN COMPANY, THE	MANSFIELD, OHIO	02	01	01
062729	TAPPAN COMPANY, THE	MANSFIELD, OHIO	01	02	01
164588	TAPPAN COMPANY, THE	MURRAY, KY	01	04	01
164589	TAPPAN COMPANY, THE	MURRAY, KY	01	05	01
235534	TAPPAN ZEE NATIONAL BANK	NYACK, N Y	02	01	01
243895	TAPPER LUMBER SUPPLY INCORPORATED	HOUSTON, TEX	02	01	01
198144	TAPPIN'S INCORPORATED & AFFILIATES	NEWARK, N J	02	01	01
219936	TARA CARBON PAPER CORPORATION	CHAMBLEE, GA	01	01	01
217798	TARAPATA MACMAHON ASSOCIATES INCORPORATED	BLOOMFIELD HILLS, MICH	02	01	01
198974	TARAPATA MACMAHON ASSOCIATES INCORPORATED	BLOOMFIELD HILLS, MICH	02	01	01
241905	TARG & DINNER INCORPORATED	CHICAGO, ILL	01	02	01
202784	TARPYS, TOM MARKET INCORPORATED	COLUMBUS, OHIO	02	01	01
213295	TARRANT DISTRIBUTORS INCORPORATED	HOUSTON, TEX	02	01	01
193760	TARRANT DISTRIBUTORS INCORPORATED	HOUSTON, TEX	01	01	01
221351	TARRANT SAVINGS ASSOCIATION	FORT WORTH, TEX	01	01	01
239711	TARRANT SAVINGS ASSOCIATION	FORT WORTH, TEX	02	01	01
098557	TASCO INCORPORATED	CHICAGO, ILL	02	01	01
145899	TASKER, A INCORPORATED	FALLS CHURCH, VA	02	01	01
178269	TASSELL INDUSTRIES INCORPORATED	GRAND RAPIDS, MICH	02	01	01
020588	TASTY SALES CORPORATION	PHILADELPHIA, PA	01	01	01
029190	TATE BUILDERS SUPPLY COMPANY INC	COVINGTON, KY	01	01	01
028973	TATE BUILDERS SUPPLY COMPANY INC	COVINGTON, KY	02	01	01
175757	TATE ENGINEERING INCORPORATED	BALTIMORE, MD	01	01	01
066666	TATHAM LAIRD INCORPORATED	CHICAGO, ILL	02	02	01
040829	TAX SERVICE OF ORANGE COUNTY INC	SANTA ANA, CALIF	01	01	01
143207	TAXICABS OF CINCINNATI INCORPORATED	CINCINNATI, OHIO	02	02	01
217321	TAYLOE PAPER COMPANY	MEMPHIS, TENN	01	01	01
138631	TAYLOE PAPER COMPANY	TULSA, OKLA	02	01	01
165908	TAYLOR & FENN COMPANY	WINDSOR, CONN	01	02	01
207697	TAYLOR & GASKIN INCORPORATED	DETROIT, MICH	01	03	01
006999	TAYLOR & GASKIN INDIANA BRIDGE COMPANY	DETROIT, MICH	01	02	01
232181	TAYLOR BEDDING MANUFACTURING COMPANY	TAYLOR, TEX	01	01	01
009703	TAYLOR BROTHERS INCORPORATED	WINSTON SALEM, N C	01	01	01
064763	TAYLOR DRUG STORES INCORPORATED	LOUISVILLE, KY	01	01	01
134941	TAYLOR ELECTRIC COOP INCORPORATED	MERKEL, TEX	01	01	01
198976	TAYLOR FORGE & PIPE WORKS	BELLWOOD, ILL	01	02	01
139439	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	04	01
149095	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	04	01
952837	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	03	01
952834	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	04	02-1
952835	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	03	01
952836	TAYLOR FORGE & PIPE WORKS	CHICAGO, ILL	01	02	01
189168	TAYLOR FORGE & PIPE WORKS OF TEXAS	CHICAGO, ILL	01	03	02-1
189167	TAYLOR FORGE & PIPE WORKS OF TEXAS	CHICAGO, ILL	01	03	02-1
048806	TAYLOR INSTRUMENT COMPANY	ROCHESTER, N Y	01	01	01
199718	TAYLOR MACHINE WORKS INCORPORATED	LOUISVILLE, MISS	01	03	01
221374	TAYLOR MANUFACTURING COMPANY	TAYLOR, TEX	01	01	01
167277	TAYLOR METAL PRODUCTS COMPANY	MANSFIELD, OHIO	02	01	01
232131	TAYLOR PUBLISHING COMPANY	DALLAS, TEX	01	03	01
079696	TAYLOR ROGERS & TRACY INCORPORATED	CHICAGO, ILL	01	01	01
227742	TAYLOR SMITH & TAYLOR COMPANY	CHESTER, W VA	01	02	01
198146	TAYLOR SUPPLY COMPANY	DETROIT, MICH	01	05	01
040159	TAYLOR WINE COMPANY INCORPORATED	HAMMONDSPORT, N Y	02	01	01
014671	TAYLOR WINE COMPANY INCORPORATED	HAMMONDSPORT, N Y	01	01	01
158897	TAYLOR WISEMAN TAYLOR & SLEEPER	MOORESTOWN, N J	04	01	01
057359	TAYLOR-COLQUITT COMPANY	SPARTANBURG, S C	02	01	01
224837	TAYLOR-DUNN MANUFACTURING COMPANY	ANAHEIM, CALIF	02	01	01
211930	TAYLOR-MARTIN PAPER INCORPORATED	FORT WAYNE, IND	02	01	01
155201	TAYLOR-WILSON MANUFACTURING COMPANY	MC KEES ROCKS, PA	01	03	01
034817	TAYLOR-WINFIELD CORPORATION, THE	WARREN, OHIO	01	02	01
034818	TAYLOR-WINFIELD CORPORATION, THE	WARREN, OHIO	01	03	01
156971	TAYLOR, CHARLES G & SONS INCORPORATED	WILMINGTON, DEL	02	01	01
211298	TAYLOR, FRANK F COMPANY	FRANKFORT, KY	02	02	01
099879	TAYLOR, HALSEY W COMPANY	WARREN, OHIO	01	03	01
251400	TAYLOR, LOU INCORPORATED	HIALEAH, FLA	01	01	01
240631	TAYLOR, MOSES HOSPITAL	SCRANTON, PA	01	01	01
234578	TAYLOR, NELSON A COMPANY INCORPORATED	GLOVERSVILLE, N Y	02	01	01
240838	TAYLOR, S G CHAIR COMPANY INCORPORATED	HAMMOND, IND	01	03	01
008008	TAYLOR, S G CHAIR COMPANY INCORPORATED	HAMMOND, IND	02	01	01
031683	TAYLOR, T R & COMPANY INCORPORATED	YORK, PA	02	01	01
168325	TAYLOR, THOMAS & SONS INCORPORATED	HUDSON, MASS	01	01	01
115360	TAYLORS INCORPORATED	PROVO, UTAH	01	02	01
186554	TAYNTON, H W COMPANY INCORPORATED	WELLSBORO, PA	02	02	01
203930	TAYTEC CORPORATION	COLUMBUS, OHIO	01	01	01
126010	TEAGUE BRICK & TILE COMPANY	TEAGUE, TEX	02	01	01
198147	TEAGUE, C C & SON CONSTRUCTION COMPANY	SHERMAN, TEX	02	01	01
164475	TEAMSTERS AFFILIATES PENSION PLAN	DETROIT, MICH	01	06	04
029475	TEAMSTERS CENTRAL PENNSYLVANIA	READING, PA	01	04	02-2
110777	TEAMSTERS CENTRAL STATES SE &SW	CHICAGO, ILL	01	03	02-2
104844	TEAMSTERS INDIANA CONFERENCE	SOUTH BEND, IND	01	06	04
216959	TEAMSTERS JB BREWERY & SOFT DRINK WKRS	SAN FRANCISCO, CALIF	05	03	02-2
128269	TEAMSTERS JOINT COUNCIL 16	NEW YORK, N Y	01	06	04
119010	TEAMSTERS JOINT COUNCIL 32	MINNEAPOLIS, MINN	01	02	02-2
098093	TEAMSTERS JOINT COUNCIL 40	PITTSBURGH, PA	01	02	02-2
035294	TEAMSTERS JOINT COUNCIL 40	PITTSBURGH, PA	01	04	02-2
138340	TEAMSTERS JOINT COUNCIL 41	CLEVELAND, OHIO	01	02	02-2
051931	TEAMSTERS JOINT COUNCIL 43	DETROIT, MICH	01	06	02-2
000627	TEAMSTERS JOINT COUNCIL 53	PHILADELPHIA, PA	01	06	04
227875	TEAMSTERS JOINT COUNCIL 62	BALTIMORE, MD	01	02	02-2
129193	TEAMSTERS JOINT COUNCIL 83	RICHMOND, VA	01	01	02-2
013726	TEAMSTERS JOINT COUNCIL 86	CHARLESTON, W VA	01	04	02-2
181053	TEAMSTERS LABORERS PENSION FUND	PHOENIX, ARIZ	01	03	02-2
007954	TEAMSTERS-LU 3 & 46	LONG ISLAND CITY, N Y	01	04	02-2
214111	TEAMSTERS-LU 6,6 A,367 & 368	SAINT LOUIS, MO	01	01	02-2
033328	TEAMSTERS-LU 25	NEW YORK, N Y	01	04	02-2
083868	TEAMSTERS-LU 27	NEW YORK, N Y	01	04	02-2

File No.	Employer, Employer Association, Employee Organization or Plan	City and State	Plan	Employees Covered	Advance Notice
239883	TEAMSTERS LU 27	NEW YORK, N Y	01	09	02-2
027053	TEAMSTERS LU 33	WASHINGTON, D C	01	09	02-2
163682	TEAMSTERS LU 37	EAST ORANGE, N J	01	01	02-2
182180	TEAMSTERS LU 39	BUFFALO, N Y	01	01	02-2
006865	TEAMSTERS LU 52	CLEVELAND, OHIO	01	09	02-2
241220	TEAMSTERS LU 67	WASHINGTON, D C	01	03	02-2
245035	TEAMSTERS LU 67	WASHINGTON, D C	01	03	02-2
222988	TEAMSTERS LU 80	NEW YORK, N Y	01	03	02-2
216366	TEAMSTERS LU 84	JERSEY CITY, N J	01	09	02-2
114012	TEAMSTERS LU 85	SAN FRANCISCO, CALIF	01	03	02-2
234226	TEAMSTERS LU 102	NEWARK, N J	01	04	02-2
185765	TEAMSTERS LU 113 MILK & ICE CREAM DRIVERS	CARTON, OHIO	01	04	02-2
154837	TEAMSTERS LU 115	PHILADELPHIA, PA	01	03	02-2
248374	TEAMSTERS LU 120	SAINT PAUL, MINN	01	01	02-2
238964	TEAMSTERS LU 122	NEW YORK, N Y	01	02	02-2
046406	TEAMSTERS LU 122	NEW YORK, N Y	01	09	02-2
147991	TEAMSTERS LU 125	JERSEY CITY, N J	01	04	02-1
166809	TEAMSTERS LU 125	NEWARK, N J	01	03	02-2
247640	TEAMSTERS LU 133	SAINT LOUIS, MO	01	03	02-2
013734	TEAMSTERS LU 134	TRENTON, N J	01	09	02-2
087984	TEAMSTERS LU 138	LONG ISLAND CITY, N Y	01	04	02-2
173982	TEAMSTERS LU 140	CINCINNATI, OHIO	01	04	02-2
055244	TEAMSTERS LU 142	GARY, IND	01	04	02-2
041499	TEAMSTERS LU 145,442 & 677	BRIDGEPORT, CONN	01	04	02-2
245852	TEAMSTERS LU 158	PHILADELPHIA, PA	01	03	02-2
168091	TEAMSTERS LU 168	BOSTON, MASS	01	09	02-2
008514	TEAMSTERS LU 169	PHILADELPHIA, PA	01	04	02-2
093539	TEAMSTERS LU 179, 330, 423 & 673	ELGIN, ILL	01	01	02-2
064761	TEAMSTERS LU 187	PHILADELPHIA, PA	01	09	02-2
079414	TEAMSTERS LU 193	INDIANAPOLIS, IND	01	04	02-2
090888	TEAMSTERS LU 194	NEWARK, N J	01	04	02-2
189229	TEAMSTERS LU 197 & 400	CLEVELAND, OHIO	01	03	02-2
091309	TEAMSTERS LU 202	BRONX, N Y	01	04	02-2
052996	TEAMSTERS LU 210	NEW YORK, N Y	01	04	02-2
006861	TEAMSTERS LU 211	PITTSBURGH, PA	01	04	02-2
220538	TEAMSTERS LU 237	NEW YORK, N Y	04	02	02-2
164279	TEAMSTERS LU 239	LITTLE NECK, N Y	01	01	02-2
079159	TEAMSTERS LU 240	NEW YORK, N Y	01	04	02-2
058094	TEAMSTERS LU 249	PITTSBURGH, PA	01	04	02-2
114931	TEAMSTERS LU 264	BUFFALO, N Y	01	04	02-2
032781	TEAMSTERS LU 272	NEW YORK, N Y	01	04	02-2
171841	TEAMSTERS LU 274	PHOENIX, ARIZ	01	01	02-2
019093	TEAMSTERS LU 277	NEW YORK, N Y	01	04	02-2
069481	TEAMSTERS LU 282	NEW YORK, N Y	01	04	02-2
033362	TEAMSTERS LU 289 & 409	MINNEAPOLIS, MINN	01	04	02-2
140976	TEAMSTERS LU 293	CLEVELAND, OHIO	01	04	02-2
053613	TEAMSTERS LU 294	ALBANY, N Y	01	04	02-2
216490	TEAMSTERS LU 294,295,449,693,810 & 917	NEW YORK, N Y	01	04	02-2
037851	TEAMSTERS LU 295	JAMAICA, N Y	01	04	02-2
244219	TEAMSTERS LU 295	JAMAICA, N Y	01	01	02-2
247650	TEAMSTERS LU 299	DETROIT, MICH	01	03	02-2
063643	TEAMSTERS LU 301	WAUKEGAN, ILL	01	04	02-2
037832	TEAMSTERS LU 311	BALTIMORE, MD	01	04	02-2
035141	TEAMSTERS LU 316	SYRACUSE, N Y	01	04	02-2
054063	TEAMSTERS LU 318	SYRACUSE, N Y	01	04	02-2
202640	TEAMSTERS LU 320 & 423	ELGIN, ILL	01	03	02-2
045018	TEAMSTERS LU 338	MOUNT VERNON, N Y	01	04	02-2
156723	TEAMSTERS LU 348	YOUNGSTOWN, OHIO	04	03	02-2
123604	TEAMSTERS LU 355	BALTIMORE, MD	01	04	02-2
249650	TEAMSTERS LU 363	NEW YORK, N Y	01	01	02-2
071321	TEAMSTERS LU 364	SOUTH BEND, IND	01	04	02-2
144688	TEAMSTERS LU 377	YOUNGSTOWN, OHIO	01	03	02-2
143795	TEAMSTERS LU 377	YOUNGSTOWN, OHIO	01	09	02-2
074114	TEAMSTERS LU 380	BOSTON, MASS	01	04	02-2
156101	TEAMSTERS LU 392	CLEVELAND, OHIO	04	03	02-2
163383	TEAMSTERS LU 400	CLEVELAND HEIGHTS, OHIO	01	01	02-2
166098	TEAMSTERS LU 408	NEWARK, N J	01	03	02-2
204448	TEAMSTERS LU 416	CLEVELAND, OHIO	01	04	02-2
228808	TEAMSTERS LU 418	GARFIELD, N J	01	03	02-2
219430	TEAMSTERS LU 422	CLEVELAND, OHIO	01	03	02-2
159502	TEAMSTERS LU 426	BALTIMORE, MD	01	09	04
158759	TEAMSTERS LU 436	CLEVELAND, OHIO	01	04	02-2
173154	TEAMSTERS LU 445	VAN'S GATE, N Y	01	04	02-2
138455	TEAMSTERS LU 445	YONKERS, N Y	01	01	02-2
051919	TEAMSTERS LU 445	YONKERS, N Y	01	04	02-2
075654	TEAMSTERS LU 453	CUMBERLAND, MD	01	04	02-2
211834	TEAMSTERS LU 453	CUMBERLAND, MD	01	01	02-2
092514	TEAMSTERS LU 456	ELMSFORD, N Y	01	04	02-2
168253	TEAMSTERS LU 471	MINNEAPOLIS, MINN	01	09	02-2
022144	TEAMSTERS LU 473	CLEVELAND, OHIO	01	04	02-2
247503	TEAMSTERS LU 473	CLEVELAND, OHIO	01	03	02-2
178615	TEAMSTERS LU 476	BUFFALO, N Y	01	04	02-2
164394	TEAMSTERS LU 478	LINDEN, N J	01	03	02-1
076936	TEAMSTERS LU 478	NEWARK, N J	01	04	02-2
149900	TEAMSTERS LU 482	ROCKFORD, ILL	01	04	02-2
113723	TEAMSTERS LU 485	PITTSBURGH, PA	01	04	02-2
084308	TEAMSTERS LU 491	UNIONTOWN, PA	01	04	02-2
174149	TEAMSTERS LU 495	LOS ANGELES, CALIF	05	04	02-2
046062	TEAMSTERS LU 496	PERTH AMBOY, N J	01	04	02-2
147041	TEAMSTERS LU 503	SAINT PAUL, MINN	01	03	02-2
241830	TEAMSTERS LU 507	CLEVELAND, OHIO	01	04	02-2
163645	TEAMSTERS LU 518 & 917	NEW YORK, N Y	01	04	02-2
087704	TEAMSTERS LU 522	JAMAICA, N Y	01	04	02-2
031583	TEAMSTERS LU 526	WETHERSFIELD, CONN	01	04	02-2
240402	TEAMSTERS LU 541	KANSAS CITY, MO	01	03	02-2
021211	TEAMSTERS LU 544	MINNEAPOLIS, MINN	01	04	02-2
094705	TEAMSTERS LU 550	NEW YORK, N Y	01	04	02-2
060074	TEAMSTERS LU 553	NEW YORK, N Y	01	04	02-2
227954	TEAMSTERS LU 554 & OPER ENGINEERS LU 571	OMAHA, NEBR	01	03	02-2
038334	TEAMSTERS LU 557	BALTIMORE, MD	01	04	02-2

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File No.	Employer, Employer Association, Employee Organization or Plan	City and State	Plan	Employees Covered	Administrator
063419	TEAMSTERS-LU 560,617 & 641	JERSEY CITY, N J	01	04	02-2
072447	TEAMSTERS-LU 560,617 & 641	UNION CITY, N J	01	03	02-2
183109	TEAMSTERS-LU 570	BALTIMORE, MD	01	04	02-2
246510	TEAMSTERS-LU 575	NEWARK, N J	01	03	02-2
233872	TEAMSTERS-LU 584	NEW YORK, N Y	01	01	02-2
261134	TEAMSTERS-LU 596	PHILADELPHIA, PA	01	03	02-2
085387	TEAMSTERS-LU 603	SAINT LOUIS, MO	01	04	02-2
024204	TEAMSTERS-LU 610	SAINT LOUIS, MO	05	04	02-2
215951	TEAMSTERS-LU 610	SAINT LOUIS, MO	01	09	02-2
151339	TEAMSTERS-LU 611	SAINT LOUIS, MO	01	09	02-2
229711	TEAMSTERS-LU 617	JERSEY CITY, N J	01	03	02-1
181818	TEAMSTERS-LU 627	PEORIA, ILL	01	04	02-2
164109	TEAMSTERS-LU 643	NEW YORK, N Y	01	04	02-2
113153	TEAMSTERS-LU 645	ROCHESTER, N Y	01	09	02-2
185645	TEAMSTERS-LU 660	JERSEY CITY, N J	01	04	02-2
091805	TEAMSTERS-LU 680 & 757	NEW YORK, N Y	01	04	02-2
056736	TEAMSTERS-LU 680	NEWARK, N J	01	01	02-2
169685	TEAMSTERS-LU 680	NEWARK, N J	01	04	02-2
229345	TEAMSTERS-LU 688	SAINT LOUIS, MO	01	01	02-2
109637	TEAMSTERS-LU 701	NORTH BRUNSWICK, N J	01	09	02-2
116327	TEAMSTERS-LU 703	OAK PARK, ILL	01	04	02-2
185190	TEAMSTERS-LU 704	CHICAGO, ILL	01	04	02-2
187629	TEAMSTERS-LU 705	CHICAGO, ILL	01	01	02-2
122467	TEAMSTERS-LU 706	CHICAGO, ILL	01	04	02-2
091132	TEAMSTERS-LU 707	WOODSIDE, N Y	01	04	02-2
119278	TEAMSTERS-LU 710	CHICAGO, ILL	01	04	02-2
072582	TEAMSTERS-LU 710	CHICAGO, ILL	01	04	02-2
055492	TEAMSTERS-LU 712	CHICAGO, ILL	01	04	02-2
163475	TEAMSTERS-LU 716	INDIANAPOLIS, IND	01	04	02-2
183574	TEAMSTERS-LU 727	CHICAGO, ILL	01	04	02-2
194685	TEAMSTERS-LU 730	WASHINGTON, D C	01	03	02-2
179132	TEAMSTERS-LU 731	CHICAGO, ILL	01	04	02-2
167459	TEAMSTERS-LU 731	CHICAGO, ILL	01	01	02-2
218736	TEAMSTERS-LU 734	CHICAGO, ILL	01	01	02-2
192417	TEAMSTERS-LU 734	CHICAGO, ILL	01	01	02-2
096454	TEAMSTERS-LU 738	CHICAGO, ILL	01	04	02-2
114516	TEAMSTERS-LU 743	CHICAGO, ILL	01	06	02-2
161757	TEAMSTERS-LU 744	CHICAGO, ILL	01	03	02-2
178372	TEAMSTERS-LU 744	CHICAGO, ILL	01	04	02-2
095845	TEAMSTERS-LU 753	CHICAGO, ILL	01	04	02-2
159986	TEAMSTERS-LU 754	CHICAGO, ILL	01	03	02-2
214181	TEAMSTERS-LU 761	CHICAGO, ILL	01	03	02-2
229718	TEAMSTERS-LU 769	CORAL GABLES, FLA	01	03	02-1
073687	TEAMSTERS-LU 777	CHICAGO, ILL	01	04	02-2
081657	TEAMSTERS-LU 782	MAYWOOD, ILL	01	04	02-2
216809	TEAMSTERS-LU 786	CHICAGO, ILL	01	03	02-2
163344	TEAMSTERS-LU 786	CHICAGO, ILL	01	04	02-2
141905	TEAMSTERS-LU 787	ALBANY, N Y	01	04	02-2
086323	TEAMSTERS-LU 802	LONG ISLAND CITY, N Y	01	04	02-2
035532	TEAMSTERS-LU 804	LONG ISLAND CITY, N Y	01	04	02-2
038230	TEAMSTERS-LU 805	NEW YORK, N Y	01	04	02-2
162278	TEAMSTERS-LU 806	ELMHURST, N Y	01	03	02-2
003926	TEAMSTERS-LU 807	LONG ISLAND CITY, N Y	01	04	02-2
240393	TEAMSTERS-LU 808	WOODSIDE, N Y	01	09	02-2
004317	TEAMSTERS-LU 812	NEW YORK, N Y	01	04	02-2
067444	TEAMSTERS-LU 813	NEW YORK, N Y	01	04	02-2
168450	TEAMSTERS-LU 813	NEW YORK, N Y	01	03	02-2
165434	TEAMSTERS-LU 814	NEW YORK, N Y	01	04	02-2
022047	TEAMSTERS-LU 815	ENGLEWOOD CLIFFS, N J	01	04	02-2
027318	TEAMSTERS-LU 816	NEW YORK, N Y	01	04	02-2
222585	TEAMSTERS-LU 816	NEW YORK, N Y	01	03	02-2
089925	TEAMSTERS-LU 817	NEW YORK, N Y	01	04	02-2
251332	TEAMSTERS-LU 819	NEW YORK, N Y	01	01	02-2
015546	TEAMSTERS-LU 820	NEW YORK, N Y	01	04	02-2
144123	TEAMSTERS-LU 824	LONG ISLAND CITY, N Y	01	06	02-2
186099	TEAMSTERS-LU 830	PHILADELPHIA, PA	01	04	02-2
234218	TEAMSTERS-LU 831	NEW YORK, N Y	01	02	04
001664	TEAMSTERS-LU 835	GARY, IND	01	09	02-2
199775	TEAMSTERS-LU 837	PHILADELPHIA, PA	01	03	02-2
243368	TEAMSTERS-LU 840	NEW YORK, N Y	01	01	02-2
243208	TEAMSTERS-LU 840	NEW YORK, N Y	01	01	02-2
031573	TEAMSTERS-LU 843	NEWARK, N J	01	04	02-2
135448	TEAMSTERS-LU 852	NEW YORK, N Y	01	04	02-2
188481	TEAMSTERS-LU 854	JAMAICA, N Y	01	01	02-2
007596	TEAMSTERS-LU 863	NEWARK, N J	01	04	02-2
145207	TEAMSTERS-LU 868	NEW YORK, N Y	01	02	02-2
148817	TEAMSTERS-LU 875	ELMHURST, N Y	01	01	02-2
245745	TEAMSTERS-LU 876	SALISBURY, MD	01	04	02-2
005459	TEAMSTERS-LU 921	SAN FRANCISCO, CALIF	01	04	02-2
251937	TEAMSTERS-LU 949	WEST PATERSON, N J	01	01	02-2
160298	TEAMSTERS-LU 945	WEST PATERSON, N J	01	01	02-2
216287	TEAMSTERS-LU 956	KANSAS CITY, MO	01	03	02-2
168448	TEAMSTERS-LU 958	MINNEAPOLIS, MINN	01	09	02-2
174035	TEAMSTERS-LU 958	MINNEAPOLIS, MINN	05	09	02-2
219459	TEAMSTERS-LU 959	ANCHORAGE, ALASKA	01	01	02-2
235943	TEAMSTERS-LU 966	NEW YORK, N Y	01	03	02-2
209387	TEAMSTERS-LU 968	HOUSTON, TEX	01	03	02-2
147212	TEAMSTERS-LU 992	HAGERSTOWN, MD	01	01	02-2
206972	TEAMSTERS LU 998	HONOLULU, HAWAII	01	03	02-2
188733	TEAMSTERS-LU 996	HONOLULU, HAWAII	01	03	02-2
243679	TEAMSTERS-LU 999	NEW YORK, N Y	01	03	02-2
212495	TEAMSTERS-LU 999	PATERSON, N J	01	03	02-2
201135	TEAMSTERS-LU 1034	NEW YORK, N Y	01	03	02-2
245225	TEAMSTERS-LU 1040	BRIDGEPORT, CONN	01	03	02-2
238887	TEAMSTERS-LU 1205	BROOKLYN, N Y	01	03	02-2
054891	TEAMSTERS-LU 1205	BROOKLYN, N Y	01	04	02-2
080576	TEAMSTERS-MILWAUKEE DRIVERS	MILWAUKEE, WIS	01	04	02-2
053748	TEAMSTERS-N HC	WASHINGTON, D C	01	06	04
085532	TEAMSTERS-NEW ENGLAND BAKING	METHUEN, MASS	01	04	02-2
074548	TEAMSTERS-NEW YORK STATE CONFERENCE	UTICA, N Y	01	04	02-2

File No.	Employer, Employer Association, Employee Organization or Plan	City and State	Plan	Employees Covered	Administrator
048404	TEAMSTERS-PHILADELPHIA & VICINITY	PHILADELPHIA, PA	01	04	02-2
076594	TEAMSTERS-PHILADELPHIA & VICINITY	PHILADELPHIA, PA	01	03	02-2
071060	TEAMSTERS-RICHMOND	RICHMOND, VA	01	04	02-2
079349	TEAMSTERS-SAINT LOUIS BREWERY	SAINT LOUIS, MO	01	04	02-2
149880	TEAMSTERS-SOUTHERN CONFERENCE	DALLAS, TEX	01	01	02-2
133106	TEAMSTERS-SUBURBAN NORTH ILLINOIS	ELGIN, ILL	05	04	02-2
070051	TEAMSTERS WAREHOUSE INDUSTRY PORT OF N Y	NEW YORK, N Y	01	04	02-2
064428	TEAMSTERS-WESTERN CONFERENCE	SEATTLE, WASH	01	04	02-2
001848	TEAMSTERS-WESTERN CONFERENCE	SEATTLE, WASH	01	03	02-2
217301	TECH WELD CORPORATION	BURLINGTON, MASS	01	01	01
232111	TECH ART PLASTICS COMPANY	MORRISTOWN, N J	05	03	01
207699	TECHALLOY COMPANY INCORPORATED	RAHNS, PA	01	02	01
199159	TECHALLOY COMPANY INCORPORATED	RAHNS, PA	01	02	01
011969	TECHALLOY COMPANY INCORPORATED	RAHNS, PA	01	03	01
201985	TECHALLOY-CALIFORNIA INCORPORATED	CITY OF INDUSTRY, CALIF	01	03	01
201984	TECHALLOY-ILLINOIS INCORPORATED	UNION, ILL	01	03	01
163142	TECHERT, A & SON INCORPORATED	SACRAMENTO, CALIF	02	07	01
114852	TECHNI-BRAZE INCORPORATED	SANTA FE SPRINGS, CALIF	02	01	01
223513	TECHNICAL APPLIANCE CORPORATION	PHILADELPHIA, PA	01	05	01
229799	TECHNICAL APPLIANCE CORPORATION	PHILADELPHIA, PA	01	05	01
071815	TECHNICAL OIL TOOL CORPORATION	LOS ARGELES, CALIF	02	01	01
018237	TECHNICAL OPERATIONS INCORPORATED	BURLINGTON, MASS	02	01	01
295689	TECHNICAL OPERATIONS INCORPORATED	BURLINGTON, MASS	01	01	01
020675	TECHNICAL PUBLISHING COMPANY	BARRINGTON, ILL	01	01	01
162519	TECHNICAL RUBBER COMPANY INCORPORATED	JOHNSTOWN, OHIO	02	01	01
229153	TECHNICAL TAPE CORPORATION	NEW ROCHELLE, N Y	01	03	01
164216	TECHNICAL WIRE PRODUCTS INCORPORATED	CRANFORD, N J	02	01	01
153225	TECHNICARBON COMPANY INCORPORATED	HOLYOKE, MASS	01	01	01
015299	TECHNICOLOR CORPORATION	HOLLYWOOD, CALIF	01	01	01
236813	TECHNICON INSTRUMENTS CORPORATION	TARRYTOWN, N Y	02	01	01
115884	TECHNICRAFT LABORATORIES INCORPORATED	THOMASTON, CONN	02	01	01
207413	TECHNOLOGY INCORPORATED	DAYTON, OHIO	01	01	01
212786	TECH GARAGE INCORPORATED	BUFFALO, N Y	01	01	01
299561	TECUMSEH PRODUCT COMPANY-ELKHART	TECUMSEH, MICH	01	03	01
299563	TECUMSEH PRODUCT COMPANY-NEW HOLSTEIN	TECUMSEH, MICH	01	03	01
299530	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	03	01
216788	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	06	01
216787	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	06	01
150579	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	04	01
065245	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	07	01
065244	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	06	01
065243	TECUMSEH PRODUCTS COMPANY	TECUMSEH, MICH	01	06	01
230516	TECUMSEH PRODUCTS COMPANY-MARION DIV	TECUMSEH, MICH	01	06	01
145129	TEE-PAK INCORPORATED	CHICAGO, ILL	01	02	01
157615	TEE-PAK INCORPORATED	CHICAGO, ILL	01	03	01
135982	TEE-PAK INCORPORATED	CHICAGO, ILL	01	04	02-1
139207	TEE-PAK INCORPORATED	CHICAGO, ILL	01	02	01
222486	TEE-PAK INCORPORATED	CHICAGO, ILL	01	03	01
053163	TEER WICKWIRE & COMPANY	JACKSON, MICH	01	01	01
053162	TEER WICKWIRE & COMPANY	JACKSON, MICH	03	01	01
121915	TEER, WELLO L COMPANY	DURHAM, N C	02	01	01
183608	TEJON RANCH COMPANY	BAKERSFIELD, CALIF	01	01	01
181103	TEJON RANCH COMPANY	BAKERSFIELD, CALIF	02	01	01
166334	TEX BEARING COMPANY INCORPORATED	STRATFORD, CONN	03	01	01
135536	TEX BEARING COMPANY INCORPORATED	STRATFORD, CONN	02	01	01
164072	TEX BEARING COMPANY INCORPORATED	STRATFORD, CONN	02	01	01
198153	TEXNI-CRAFT INCORPORATED	ROCKTON, ILL	02	01	01
198152	TEXNI-CRAFT INCORPORATED	ROCKTON, ILL	01	01	01
228958	TEXNOR APEX COMPANY	PAWTUCKET, R I	01	02	01
050145	TEXTRONIX INCORPORATED	BEAVERTON, OREGON	02	01	01
039851	TEL-E-LECT PRODUCTS INCORPORATED	MINNEAPOLIS, MINN	02	03	01
041043	TEL-E-LECT PRODUCTS INCORPORATED	MINNEAPOLIS, MINN	02	03	01
030202	TELAUTOGRAPH CORPORATION	LOS ARGELES, CALIF	01	07	01
229170	TELE COIL COMPANY	CAMDEN, N J	02	01	01
171522	TELE-SIGNAL CORPORATION	HICKSVILLE, N Y	02	02	01
229173	TELE-SIGNAL CORPORATION	LONG ISLAND CITY, N Y	01	03	01
248232	TELECOMMUNICATIONS ENGINEERING SALE SERV	OAK RIDGE, TENN	01	01	01
250283	TELEDYNE CANONSBURG	WASHINGTON, PA	01	02	01
174014	TELEDYNE COMPANY	GARLAND, TEX	01	01	01
006715	TELEDYNE GURLEY COMPANY	TROY, N Y	01	04	02
227870	TELEDYNE INCORPORATED	LOS ARGELES, CALIF	01	02	01
227891	TELEDYNE INCORPORATED	LOS ARGELES, CALIF	01	03	01
094972	TELEDYNE INCORPORATED	NORTH TONAWANDA, N Y	02	01	01
237447	TELEDYNE KINETICS	SOLANA BEACH, CALIF	02	01	01
250282	TELEDYNE MOVABLE OFFSHORE	LAFAYETTE, LA	02	01	01
001595	TELEDYNE RYAN AERONAUTICAL COMPANY	SAN DIEGO, CALIF	01	03	01
001612	TELEDYNE RYAN AERONAUTICAL COMPANY	SAN DIEGO, CALIF	02	02	01
247134	TELEDYNE VASCO	LATROBE, PA	01	03	01
184268	TELEDYNE VASCO	LATROBE, PA	04	02	01
181742	TELEFLEX INCORPORATED	NORTH WALES, PA	01	04	01
216793	TELEFLEX INCORPORATED	NORTH WALES, PA	01	02	01
251894	TELEFLEX INCORPORATED	NORTH WALES, PA	01	03	01
117243	TELEGRAM PUBLISHING COMPANY	GARDEN CITY, KANS	02	01	01
251233	TELEGRAM-TRIBUNE COMPANY	SAN DIEGO, CALIF	01	01	01
152114	TELEGRAPH HERALD	DUBUQUE, IOWA	02	01	01
251160	TELEGRAPH PRESS	HARRISBURG, PA	01	03	01
069652	TELEGRAPH PRESS	HARRISBURG, PA	01	02	01
147219	TELEGRAPH PUBLISHING COMPANY	NASHUA, N H	01	01	01
024048	TELEGRAPHERS-COMMERCIAL	SILVER SPRING, MD	01	06	04
032468	TELEKLEW PRODUCTIONS INCORPORATED	SANTA MONICA, CALIF	02	01	01
219947	TELEMET CO DIV THE HAMMARLUND MFG CO INC	AMITYVILLE, N Y	01	02	01
251343	TELEPHONE & DATA SYSTEMS INCORPORATED	CHICAGO, ILL	01	01	01
198155	TELEPHONE UTILITIES INCORPORATED	ELWACO, WASH	01	01	02
174617	TELEPHONE UTILITIES OF PA INC	EXPORT, PA	01	01	01
181872	TELESCOPE FOLDING FURNITURE COMPANY	GRANVILLE, N Y	01	04	02
177320	TELESCOPE FOLDING FURNITURE COMPANY	GRANVILLE, N Y	01	02	01
043400	TELETYPE CORPORATION	SKOKIE, ILL	01	01	01
199719	TELEVISION COMMUNICATIONS CORPORATION	NEW YORK, N Y	01	01	01
168150	TELEVISION MANUFACTURERS OF AMERICA CO	WHEELING, ILL	05	02	01
251545	TELEX COMPUTER PRODUCTS INCORPORATED	TULSA, OKLA	01	01	01

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1855

JOHN DANIEL,

Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2865—**Alfred Y. Kirkland**, *Judge.*

HEARD APRIL 4, 1977—DECIDED AUGUST 20, 1977

Before CUMMINGS and TONE, *Circuit Judges*, and JAMESON, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* Plaintiff is a resident of Illinois and has been a member of defendant Local Union 705 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America since 1951. He also purports to serve as the representative of the class of all members of all affiliate locals of the Teamsters International who have "purchased and acquired an interest in a Teamsters' pension fund." The

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* The Honorable William J. Jameson, Senior District Judge of the District of Montana, is sitting by designation.

original defendants were Local 705, the International Brotherhood, three classes (Teamster local unions with pension funds similarly situated to Local 705, trustees of such pension funds and all officers of locals with such pension funds), and Louis Peick, an officer of Local 705 and a trustee of its pension fund. Additional defendants added by amendment are Local 705's Pension Fund and seven individuals representing that pension fund and all other Teamster pension funds.

According to the complaint, the Teamsters locals negotiate labor contracts with companies across the United States for the benefit of their members who are employees of such companies. Under these contracts, Teamster members agree to provide their services as employees of the companies in return for wages and various other forms of consideration. Since 1955, most of those labor contracts negotiated by the Teamsters have provided for the establishment of pension funds for their union members. Under the labor contracts, the employing companies make set payments into the pension funds for Teamster members "as part consideration for the labor services provided by such union members." (Complaint par. 12) These payments are held in trust and invested by pension trust fund trustees who are equally divided between employer and union representatives. Therefore, the Teamster member employees contribute their labor services in return for their participating interest in the pension trust funds and their wages and fringe benefits.

Again, according to the complaint, the Teamsters pension plans do not differ *inter se* in any material respect for the purposes of this case. Each was a defined benefit pension plan where employees are offered various benefits if they meet certain eligibility requirements. Actuarial assumptions based on estimated union member turnover, mortality and the rate of return on fund capital are used to determine the amount the employer must contribute so that the pension fund will be able to pay the promised benefits to union members as they retire without jeopardizing the payment of benefits to future and antecedent retirees. The pension trust funds have lengthy vesting periods. If a Teamster

member does not meet the length of service requirement of the vesting period, the entire contribution paid into the trust fund for him is forfeited, thereby extinguishing his interest in the fund. Local 705's pension fund had a twenty-year vesting period, a typical provision.

In addition to the lengthy plan-vesting periods, most of the Teamsters pension plans require continuity of employment with employers who have entered into labor contracts with the Teamsters.[1] Under this continuity or "break-in-service" rule, no pension benefit is available to a Teamster union member who has been employed by covered employers for the full vesting period but whose employment with covered employers is not continuous and uninterrupted. Employer-paid contributions are also forfeited when the union member cannot meet the break-in-service requirement of his pension plan's vesting rule.

The monies contributed to the pension funds are invested by the trustees thereof, and it is alleged that each trust fund "over the long run [is] reasonably expected to grow through the accumulation of dividends, interest and other earnings." (Complaint par. 15) Failure to meet the length or continuity requirements of the pension fund's vesting provision also causes the forfeiture of a union member's participating interest in these accumulated earnings. When the complaint was filed in 1974, plaintiff had worked for covered employers for 22½ years, but his service was interrupted by an involuntary four-month break in service from December

[1] A survey of 32 pension plans representing over half of the Teamster membership disclosed no other plan which would have absolutely disqualified a man in Daniel's circumstances. Most plans have continuity requirements but involuntary breaks in service are usually remediable upon satisfaction of certain requirements. Local 705's continuity requirement has been so modified for a break in service occurring after 1970 (International Br. at 9 n. 12).

1960 to April 1961.[2] Because of this interruption in service, Local 705 has refused to pay plaintiff any pension benefits whatsoever and the employer contributions paid on his behalf and the earnings accumulated therefrom have been forfeited.

Count I of the complaint asserts that beginning in 1955 and continuing to the present, defendants misrepresented certain material facts and omitted to make other material facts by making misleading statements which in general related to the value of a member's participating interest in his local pension fund. The misrepresentations concerned misleading statements as to the length and continuity requirements of the pension plan's vesting provision. Defendants are said to have made omissions of material facts by failing to inform the members that they would receive no pension benefits whatsoever if they did not meet the length or continuity requirements of the vesting provision and that, upon failing to satisfy these requirements, the contributions made on their behalf into the fund and the earnings accumulated therefrom would be forfeited. Defendants allegedly also omitted to state that the fund's actuarial basis was arbitrary. Other omissions are said to be the failure to disclose pertinent information needed to disclose the actuarial basis upon which the funds were grounded and the actuarial likelihood that a union member will not receive any pension benefits at all. Finally, plaintiff alleged a failure to state that the defendants have unlawfully diverted pension funds for the benefit of persons other than the pension trust beneficiaries.

Plaintiff claims in Count I that although he purchased an interest in the pension fund by providing labor service to an employer with a labor contract with the Teamsters, he sustained substantial losses which were a

[2] According to plaintiff's supporting affidavit, from April 1961 to July 5, 1961, his employer's bookkeeper embezzled the employer's contributions to the Local 705 Pension Fund. Plaintiff reported this embezzlement to Local 705. It subsequently treated his break in service as a seven-month interruption, although it had assured him at the time of his report to it about the lapse vis-à-vis his pension rights that it "would take care of whatever had to be done on account of the embezzlement." (App. 95a)

direct and proximate result of a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder by the defendants. Besides requesting class relief, plaintiff requested the district court to find that defendants violated Section 10(b) and Rule 10b-5 and to reform the pension fund agreements by deleting the length and continuity requirements of the vesting provision. The plaintiff also sought a judgment requiring defendants to pay pension benefits unlawfully withheld from plaintiff and his class. In addition, a judgment was sought in the amount of any interests which had been diverted from their proper purposes.

Count II of the complaint sought similar relief under Section 17(a) of the Securities Act of 1933. However, neither this nor any other count of the complaint charged that the registration requirements of that Act were applicable.[3]

Plaintiff's Affidavit

Four months after the docketing of his complaint, plaintiff filed an affidavit which we treat as part of the pleadings for purposes of our review of the order below denying the motion to dismiss. The affidavit showed that he had only an elementary school education and had joined Local 705 in April 1950 when he became a truck driver with an employer who had a collective bargaining agreement with that Union. He worked continuously as a truck driver with Local 705 contracting employers from April 1950 through November 1973, except for an interruption from December 5, 1960, until April 1961, when he was involuntarily laid off wholly because of the

[3] The original complaint contained three additional counts, and a fourth was added by amendment on February 7, 1975. The plaintiff thereby seeks relief for the defendants' alleged breach of their duty of fair representation under Section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 159(a), and for the failure of the pension fund to be established for the "sole and exclusive benefit of the employees," as required by Section 302(c)(5) of the NLRA, 29 U.S.C. 186(c)(5). Finally, the plaintiff seeks to recover under common law theories of breach of fiduciary duty, fraud and deceit. Since they are not involved in this appeal, the additional counts will not be discussed further herein.

adverse economic condition of his employer.[4] Plaintiff tried unsuccessfully to find any trucker's work during this time period. He retired because of cataracts on December 1, 1973, at the age of 63. Since his retirement, Daniel has not worked at all.

In 1955, plaintiff learned of Local 705's pension fund and understood that as a Local 705 member he would be eligible to receive retirement benefits upon completing 20 years of employment with Local 705 covered employers. He believed that employer contributions to the Local 705 pension fund would finance the retirement payments which he would receive after 20 years of employment. This retirement plan was a material factor in his continuing employment with Local 705 covered employers. If he had known that Local 705 would interpret the pension plan as requiring uninterrupted service of 20 years, he would have sought employment elsewhere with an adequate retirement plan. The communications he received from Local 705 did not disturb his understanding that he would receive a pension after 20 years of employment with covered employers.[5]

[4] See note 2 *supra*.

[5] Pension plan booklets describing pension plans are often designed "to sell the plan * * *." D. McGill, Fulfilling Pension Expectations 17 (1962) (Institute for Public Interest Representation's Br. at 12). For example, these materials do not forthrightly disclose in terms understandable to a truck driver with a limited education the

> "minimum length of time considered to constitute a break-in-service in the Local 705 Pension Fund 20 years continuous service vesting rule; such materials do not disclose that all contributions made on behalf of a Local 705 member into the Local 705 Pension Fund (and all accumulated earnings on the aggregate of such contributions) will be forfeited following any proscribed break in service; and such materials do not disclose either the actuarial bases on which the Local 705 Pension Fund has been established or the likelihood that any Local 705 member will ever receive a pension benefit." (Pl. Br. at 5)

Indeed, one *amicus* siding with defendants admits that this lack of disclosure is rampant generally in the pension field:

> "Thus employees are often not aware of the fact that the actual realization of benefits depends upon meeting certain benefit eligibility conditions, depends upon prudent management of the retirement fund, depends upon contributions by their employer sufficient to pay retirement benefits as they come due, and depends upon their employer remaining in business." (Erisa Regulations Industry Committee's Br. at 19-20).

In June 1971, plaintiff received a letter from defendant Peick stating that after 20 years of covered service and at 60 years of age or over, a retired employee would receive a monthly pension of $400. He expected to receive such a pension on his retirement. One of Local 705's booklets advised him that the purpose of the pension fund was to take care of him and his family in case of retirement and that the funds afforded protection to him, his wife and unmarried children under 18 years of age. He relied on such assurances that the fund would provide for financial security in his old age.

He did not learn until December 1973 that his involuntary 4-month layoff caused the Draconian result of total forfeiture of his pension. He never learned of the success or failure of the trustees' management of the Local 705 pension fund, nor was he advised of the type of investments being made by the trust fund. During several months prior to this December 1, 1973, retirement, he visited Local 705's office on five to eight occasions to arrange for his pension and was not then advised that he was ineligible to receive it. After Daniel's retirement, he was told for the first time that his 4-month involuntary break in service made him ineligible to receive any pension benefits. On December 26, 1973, and on March 28, 1974, he appeared before the Local 705 trustees, but they refused to reverse the prior denial of his pension. He and his fellow Local 705 members had always had the common understanding that they would receive a retirement benefit after 20 years of covered employment and that no employer contributions could be forfeited. Other members of Local 705 were shocked to learn that a Local 705 member with Daniel's record of employment could be denied all pension benefits because of a temporary break in service. Indeed neither the defendants nor the *amici* who support their position dispute that this is "unfair in the extreme, shocking to the conscience" (Secretary of Labor's Br. at 21).

Local 705, Peick and the International Brotherhood of Teamsters filed motions to dismiss Counts I and II of the complaint on the ground that the court lacked subject-matter jurisdiction and that they failed to state a claim

upon which relief could be granted.[6] Local 705 and Peick also maintained that the action under Counts I and II was barred by the limitations provisions of the Securities Act of 1933 and the Illinois Statute of Limitations.[7] On March 1, 1976, the district judge handed down a memorandum opinion and order denying the motions to dismiss as to all counts and holding the anti-fraud provisions of the securities laws applicable. This opinion is reported in 410 F.Supp. 541. The effect of the opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F.Supp. at 551), that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts. Subsequently, the court entered an order denying defendants' motions to reconsider its refusal to dismiss Counts I and II but certified their application for interlocutory appeal under 28 U.S.C. § 1292(b). The certification was limited to Counts I and II of the complaint. The controlling question of law certified to this Court can be easily identified by the district court's careful circumscription of its holding below with respect to Counts I and II, *viz.*:

> "The Court makes no finding here beyond the narrow holding that the complaint alleges the sale of a security for purposes of application of the anti-fraud provisions of the Securities Acts, and that the complaint alleges violations of those provisions. The Court makes no finding with respect to applicability of any other sections of those Acts to employee pension plans such as the one here litigated." 410 F. Supp. at 553.

[6] Local 705 and Peick included additional defenses in their motion to dismiss as to Counts I and II as well as some defenses directed at the other Counts of the complaint. The International answered the complaint and subsequently filed a motion to dismiss Counts I and II only, based on an asserted lack of subject-matter jurisdiction and failure to state a claim.

[7] On appeal, the limitations defense has been abandoned.

Thereafter we granted permission to appeal.[8] Three *amici curiae* have filed briefs urging reversal and four urge affirmance.[9] We affirm.

Modality of Analysis

The securities cases in the Supreme Court's 1976 October Term have underscored its recently expressed methodology in interpreting the securities laws. See *e.g.*, *Piper v. Chris-Craft Industries, Inc.*, 45 LW 4182; *Santa Fe Industries, Inc. v. Green*, 45 LW 4317. Analysis begins with the relevant statutes themselves. After a study of their language and any court-added gloss, attention shifts to the statutes' legislative history. Additional considerations weigh in the balance. The history of the SEC's administration of the securities laws often can add a substantive gloss of its own which is entitled to the usual administrative deference (*Investment Company Inst. v. Camp*, 401 U.S. 617, 626-627) so long as it does not become law-making. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214. And to the extent that these more cogent interpretive tools are not dispositive of the statutes' meaning, additional considerations of policy may tip the scales. *Id.* at 214 n. 33. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737. We shall use this methodology in our analysis of this case.

Statutes

Both of the major anti-fraud portions of the federal securities laws are relied upon in this complaint. Count I charges a breach of Section 10b of the Securities Ex-

[8] The district court has not yet ruled upon plaintiff's and defendants' respective motions for class action certification.

[9] Those favoring affirmance are the Securities and Exchange Commission (SEC), the Gray Panthers, the Institute for Public Interest Representation (IPIR) and the Teamsters for a Democratic Union. Opposed are the Secretary of Labor, the Erisa Regulations Industry Committee (ERIC) and the National Coordinating Committee for Multiemployer Plans. The General Counsel of the SEC and a representative of the Secretary of Labor participated in the oral argument.

change Act of 1934 (15 U.S.C. § 77j(b))[10] and Rule 10b-5 thereunder (17 C.F.R. § 240.10(b)-5)[11] while Count II alleges a violation of Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)).[12] This being an appeal from

[10] Section 10b provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[11] Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[12] Section 17(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

an order denying a motion to dismiss, the allegations concerning the use of the jurisdictional means and the making of material misrepresentations, the omissions to state material facts or the use of manipulative or fraudulent devices are treated as true by defendants. Their argument is based upon the phrase "in connection with the purchase or sale of any security" in Section 10b and Rule 10b-5 and the phrase "sale of any securities" in Section 17(a). Defendants assert that these anti-fraud provisions are inapplicable on their face on the ground that plaintiff's interest in the pension fund is not a "security" and was not acquired by him in a "sale."

Plaintiff's Interest in the Pension Fund Is a "Security"

The term "security" is defined in Section 2(1) of the 1933 Act (15 U.S.C. § 77b(1))[13] and in Section 3(a)(10) of the 1934 Act (15 U.S.C. § 78c(a)(10)).[14] In each statute, the definition of "security" includes any "investment con-

[13] Section 2(1) of the 1933 Act provides:

"When used in this title, unless the context otherwise requires—

(1) the term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." (Emphasis supplied.)

[14] Section 3(a)(10) of the 1934 Act provides:

"When used in this title, unless the context otherwise requires—

(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or

(Footnote continued on following page)

tract."[15] Since the same Congress which passed both the 1933 and 1934 Acts clearly indicated that its definition of "security" in the 1934 Act was intended to be "'substantially the same * * *'" as in the 1933 Act, cases construing either definition can be used interchangeably. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 847 n. 12; *Tcherepnin v. Knight*, 389 U.S. 332, 336, 342. Therefore we need not break out separate lines of analysis in order to determine the existence of a security under Section 10b of the 1934 Act and Section 17(a) of the 1933 Act.

In construing the statutory term "security," guidance is provided by two overriding principles. First, as remedial legislation the securities acts should be construed broadly to effectuate their purposes. Congress purposely defined the term "security" broadly, and it has been construed liberally by the Supreme Court in order to protect the public from speculative or fraudulent schemes. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 338. Secondly, in searching for content in the term "security," "form should be disregarded for substance and the emphasis should be on economic reality." *Id.* at 336.

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[14] *continued*

subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." (Emphasis supplied.)

[15] Plaintiff does not seriously press the theory that he had a "certificate of interest or participation in any profit-sharing agreement" but rather relies on the "investment contract" theory. Since we find merit in the "investment contract" theory, we have no occasion to express a view on the adequacy of the "certificate" theory under the facts of this case where Daniel has no document which evidences his interest in the Local 705 Pension Fund.

With this background, attention can now focus on whether plaintiff's interest in the Teamsters' pension fund is an investment contract. An investment contract was defined by the Supreme Court in *SEC v. W. J. Howey Company*, 328 U.S. 293, 298-299, to mean

> "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852, the Supreme Court reiterated this rule and stated that

> "[t]his test, in short-hand form, embodies the essential attributes that run through all the Courts' decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

"What distinguishes a security transaction [from every other form of commercial dealing] is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use." *Id.* at 858.[16] As demonstrated below, the elements of the Howey rule are present here, for under the Local 705 Pension Fund, money is invested in a common enterprise, the management of which is committed to a third party, and from which profits and income are reasonably expected.

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[16] The International's argument that a union member is not an investor "in any sense understood by Congress when it was protecting investors in the securities markets" (Br. 12) is addressed *infra*.

The Union Member as an Investor

In the present case, the money invested in the pension fund came from employer contributions paid on behalf of the employee. The local defendants maintain that non-contributing beneficiaries of a fund cannot be conceptualized as investing in the fund, citing *SIPC and SEC v. Morgan, Kennedy & Cox, Inc.*, 533 F.2d 1314 (2d Cir. 1976). In *Morgan, Kennedy*, the Second Circuit was asked "to determine whether the one hundred and eight employee beneficiaries of a trust created under a profit-sharing plan qualify as 'customers' of a bankrupt broker-dealer for the purpose of receiving compensation for losses available to such customers under the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. § 78aaa *et seq.*" *Id.* at 1315. The statutory definition of "customer" read in pertinent part "persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities *received, acquired* or *held* by the debtor from or for the *account of such persons* * * *" (emphasis supplied). *Id.* at 1316. Prior Second Circuit law had used investor and customer status interchangeably. *Id.* at 1317. In *Morgan, Kennedy* it was the trust as an entity as represented by the trustees, rather than its beneficiaries, who were the customers of the debtor broker-dealer. The account was held in the trustees' names and the individual beneficiaries' identities were totally unknown to the broker-dealer. Moreover, control over investment decisions was exercised exclusively by the trustees. "The employee-beneficiaries * * * made no purchases, transacted no business, and had no dealings whatsoever with the broker-dealer in question respecting the trust account." *Id.* at 1318. Common sense mandated the conclusion that the individual beneficiaries were not customers of the broker-dealer. Because of the *sui generis* definition of customer/investor under the Securities Investor Protection Act of 1970, *Morgan, Kennedy* is irrelevant to the question whether the union members have made an investment in the meaning of the 1933 and 1934 Acts.

More relevant is the recent case of *Klamberg v. Roth*, [76-77 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 95,747 (S.D. N.Y. 1976). There the court held that the

plaintiff as beneficiary in an employee pension plan had standing to bring an anti-fraud action against the plan trustees:

> "Fraud perpetrated by a trustee in the purchase or sale of securities on behalf of the trust has a tangible impact on each beneficiary, no matter how many beneficiaries are thereby affected and regardless of the precise purposes of the trust. The policies behind the *Birnbaum* rule are not undermined * * *" *Id.* at 90,630.[17]

The employer contributions to the plan's pension fund constitute a sector of the total employee compensation structure. *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), certiorari denied, 336 U.S. 960. "Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation." Welfare and Pension Plans Disclosure Act of 1958, S.Rep. No. 1440, 85th Cong., 2d Sess. (1958), reprinted in 3 U.S. Code Cong. and Admin. News 4137, 4139. This thesis is accepted by the courts, see, *e.g., Lewis v. Benedict Coal Co.*, 311 U.S. 459, 469; *Employing Plasterers' Assoc. v. Journeymen Plasterers' Protective and Benevolent Soc'y*, 279 F.2d 92, 99 (7th Cir. 1960), and the commentators alike. P. Drucker, The Unseen Revolution 8, 34 (1976); Note, Legal Problems of Private Pension Plans, 70 Harv. L. Rev. 490, 494 (1957). Indeed the International Brotherhood has conceded[18] these pension funds "constitute a form of compensation for an employee's

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[17] *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), certiorari denied, 343 U.S. 956, confined recoveries under Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder to buyers and sellers of securities.

[18] In the district court, the International Brotherhood did not challenge that an "investment contract" was involved here. Even now all the defendants agree that "the SEC has consistently taken the position that interests in some pension plans are "securities" (Joint Rep. Br. at 2).

labor" (Br. 12).[19] Realistically speaking, employees are putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck. Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans, 29 Law & Contemp. Prob. 795, 803-804 (1964).

The International maintains that employees do not even have an interest in the pension plan except in the attenuated sense that they have a contingent expectancy of receiving pension payments at a future date. But mere contingent expectancies are the rule rather than the exception in the equity markets. Profits in an equity security require that the market value plus accrued dividends of a stock be greater than the stockholder's cash basis. Thus profits are contingent on the successful operation of the common enterprise, there the issuing corporation. Whether an employee is found to have covered employment before his benefits vest or a stockholder is forced to sell his stock at a net loss does not eject his interest in the respective common enterprises from the bounds of the *Howey* definition of security. Realizing this analogy is not exact, we think that a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer, is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future.

The Local defendants attempt to erect a dichotomy between wages *per se* and the fringe benefits of employment which together make up an employee's total compensation by referring to sections of the Bankruptcy Act, the Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act and the Sherman Act which purportedly raise such a distinction for the pur-

[19] The International Brotherhood argues that the employee, once employed, has no individual control over either the fact or amount of the contributions to the fund. Such issues of investment autonomy are best addressed in the context of the existence of a sale. Consequently we defer the bulk of our discussion on these issues until our discussion of whether a sale of an instrument found to be a security can be said to have occurred.

poses of those Acts. The existence of a wage/compensation dichotomy in other unrelated statutes is wholly irrelevant to whether a union member has made an investment under the *Howey* rule. The *Howey* test only requires that the employer-paid contributions to the pension fund can be properly considered to be economic compensation to the employee. This proposition is universally accepted by the courts and commentators. Accodingly, the investment of money prong of the *Howey* rule has been satisfied.[20]

The Pension Fund as a Common Enterprise

Under *Howey*, it is "immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." 328 U.S. at 299. As a result, the common enterprise can properly take the form of a trust fund investing in the capital markets where the beneficiaries' common relationship with the enterprise is an undivided interest in such a trust without the beneficiaries having certificates evidencing their interest or the power to transfer their interests in the trust. See *Collins v. Rukin*, 342 F.Supp. 1282, 1286 (D. Mass. 1972). Presumably, an investor who purchases a minority block of stock from a close corporation whose shares have restraints on their alienation may still sue for fraud under the securities laws. *Holdsworth v. Strong*, 545 F.2d 687 (10th Cir. 1976) (*en banc*) Here the enterprise is common to all of the Local 705 members. The pension fund trustees self-admittedly exercise exclusive control over the common enterprise and the investment of its assets. The pension fund which receives the union members' investments is a common enterprise under *Howey*.

[20] The International makes the overly facile analogy to *Forman*, *supra*, that just as the "shareholders" in *Forman* decided whether to live in a particular place, the union members made the decision whether to work for a Teamster shop. It is clear that the union member does not intend to purchase a commodity or realty for personal use; rather he parts with his money in the hope it, through the management of others, can fund his retirement.

Profits from the Efforts of Others

The Local defendants point principally to *United Housing Foundation v. Forman*, 421 U.S. 837, in arguing that the pension fund does not generate profits in the *Howey* sense.[21] In *Forman*, profits were defined as follows:

> "By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner* [320 U.S. 344] (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin v. Knight, supra* (dividends on the investment based on savings and loan association's profits). In such cases the investor is 'attracted solely by the prospects of a return' on his investment. *Howey, supra*, at 300." *Id.* at 852.

It is conceded that the expected payout to a beneficiary will exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit. Black's Law Dictionary. However, the Local defendants attempt to discredit this gain as a *Forman* "profit" because, on an amortized basis, some of the gain may be attributable to "pooled" contributions of all participating employers, forfeitures of employees whose pension rights do not vest or to increased contributions negotiated by the union.

Initially it may be noted that gain relative to a security can derive from sources other than the direct efforts of the managers of the common enterprise. In both *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974), and *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), certiorari denied, 414 U.S. 821, the gain present for any particular investor in those pyramid sales schemes had as its source a substantial fraction of the investment of another investor in the scheme. Similarly, the payout to a maturing annuitant in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65,

[21] Defendants do not contest that whatever is expected from the common venture will be solely derived from the efforts of persons other than the venture's investors.

was more likely to derive from investments of new annuitants than from a return on his original investment and the compounded income earned on it.[22] Moreover, realizing a profit from a non-transferable stock option given in exchange for services would depend upon the investor having enough money to exercise the option. *Collins v. Rukin*, 342 F.Supp. 1282 (D. Mass. 1972). Yet in all of these cases the investor's interest was still characterized as a security.

In any event, only a portion of the gain can even arguably derive from non-investment sources. A substantial part of the gain (which even defendants concede to be at least 25%, International Br. at 10-11) will derive from traditional return on the pension fund participant's investment, a dollar-profit element in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustees' management of the pension fund.[23] For example, the current weekly contribution to the Local 705 pension fund of $24 invested at the current maximum bank interest rate of 7½ percent per annum on a compounded basis generates a substantial sum of money. At this rate, over a 20-year career, almost $25,000 is invested and if earnings are accumulated on a tax-deferred basis pursuant to Section 401 of the Internal Revenue Code (26 U.S.C. § 401), the profit over capital contribution will be over $33,000. An increase of 1% in return on a pension fund's capital can allow benefits to be increased by 20% (SEC Br. at 11). It is precisely this promise of retirement benefits far in ex-

[22] Both *Turner* and *Variable Annuity* were cited in *Forman*. The Supreme Court did not speak disapprovingly of either case. 421 U.S. at 852 n. 16 and 857 n. 24.

[23] That this profit element is fixed because pension payments are set at specific levels from time to time is wholly immaterial to gain being profit in the *Forman* sense. A number of instruments which all would concede to be securities (bonds, debentures, etc.) are fixed return.

cess of the pensioner's investment that forms the economic inducement to invest in a pension fund.[24].

Recently the district court for the District of Columbia has decided that surviving spouses and dependents of deceased coal miners, who claimed a right to permanent health care coverage by the United Mine Workers, did not have an interest in the United Mine Workers of America 1950 Benefit Plan and Trust, which provides health benefits for active and retired miners, their families, dependents and survivors, that could be deemed to be a "security" under the 1933 or 1934 Acts. *Robinson v. United Mine Workers of America Health and Retirement Funds et al.*, Civ. No. 77-0698 (D. D.C. July 29, 1977). Although conceding that the district court's opinion in *Daniel* was distinguishable from his case (mem. op. 3 n. 1), Judge Gesell in *dicta* disagreed with the reasoning of Judge Kirkland in *Daniel*.

The *Robinson* opinion was based squarely on the gloss *United Housing Foundation v. Forman*, 421 U.S. 837, gives to the term "investment contract" appearing in the securities acts' definitions of "security." Judge Gesell's "reluctance" to find the *Robinson* plaintiffs' interest to be an investment contract was based entirely upon his view that *Forman* foreclosed such a result (mem. op. 3). *Robinson* is not applicable here.

In no sense could the spouses and dependents of the deceased coal miners in *Robinson* be viewed as investing in the fund since they contributed nothing to the employers in return for the employers' payment of per-tonnage royalties into the trust fund on behalf of and in

[24] The district court also noted "there is no warranty that the trust will be able to fund the supposed fixed benefits due to members of the plaintiff class". 410 F.Supp. at 550. This resulting risk was deemed to generate "risk capital" return under *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811, 361 P.2d 906 (1961). Some doubt as to the validity of the risk capital approach exists. See *Forman*, 421 U.S. at 857 n. 24. Since traditional profits are present in our case, we need not explore the risk capital theory beyond noting that pensioners are far from taking "no risk in any significant sense." *Id.; El Khadem v. Equity Securities Corp.*, 494 F.2d 1224 (9th Cir. 1974), certiorari denied, 419 U.S. 900.

return for the services of the union miners. The *Robinson* plaintiffs were donees instead of purchasers, so that the requisite *Blue Chip* sale (421 U.S. 723) was lacking.

Unlike *Daniel*, where Local 705 members could affect the employers' payments into the pension fund or the allocation of contributions between pension fund payments and current wages by failing to ratify a given contract with set contribution levels, the *Robinson* plaintiffs were powerless to increase or decrease payments or convert them to their personal use. Additionally, there was no expectation of profit in *Robinson*, because benefits were to be paid out of the employers' current contributions to the trust rather than depending on the fund's capital. In *Daniel*, however, funding of the benefit program was crucially dependent on profits from the investment of the fund capital. Further, all the assets of the pension fund not committed to pay out current benefits were invested at risk for profit.

Although the UMW Benefit Plan included retirement benefits for retired miners and lump-sum death benefits to their heirs, only the length of time health care coverage was to be extended to the plaintiffs was in issue in *Robinson*. That case therefore involved merely the consumption of "free" medical care rather than, as in *Daniel*, an actual dollar financial return on investment, *i.e.*, "an expectancy of dollar benefits," which the investor could then use to purchase anything he chose. 421 U.S. at 852-853.

To declare the *Robinson* plaintiffs' interest in the benefit plan to be a "security" would indeed have required "a degree of creativity unwarranted by the realities of the transactions and the function and purpose of the securities laws" (mem. op. 3). As already shown, to declare Daniel's interest to be a security does not require such an attempt "to stretch the securities laws beyond their traditional scope" (mem. op. 5). Finally, the legislative history relied upon in *Robinson* concentrates on the registration provisions of the securities laws rather than the anti-fraud provisions, as discussed more fully *infra*.

Economic Reality

The literal passage of the *Howey* test is only the first hurdle. The definitional sections herein involved are introduced with the phrase "unless the context otherwise requires." This context is, of course, economic reality in view of the surrounding factual circumstances. *Emisco Industries, Inc. v. Pro's, Inc.*, 543 F.2d 38 (7th Cir. 1976). As Mr. Justice Powell explained in *Forman*:

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system, the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. Thus, in construing these Acts against the background of their purpose, we are guided by a traditional canon of statutory construction:
>
> > " '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)." 421 U.S. at 849.

If an interest is not a security in economic reality, abuses should be remedied by Congress rather than by an over-liberal extension of the securities laws. *Id.* at 859 n. 26.

However, the economic inducement for plaintiff's interest in the pension fund was investment for a profit to provide wherewithal in his retirement. This plaintiff's interest in the fund embodies many of the significant characteristics typically present in the instruments concededly covered by the securities acts. *Id.* at 851. Plaintiff has an undivided interest in the Local 705 Pension Fund consisting of the aggregate of all monies invested on behalf of Local 705 union members by covered employers for whom those members worked. Those

monies are managed and invested by the pension fund trustees in stocks, bonds, mortgages and other investments for the sole benefit of Local 705 members. As such, the Local 705 Pension Fund resembles a mutual fund, *viz.* a pool of money invested for the benefit of the mutual fund shareholder by the fund manager. The amount of payout to any particular member would depend upon his length of service in covered employment, the extent of funding in the plan and the monthly pension determined by the trustees. Their success in money management will be one of the most important factors in determining the amount of payout. A Local 705 member invests $1,248 per year through his employer contributions into that fund. Since an interest in a mutual fund is a security, the interest in a pension fund should also be considered a security. See, Testimony of SEC Commissioner Purcell, Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 895 (1941). Otherwise the trustees of private pension plans with annual employer contributions of $23 billion for the benefit of 30 million employees[25] will be able to mislead their beneficiaries with immunity from the anti-fraud provisions of the 1933 and 1934 Acts.

Not only is plaintiff's interest like an interest in a mutual fund, it is also like an interest in a variable annuity contract. Variable annuity contracts have been held to be securities within the securities laws. *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65; *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202. The securities in *VALIC* and *United Benefit* were investment vehicles designed to provide a return on capital upon retirement. Even though the annuity contract in *VALIC* contained several elements of traditional life insurance and although the flexible fund annuity in *United Benefit* contained a minimum insurance type guarantee, the Court separated the conventional life insurance attributes from the security involved. See, *e.g.*, *United Benefit*, *supra*, at 207. Similarly, the employment fringe

[25] Skolnick, Private Pension Plans, 1950-74, 39 Social Security Bulletin 34 (June 1976).

benefit aspect of a pension can be separated from its security aspects. Plaintiff can be both an investor and employee. See, *e.g.*, *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 476 (5th Cir. 1974); *Collins v. Rukin*, 342 F.Supp. 1282 (D. Mass. 1972). As in *VALIC* and *United Benefit*, a Local 705 member is entitled to full disclosure of the material of the enterprise in which his money is put so that he can intelligently appraise the risks involved.

Reduced to fundamentals, economic reality mandates the realization of the immense importance of private pension plans to the American capital markets. As a Senate Report has disclosed:

> "In 1940, an estimated four million employees were covered by private pensions; in 1950, the figure had more than doubled to 9.8 million; in 1960, over 21 million employees were covered; and in 1973, approximately *30 million workers participated.* Currently, *one-half* of the industrial work force in the United States are members and participants of private pension plans. It is projected that by 1984, 42.3 million workers will be covered by private pension plans. The growth of the assets owned or controlled by pension funds has closely paralleled this expansive growth. Total estimate assets of pension plans have accelerated from $2.4 billion in 1940 to *$150 billion in 1973* and are increasing at a rate projected to exceed $250 billion by 1980." (Emphasis added) S. Rep. No. 93-127, 93rd Cong., 2d Sess. 2-3 (1973).

Because of favorable tax provisions and economies of scale, pension funds are the most efficient way for an employee to invest. N. Ture, the Future of Private Pension Plans 3 (1976). On a relative scale, his pension plan will probably be a Teamster member's largest investment. On an aggregate basis, private pension funds control a huge amount of the capital markets. At the end of 1972, they held 11% in value of all New York Stock Exchange listed stocks and in the same year they accounted for over 23% of the dollar value of all shares traded there. If the sole investment vehicles for tens of millions of Americans which in the aggregate control a

quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized.

Legislative History and SEC Interpretation

Not only do the cases support considering this interest as an investment contract, but so do the legislative history and the SEC's interpretation of the securities acts. The legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans. However, subsequent legislative action[26] and accompanying SEC interpretation[27] do provide a measure of guidance in construing the 1933 and 1934 Acts.

Thus in 1934, the Senate adopted an amendment to the 1933 Act to exempt from registration

> "an offering made solely to employees of an issuer or of its affiliates in connection with a *bona fide plan for the payment of extra compensation* or stock-investment plan for the exclusive benefit of such employees". 78 Cong. Rec. 8708 (1934). (Emphasis supplied.)

The amendment was eliminated in conference in order to protect participants in such plans who

> "may be in as great need of protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73d Cong., 2d Sess. at 41 (1934).[28]

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[26] As to the significance of subsequent congressional expressions with respect to the meaning of earlier statutes, see *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 274-275; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381.

[27] As to the significance of subsequent SEC administrative practice with respect to the meaning of the securities laws, see *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 725; *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-410.

[28] Since the 1934 Act was passed by the same Congress that passed the 1933 Act, this legislative history is tantamount to being actual 1933 Act history and should be credited accordingly. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 342.

(Footnote continued on following page)

In 1941, SEC Commissioner Purcell commented on the 1934 rejection of the Senate amendment as requiring the SEC to interpret the 1933 Act as applying to employee pension funds which involve the sale of securities as "investment contracts."[29] In his view, this included any

> "plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date * * *." 1941 Hearings at 895-896.

Commissioner Purcell also noted that the 1940 Congress was aware of the economic congruence between employee pension plans and ordinary mutual funds because it defined an "employees' security company" as one type of "investment company" in Section 2(a)(13) of the Investment Company Act of 1940. 1941 Hearings at 895. Consequently, an employee pension plan is regulated by the 1940 Act unless it falls within an exemption from registration. See, *e.g.*, 15 U.S.C. §§ 80a-3(c)(11) and -6b.

Similarly, the opinion of the Assistant General Counsel of the SEC in 1941 was that "security" within the definition of the 1933 Act included employee pension plans.[30] More recently, former Chairman Cohen of the SEC also has testified on the basis of his own expertise as to the common understanding of a number of institutional investors that interests in a pension plan fall

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[28] *continued*

Recently, class action suits against employee profit-sharing plans have charged that the managers of these plans have failed in their responsibilities by investing too much in the employer's own stocks. Employees Wrath Hits Profit-Sharing Plans, Bus. Week, July 18, 1977 at 25.

[29] Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 895-896 (1941) (1941 Hearings).

[30] Opinion of Assistant General Counsel of SEC [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75, 195 (1941).

within the definition of a security in the 1933 Act.[31] Like Commissioner Purcell, he explained that is why they had to be specifically exempted from the Investment Company Act of 1940 (15 U.S.C. § 80a-3(c)(11)). Additionally, he commented on the similarities between a pension fund and a mutual fund investment. Accordingly, Professors Mundheim and Henderson have characterized the SEC's interpretation of "security" as used in the securities laws as including an interest in employee pension plans as that "traditionally taken."[32]

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[31] Hearings on S. 3598 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92 Cong., 2d Sess. 231 (1972). In those hearings, Mr. Cohen included Ch. VII of the Summary Volume of the SEC's 1971 *Institutional Investor Study* which states that interests of participants in employee pension plans meet the definition of security in the 1933 Act. See also Interim Report, Senate Committee on Labor and Public Welfare, S.Rep. 92-634, 92d Cong., 2d Sess. 96 (1972). The defendants concede the SEC has treated interests in pension funds as securities since 1971 (Rep. Br. at 5).

[32] Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 Law and Contemp. Prob. 795, 811 (1964). The defendants and some *amici* rely on comments by Congressman Wolverton, a member of the House Committee that reported the 1933 and 1934 Acts, sitting on the Committee before which Commissioner Purcell was testifying that he did not believe Congress intended to regulate pensions under the securities laws. 1941 Hearings, at 870-871, 878, 888, 913. Although the 1934 Congress did not specifically focus on pension funds, the 1934 abortive Senate amendment does show Congress did have some forms of employee security plans in mind. Certainly, the definition of security adopted is broad enough to include the plans.

Moreover, the statements by Congressman Wolverton deal with "supervision" or "regulation" under the 1933 Act, *viz.*, registration. But as we show in the opinion, the registration provisions of the 1933 Act do not apply to securities consisting of interests in pension plans. It might be that a realization of this fact will calm concerns about undue "regulation of employee benefit plans." Statement of Representative Dent, 174 D.L.R. at A-6 (BNA, Sept. 7, 1976).

Congress has evidenced agreement with the SEC's position that interests in pension funds are securities by way of the Investment Companies Amendments Act of 1970. Recognizing that interests in employee pension funds are "securities," in 1970 Congress decided to exempt them from the registration requirements of Section 5 of the 1933 Act (15 U.S.C. § 77e) if the employee pension fund was maintained by a bank or in a separate account maintained by an insurance company (15 U.S.C. § 77c(a)(2)(A)).[33] This exemption was to codify the long

[33] The exemption comprehends, in pertinent part:

"Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of *securities.* * * *

* * * * *

"any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, *other than* any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities *(other than interests or participations in the trust or separate account itself)* issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26. The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter." (Emphasis supplied)

established administrative practice of the Commission in exempting certain pension funds from the registration requirements of the 1933 Act. H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970). A similar exemption amendment was provided with respect to the 1934 Act. 15 U.S.C. § 78c(a)(12).[34] This action of course shows that

[34] The 1934 Act provision provides:

"The term 'exempted security' or 'exempted securities' includes—

"any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock-bonus pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, other than any plan described in clause (A) or (B) of this paragraph which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26; and such other securities (which may include, among others, unregistered securities the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an 'exempted security' or to 'exempted securities.' "

This provision specifically exempts only interests in collective trust funds while the 1933 Act exemption includes interests in single funds. However, the final clause of the exemption quoted above gives the SEC plenary authority to exempt other securities from the reporting requirements of the 1934 Act. The comments of the General Counsel of the SEC speaking for the Commission in argument before us suggests the SEC in the exercise of this power has decided that interests in pension funds are "exempted securities" under the 1934 Act.

However, under the 1933 Act the SEC's interpretative and quasi-legislative powers are limited by Section 3(b) which provides "no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $500,000" (15 U.S.C. § 77c(b)). Accordingly, in order to achieve exempted status for securities such as interests in pension funds under the 1933 Act, Congress could not rely on SEC administrative practice being binding as it could under the 1934 Act. Thus the wording differences between the 1933 and 1934 Act represent a need to codify the administrative practice under the 1933 Act.

Congress considered such pension funds to be securities that would not be exempt from registration absent the 1970 Amendments. Therefore, if the Local 705 Pension Fund is being maintained by a bank,[35] the interests involved here would be securities exempt from registration. However, exemption from registration and reporting requirements does not mean exemption from Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, as the House Committee on Interstate and Foreign Commerce realized in its report.[36] See also 15 U.S.C. § 77q(c).

Defendants and the *amici* who support their position seek to downplay the importance of the 1970 Amendments by arguing that the 1970 exemption relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds, claiming that the sale to employees of interests in the underlying pension fund is entirely outside the scope of the 1970 act. However, these arguments relate to legislative history concerning an earlier version of the Act which referred only to "collective" trust funds. A close study of the legislative history shows that the version of the Act which was finally adopted contemplated the interests sold to employees in the underlying pension fund.

The principal stimulus for the amendment to the 1933 Act in 1970 was to settle the legal status of certain commingled investment accounts maintained by banks and

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[35] A large portion of Local 705's Pension Fund is maintained by the trust departments of major Chicago banks. See note 61, *infra*. Plaintiffs represent that "because most employee pension plans are bank maintained, registration is not required for most employee pension plans" (Pl. Br. at 37-38).

[36] Report of the House Committee on Interstate and Foreign Commerce on the Investment Company Amendments Act of 1970. H. Rep. No. 91-1382, 91st Cong., 2d Sess. 10, 43 (1970).

insurance companies.[37] As a result the early versions of the bill only exempted:

> "any interest or participation in a *collective* trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954" (emphasis added).

See, *e.g.*, S. 34, 91st Cong., 1st Sess. 65 (1969), reprinted in S. Comm. on Banking and Currency, *Analysis of S. 34*, 91st Cong., 1st Sess. 119 (1969). After the Senate passed a bill containing this language, the General Counsel of the Sperry-Rand Corporation wrote a letter to the House Subcommittee considering the legislation pointing out that the bill did not exempt interests in single trust funds. Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., Part 2 at 929-931. His suggestion was to add the language "or any employees' stock bonus, pension or profit-sharing trust" after "separate account maintained by an insurance company."

In response to this suggestion, the Subcommittee reported out a bill with the added phrase "single or" to precede the phrase "collective trust fund maintained by a bank." This version, later passed by the House, thereby altered the focus of the exemption to encompass interests in the underlying pension funds. The Conference Report went along with the House version:

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[37] "Banks maintaining these collective funds would solicit money from various institutional investment vehicles, including pension funds, and would promise to commingle the funds to take advantage of the economies of size that could be gained in the securities market and the investment expertise of the bank's analysts. Since an interest in such collective funds held by an individual pension fund is a security and the bank collective fund an investment company, efforts were made to exempt this security from the registration provisions of the Securities Act and the collective fund from the Investment Company Act." (SEC Br. 32 n. 40)

"The Senate bill exempted from the registration requirements of the 1933 Act certain collective trust funds maintained by a bank or in a separate account maintained by an insurance company.

"The House amendment would have codified a long established administrative practice of the Commission by making it clear that this exemption applied not only to collective trust funds, but also to single trust funds.

"The conference agreement follows the House version." H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970).

Two subsequent changes in the language of the exemption show the shift to include interests in the underlying plans. Although the Conference Committee generally adopted the House version, it did include a small modification. Since the House provision exempted interests in all pension funds, it was contrary to the SEC's administrative position that non-registration of pension interests did not apply in all situations. In particular, the SEC required registration where an amount in excess of the employer's contribution to a pension fund is allocated to the purchase by the fund of securities issued by the employer. In order to conform the exemption, a provision was included to exclude the above situation from exemption. *Id.* at 24.

This exclusion generated another legislative fillip. The exclusion applied when the excess was used to purchase securities issued by the employer. Since interests in pension funds are themselves securities, the exclusion could potentially be interpreted to require registration of all pension plans where any money is contributed to the pension plan directly by employees, since they could be conceptualized as buying securities.[38] Accordingly, Section 3(a)(2) of the 1933 Act was amended one week after

[38] "In particular, there was concern that where an insurance company maintained a separate account to fund pension benefits for its own employees, interests in such an account might be considered securities issued by the employer." (SEC Br. 34 n. 44.)

the passage of the 1970 Amendments to make it clear that the term "security issued by the employer" did not include the securities consisting of the interests in the pension fund. See 116 Cong. Rec. 40608 (Dec. 9, 1970).

Therefore the 1970 Amendments show that Congress intended to conform the 1933 Act to the SEC's administrative view that, although interests in pension funds did not need to be registered in most cases, they are nonetheless securities. See 116 Cong. Rec. 33287 (Sept. 23, 1970). When conjoined with the above-detailed legislative history and SEC interpretation, the 1970 Amendments provide substantial support for the proposition that an interest in an employee pension fund is a security.

Policy

Perhaps the main reason that pension plans are not specifically mentioned in the legislative history of the 1933 and 1934 Acts themselves is the fact that in the early 1930's pension plans were still a rarity. In the early decades of the 20th century, only 38% of invested capital was invested indirectly, and of this amount only 1/10 of 1% was invested in pension funds. By 1962, the indirect sector of the capital markets had jumped to 83% and pensions constituted 27% of this amount. Hearings Before the Subcommittee on Fiscal Policy, U.S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 17-18 (1970). Since 1955, the asset value of pension plans has exceeded the total accumulated by the other three major institutional investors: mutual funds, life insurance companies and property and liability insurance companies. We are informed by an *amicus curiae* that the book value of private pension plan assets is $216.9 billion, the largest single source of private investment capital in the economy.

Because employee pension plans are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of investment vehicle that the securities acts were passed to regulate. To proclaim

that the securities laws encompass securities consisting of interests in pension plans is "quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it * * *." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737. The type of fraud allegedly perpetrated on the plaintiff is among those the securities laws were passed to prevent and remedy.

Of course, the normal scheme of the securities acts require registration as well as providing anti-fraud remedies. However, as demonstrated above, the 1970 Amendments codified the SEC's practice of exempting pension funds from the registration requirements of the 1933 Act. Thus declaring an interest in a pension fund to be a security will not subject any plans to registration which are not already so subject. Consequently, since the anti-fraud provisions do not impose an undue burden on anyone, they should be available to employees to remedy fraud. Mundheim and Henderson, *supra*, at 814. The proper inquiry then is not whether interests in employee pension plans are securities but rather why such a vital investment vehicle should be nevertheless excluded from the protection of the securities laws. We now turn to this inquiry.

Plaintiff's Security Was Acquired in a "Sale"

Defendants maintain that even if the plaintiff's interest is a security, his cause of action is defeated because he did not acquire it in a sale.

The 1933 Act defines "sale" as including

> "every * * * disposition of a security or interest in a security for value" (15 U.S.C. § 77b(3)).

and the 1934 Act defines "sale" as including "any contract to sell or otherwise dispose of" (15 U.S.C. § 77c(a)(14)). Accordingly, in both Acts, a "sale" of an interest in a pension fund depends upon whether there has been a disposition of it. Here plaintiff acquired an interest in the Local 705 Pension Fund, and as shown, that interest is a security. Therefore, there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts. The 1933 Act also requires

that the disposition be "for value." Here plaintiff's giving of his services and the employer's contribution on behalf of the employee constitutes value, thereby meeting the "for value" requirement. See S.Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958). From the employee's viewpoint, the contributions to the pension fund are part of his compensation and the value flows from him to that extent.[39] From the employer's viewpoint, the contribution flows from the employee, constituting a part of the employee's compensation package. In either event, value has been given for a security, so that erection of a direct-indirect dichotomy is unwarranted. *SEC v. Harwyn Industries Corp.*, 326 F.Supp. 943, 954-955 (S.D. N.Y. 1971, Mansfield, J.); see also *Hector v. Wiens*, 533 F.2d 429, 431-433 (9th Cir. 1976); cf. *Pete v. United Mine Workers*, 517 F.2d 1275, 1287 (D.C. Cir. 1976).

The defendants maintain there is a controlling conceptual distinction between "non-contributory" plans and plans where the employee first receives cash and then pays over such cash into the pension fund. We refuse to subscribe to undue literalism. An employee's performance of services satisfies the for value requirement of

[39] Union spokesmen for both the United Auto Workers and the Teamsters have testified that pensions are deferred wages which are given high priority in collective bargaining. As to the UAW, see Hearings before the Senate Subcommittee on Private Pension Plans of the Committee on Finance, 93d Cong., 1st Sess. 467 (1973). As to the Teamsters, see Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor, 87th Cong., 1st Sess. 225 (1961). This was the recurrent theme emerging from the ERISA [Employment Retirement Income Security Act] hearings as well:

> "An important theme which emerged from Subcommittee hearings related to the basic dichotomy in the rationale for a pension plan. Repeatedly, witnesses volunteered testimony that they regarded their pension benefits as deferred wages. Since labor negotiations resulting in wage increases through collective bargaining invariably include some consideration of pension benefits, employees believe that had pensions not been included in the settlement package, they would have received higher wage commitments." S.Rep. No. 92-634, Interim Report of Activities of the Pension Welfare and Pension Plan Study, 1971, 92d Cong., 2d Sess. 75 (1972).

the 1933 Act. See *Collins v. Rukin*, 342 F.Supp. 1282 (D. Mass. 1972); *SEC v. Addison*, 194 F.Supp. 709 (N.D. Tex. 1961); *Lawrence v. SEC*, 398 F.2d 276 (1st Cir. 1968); see also *Truncale v. Blumberg*, 88 F.Supp. 677 (S.D. N.Y. 1950); *Hector, supra*, at 432. Recent SEC interpretations also support the view that an interest in a non-contributory plan is gained for value. *Oklahoma National Gas Co.* [71-72 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 78,583 (1971); *Allis-Chalmers Corp.* [72-73 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 78,803; *Keene Corp.* [71-72 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 78,475; *Missouri Research Laboratories, Inc.* [72-73 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 79,-036.

Defendants argue that there can be no sale because the contribution to the pension fund is compulsory. However, the definitions of "sale" in the 1933 and 1934 Acts do not require volition. In any case, volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union.[40] Similarly, in the corporate merger

[40] The Teamsters maintain that a local whose constitution requires member ratification of pension plan agreements such as 705's is a rarity. Be that as it may, in our mobile society, an employee will be faced with a number of employment decisions during his career, and as he ages, such shifts will be more and more affected by the pension plan offered by a prospective employer. Accordingly, an employee may be faced with a meaningful decision even in the case of a compulsory plan whether to acquire interests in the pension fund. See Note, *supra*, 70 Harv. L. Rev. at 494. Needless to say, this construct does not render the individual employee a party to the bargain with the employer in the technical labor law sense. In this sense, the Union remains the exclusive agent.

Amicus ERIC suggests that if ratification is the doctrinal reed upon which a finding of volition is hung, unions will quickly eliminate ratification votes. First, we have shown that volition can exist even if ratification does not. But in any event, volition is not necessary for a sale under the securities acts. Even in a worst-case analysis, movement away from contract ratification would probably be limited. Elimination would require constitutional amendment which would presumably be difficult to achieve, requiring, in effect, a vote to weaken union democracy.

context (where a vote by the shareholders to merge is binding notwithstanding any individual shareholder's vote to the contrary), cases under the anti-fraud provisions have held that a sale occurs where there is no voluntary action by the alleged purchaser. *Vine v. Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir. 1967); *Zeller v. Bogue Electric Manufacturing Corp.*, 476 F.2d 795 (2d Cir. 1973); *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974), certiorari denied, 417 U.S. 932. The volition argument in a no-sale conclusion in the merger context, which was used only in the registration milieu, was derived from SEC Rule 133 (33 C.F.R. § 230-133 (1964)) but it was rescinded in 1972. In rescinding that rule, the Commission characterized that rationale as "only correct in the formalistic sense" in that it "overlooks the reality of the transaction." As the SEC pointed out, the "corporate action * * * is not some type of independent fiat, but is only the aggregate effect of the voluntary decisions made by the individual stockholders * * *." 37 Fed. Reg. 23631, 23632 (Nov. 7, 1972). To like effect, the Local 705 Pension Fund contributions are not an independent employer fiat but rather represent the aggregate effect of the union members.

Also, plaintiff's affidavit shows that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension. When an employee decides to retain his job, his decision results in his continuing to give value in the future and in his further acquisition of interests in the pension fund.

In its brief as *amicus curiae*, the SEC has persuasively shown why it formerly reached a different result for the purposes of the 1933 Act's registration provisions in the case of plans that are either non-contributory or compulsory. It was reasoned that there was no sale involved for a non-contributory plan because there was no direct investment of money by the employee, consistent with the then current legal view that the employer's contributions were gifts. Although the SEC recognized that an individual had a choice whether to become or remain an employee, it was thought that the choice would never

turn on representation concerning the pension plan.[41] Therefore compulsory plans were not considered to involve sales. Testimony of Commissioner Purcell, 1941 Hearings at 896-897; Opinion letter of the Assistant General Counsel of the SEC, 1 CCH Fed. Sec. L.Rep. ¶ 2105.53; Testimony of Chairman Cohen, Hearings on Amendment No. 438 to S.1659 Before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., part 3, at 1326 (1967). See also 3 SEC Institutional Investor Study 980 quoted in Rep. Br. at 7-8.

These positions were never taken as to the anti-fraud provisions and are no longer viable even as to the registration provisions because non-contributory pensions are no longer viewed as a mere gift. Even though the Commission had in the past applied a no-sale rule to pension trusts as to the registration requirements of the 1933 Act, that rule was not administratively and should not be judicially applied to the anti-fraud provisions of both Acts. *SEC v. National Securities, Inc.*, 393 U.S. 453, 465-466. The purposes of the registration and anti-fraud provisions differ (*The Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1139 (2d Cir. 1976)), so that a narrow view of "sale" would be most inappropriate as to fraudulent activity. *Collins v. Rukin*, 342 F.Supp. 1282, 1287-1288 (D. Mass. 1972). Since "sale" as used in the two securities laws is not limited to transactions covered by the commercial law of sales but is to be broadly construed in view of the need

[41] This is invalid in our case because Daniel's affidavit reveals material reliance on pension benefits in retaining his job. Moreover, now that pension benefits have become such an important part of the total wage package, this conclusion has little, of any, general application. See S.Rep. No. 1734, Welfare and Pension Plan Investigation, 84th Cong., 2d Sess. 11-13 (1956); Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor, 87th Cong., 1st Sess. 32 (1961); Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 99 (1972). Pensions are second only to wages as a reason for membership rejection of settlement proposals and are well ahead of such factors as vacations, hours and overtime, working conditions and seniority. Simkin, Union Membership Rejection of Contract Settlements, Labor Relations Yearbook 332, 342 (IPIR Br. at 13).

for anti-fraud protection,[42] we conclude that the present disposition to plaintiff falls within the definitions of sale in the two statutes. See *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 266-267, 269 (7th Cir. 1967).[43]

Section 17(a) of the 1933 Act Creates a Private Cause of Action

It is now well settled that Section 10b of the 1934 Act and Rule 10b-5 give rise to a private right of action for the breach of its substantive terms. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-731. The existence of a private right of action under Section 17(a) of the

[42] As one industry spokesman has testified:

"The magnitude of the investment employers make in pension benefits for employees, encourages the tendency to present the plan in the most positive terms possible so that a return in positive employee attitudes can be realized on the investment. This leads to over simplification and an advertising sales approach. When, as is so often the case, the communication material is prepared by persons not thoroughly cognizant of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading." Testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 765 (1973)

[43] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, on which defendants rely, reaffirmed the *Birnbaum* rule (note 17 *supra*) that liability under Section 10(b) of the 1933 Act and Rule 10b-5 requires a purchaser and seller. It does not weaken our holding in *Dasho* that "sale" in the securities laws is a comprehensive term not to be narrowly construed. Similarly, *Alabama Power Co. v. Davis*, ... U.S. ....., 45 LW 4588, is not contrary to the opinion below. That case merely categorizes pension plans as a compensation for length of service rather than for daily services rendered as required under the prevailing conceptualization on employee rights given returning veterans under the Military Selective Service Act. Although *Hurn v. Retirement Trust Fund*, 434 F.Supp. 80 (C.D. Ca. 1977), and *Wiens v. International Brotherhood of Teamsters*, BNA Sec. Reg. and L.Rep. No 397 at A-13 (C.D. Ca. 1977) (where the district judge gave his ruling from the bench), support defendants, neither contains an in-depth discussion and we respectfully decline to follow them.

1933 Act is not as universally admitted. *Id.* at 733 n. 6. Since we proceed on the assumption that the operative provisions of the anti-fraud sections of the 1933 and 1934 Acts are identical for the purposes of this lawsuit, the validity of our unitary analysis requires that we deem Section 17(a) of the 1933 Act as creating a private action under the facts of this case.

As a preliminary matter, Judge Kirkland rejected Local 705's and Peick's argument that Section 17(a) of the Securities Act of 1933 does not create a private cause of action, 410 F.Supp. at 546. In the court below and in its principal brief here, no argument was presented by the International Brotherhood as to the existence or nonexistence of a private cause of action under Section 17(a). The language of Section 17(a) (15 U.S.C. § 77q(a)) is certainly broad enough to imply such a right. In fact, Section 17(a) is more specific than Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) under which private rights of action have been commonly approved. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730. Accordingly, in another opinion by the same district court as below, Judge McGarr also held that Section 17(a) impliedly calls for a private right of action. *Local 734 Trust v. Continental Illinois National Bank & Trust Co.*, [73-74 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 94,565 at 95,963 (N.D. Ill. 1974). After noting that various courts have expressly recognized the existence of such a remedy while others have assumed it, the *Local 734 Trust* court concluded "there seems to be little practical value in denying the existence of a private action under § 17 once [as here] it is established that a plaintiff has an action under § 10(b) of the 1934 Act."[44]

[44] For similar rulings by the court below, see *Freed v. Szabo Food Service, Inc.*, [61-64 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 91,317 (N.D. Ill. 1964); *Schaefer v. First National Bank of Lincolnwood*, 326 F.Supp. 1186, 1190 (N.D. Ill. 1970), affirmed in this respect, 509 F.2d 1287, 1293 (1975); *contra*, *Reid v. Mann*, 381 F.Supp. 525, 526-528 (N.D. Ill. 1974), noting the divergence of opinion on the subject.

In *Surovitz v. Hilton Hotels Corp.*, 342 F.2d 596, 604 (7th Cir. 1965), reversed on other grounds, 383 U.S. 363, we first assumed there was a private cause of action under Section 17(a), for Judge Major stated "[t]he plain language of that Section convinces us that any cause of action arising under that Section is a right of the person injured by the acts and practices therein proscribed." In *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1293 (7th Cir. 1975), this Court squarely held that Section 17(a) permits a private cause of action, stating:

> "Since [as here] fraud as well as negligence has been alleged and the section 10(b) claims established plaintiffs' section 17 claim will be allowed to stand."[45]

In Local 705's main brief before us, the Section 17(a) point is only mentioned in passing (Br. 21). Similarly, in their joint reply brief, defendants do "not particularize with respect to the non-applicability of [Section 17(a)]" (Reply Br. 8 n. 19). Defendants there observed that the 1933 Act relates to the initial issuance of securities and the 1934 Act relates to the resale market and then reasoned that Section 17(a) is the only anti-fraud provision even possibly applicable here.[46] Finally, the reply

[45] In *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1283-1284 (2d Cir. 1969), certiorari denied, 397 U.S. 913, the Second Circuit decided there was a cause of action under Section 17(a) because there was "little practical point in denying the existence of an action under Section 17 once it is established that an aggrieved buyer has a private action under Section 10(b) of the 1934 Act." The court cited many authorities upholding a private right of action for a violation of Section 17(a).

[46] As Judge Friendly has noted, "*courts have shrunk from a literal reading that* would extend the reach of the statutes beyond what could reasonably be thought to have been intended in these two great pieces of legislation and *would produce a seemingly irrational difference in the scope of their anti-fraud provisions.*" *Exchange Nat. Bank, supra*, at 1133. (Emphasis supplied.) Here the security is plaintiff's interest in the pension plan. These interests generically arose when the pension plan was first formed for the benefit of Local 705 members. This was the primary distribution of the securities.

(Footnote continued on following page)

brief states that defendants "raise but do not argue the absence of an implied right of private action under Section 17(a)" (*ibid.* n. 9). In sum, defendants either do not contest or only weakly contest the existence of a private right of action under Section 17(a) where a "sale" of a "security" is present. Having decided that the definitions of a "sale" and "security" have been met by this complaint, we reaffirm *Schaefer* and therefore hold that Section 17(a) permits Count II to proceed.[47]

The Anti-fraud Provisions of the Federal Securities Laws Have Not Been Pre-empted by ERISA

The defendants[48] and the *amici* who support their position urge that the Employment Retirement Income Security Act of 1974 (ERISA) has repealed the anti-fraud provisions of the 1933 and 1934 Acts insofar as they apply to union pension funds. Since we have concluded that the securities laws apply to a union member's interest in his pension fund, pre-emption may only be declared in the face of an explicit repealer provision or the most cogent repugnancy between the securities and pension regulatory schemes. Cf. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682-683. Neither of these triggering conditions for pre-emption of the securities laws is present in this case.

[46] *continued*
Since Daniel was a member of Local 705 at this time, he has standing to sue for fraud in the primary distribution under Section 17(a) of the 1933 Act. Each year Daniel paid more value into the fund and from time to time plan amendments were effected which Daniel claims contributed to his being defrauded. This is the conceptual predicate for finding a secondary distribution under Section 10b of the 1934 Act.

[47] In *Sanders v. John Nuveen & Co., Inc.*, ... F.2d ..... (7th Cir. 1977), we found it unnecessary to decide whether a private right of action exists under Section 17(a) when it is not accompanied by a viable Rule 10b-5 claim (slip op. 8-9). Where, as here, the Section 17(a) count accompanies a viable Rule 10b-5 count, *Sanders* requires proof of *scienter* under Section 17(a) (slip op. 9).

[48] In the court below, the International Brotherhood conceded that ERISA does not exempt "employee pension plans from the Federal Securities Laws, either expressly or by implied repeal." International's Sup. Memo. in support of Its Motion to Dismiss at 4 (Oct. 9, 1975).

Section 514(d)[49] of ERISA (29 U.S.C. § 1144(d)) is a general savings clause which provides that ERISA shall not be construed to supersede any federal law or rule thereunder. At the same time, Congress preserved state securities laws (29 U.S.C. § 1144(b)(2)(A)) in Section 514(b)(2)(A)[50] and they generally do not exempt pension interests from their anti-fraud provisions.[51] Thus ERISA's own savings clause by its own terms strongly suggests that pre-emption was not intended.

The defendants attempt to counter the statute's explicit terms by arguing that since it was universally believed pension funds were outside the scope of the securities acts, Congress saw no need to explicitly exempt a truism. But see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416 n. 20, 437. Defendants strain for support in the legislative history of the various pension regulatory acts. But all of the sources cited by the defendants[52] support only the proposition that

[49] Section 514(d) provides in pertinent part:
"Nothing in [ERISA] * * * shall be construed to alter, amend, modify, impair, or supersede, any law of the United States * * * or any rule or regulation issued under any such law."

[50] Section 514(b)(2)(A) provides in pertinent part:
"[N]othing in this title shall be construed to exempt or relieve any person from any law of any State which regulates * * * securities."

[51] The Illinois Securities Law of 1953 defines a security, for our purposes, in terms identical to the federal acts. 1975 Ill. Rev. Stat. Ch. 121½, Section 137.2-1. Pension interests are covered by the definition since "securities issued by or pursuant to * * * employee pension trusts or plans" are freed from registration requirements. 1975 Ill. Rev. Stat. 121½, Section 137.3-0. A similar definition of security and exemption from registration is included in the Uniform Securities Act which has been adopted in 32 jurisdictions. 7 Uniform Laws Ann., Uniform Securities Act §§ 501(1) and 402(a)(11) (1970) and Cumulative Annual Pocket Part at 342 (1976).

[52] S.Rep. No. 1440, 85th Cong., 2d Sess. reprinted in 3 U.S. Code Cong. & Admin. News 4145 (1958); Welfare and Pension Plans Investigation, Hearings before the Senate Subcomm. on Labor and Public Welfare, 84th Cong., 1st Sess. 943-945 (1955); S.Rep. No. 1734, 84th Cong., 2d Sess. 57, 60 (1956); 3 U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess. 4649, 4863 (1974); *id.* at 4641-4643, 4840-4842, 4847. See Mundheim and Henderson, *supra*, at 837.

"Pension and profit sharing plans are exempt from coverage under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*), unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. A voluntary contributory plan is one to which both the employee and the employer contribute and in which employees voluntarily participate. If the plan's investment in the employer's securities exceeds the employer's contribution, both the employer's securities and the interest in the plan must be *registered* under the Securities Acts with the SEC." Interim Report of the Private Welfare and Pension Plan Study, 1971, S. Rep. No. 92-634 of the 92d Cong., 2d Sess. 96 (emphasis supplied).

Herein lies the defendants' quintessential error. They confuse the requirements of the 1933 Act's registration provisions with the anti-fraud provisions of the 1933 and 1934 Acts. The registration provisions are designed to assure that investors will be furnished with all material information concerning an informed investment decision. The mechanism to implement this objective includes filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer. In contradistinction, the anti-fraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather the anti-fraud provisions are essentially a generalized self-executing prohibition against fraudulent activity. There is no invitation "to create a federal common law governing the management of pension plans." *Lugo v. Employers Retirement Fund*, 529 F.2d 251, 255 (2d Cir. 1976), certiorari denied, 45 L.W. 3250.

The fact that the SEC has historically advocated[53] a hands-off approach to the regulation of pension plans

[53] The Senate Report on the 1958 pension act explained:

"Serious consideration was given earlier to placing the administration of the bill with the Securities and Exchange Commission on the basis of its past experience in the ad-

(Footnote continued on following page)

with respect to disclosure requirements holds no brief for exempting pension plans from the anti-fraud provisions of the securities acts. Nor does the fact that ERISA provides for disclosure of a plethora of information after its effective date of January 1, 1975,[54] and that

[53] *continued*
ministration of disclosure type legislation. However, as the official representatives of the Securities and Exchange Commission clearly indicated that they did not feel they were the proper agency to handle the administration of this type of legislation and as they felt that the taking on of this function might interfere with their presently established functions, this consideration was abandoned."

S.Rep. No. 1440, 85th Cong., 2d Sess., reprinted at 3 U.S. Code Cong. & Admin. News, 4137, 4156 (1958). See also 1957 Hearings at 107, 119. The SEC's decision not to accept a regulatory role to enforce disclosure of material investment information was largely based on the conclusion that:

"Inasmuch as welfare and pension plan beneficiaries generally have no individual choice as to the securities to be purchased by a welfare or pension fund, the type of meaningful information to be furnished to them as to the management, investments and transactions of their funds may involve quite different criteria from those presently employed by the Commission under the various Federal Securities Acts." *Id.* at 119.

The SEC did not apparently object to being given plenary jurisdiction over individual retirement accounts. ERISA Leg. Hist., Vol. III at 4605. Nor was the Congress that enacted ERISA unaware that the SEC considered interests in pension funds to be securities under the 1933 Act unless excepted. See note 31 *supra*.

[54] It should be noted that the defendants concede that certain voluntary and contributory pension plans are subject to both the securities laws' registration requirements and ERISA (Rep. Br. 206). The securities laws apparently have not torpedoed such plans. This seems to follow from the continuing registration of such plans. In fact, the disclosure requirements are becoming complementary as the SEC in its revisions of Form S-8 attempts to avoid duplication of, but not defer to the ERISA requirements. Form S-8. Sec. Act Release No. 33-5488 (1974), CCH Fed. Sec. L.Rep. ¶ 7197; Sec. Act Release No. 5767 (Nov. 22, 1976), [76-77 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 80,809; *SEC v. Garfinkle* [74-75 Transfer Binder] CCH Fed. Sec. L.Rep. ¶ 95,020 (S.D. N.Y. 1975).

it heavily regulates the pension industry *ipso facto* dictate that pension funds should enjoy a blanket exemption from the anti-fraud sections. Although banks and life insurance companies are subject to stringent regulation, bank securities and insurance variable annuities and flexible funds are subject to the anti-fraud rules of the securities acts, even though they are sometimes exempt from the registration regulations of the acts. *Tcherepnin v. Knight*, 389 U.S. 332; *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65; *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202; *SEC v. National Securities, Inc.*, 393 U.S. 453.

Reading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA makes good sense. The requirements of ERISA do not substitute for the protections afforded by the anti-fraud provisions because the securities laws require that all material facts, including, of course, risk of loss, be disclosed prior to the investment decision (*TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438) while ERISA disclosure limits itself to the plan provisions[55] without a particularizing of how or how likely benefits may be lost (ERISA Section 102 (29 U.S.C. § 1022)) and may be made 90 days subsequent to the investment commitment.[56] ERISA Section 104(b)(1)(A) (29 U.S.C. § 1024(b)(1)(A)). Defendants have not shown that ERISA would provide relief to persons who have acquired an interest in a pension fund where false or misleading

[55] ERISA has other *post-hoc* disclosure times. Thus the amended provisions of a pension plan need not be disclosed until after adopted (ERISA Section 104(b)(1)(B) (29 U.S.C. § 1024(b)(1)(B)) and then only summaries of the changed provisions are given until five years later when they must be incorporated into the integrated plan summary. In the establishment of a new plan, disclosure can occur within four months of adoption. *Id.*

[56] Circumscribing the utility of ERISA disclosure further are the widespread disclaimers of liability for incorrect plans description or analysis which are contained in most post-ERISA summary plan description booklets. Under Section 14 of the 1933 Act and Section 29 of the 1934 Act, waivers of liability regarding securities are ineffective. See *Wilko v. Swan*, 346 U.S. 427; *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, ... F.2d ..... (7th Cir. July 26, 1977).

representations have been made at inception or during subsequent ratifications or upon a job offer.[57] Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits.[58] Thus the anti-fraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan, protecting them from losing benefits through ignorance of the plan provisions. Consequently, we conclude it would be unwarranted to impute an intent on the part of Congress for ERISA to override the federal or state securities laws, *SEC v. Garfinkle* [74-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,020 (S.D. N.Y. 1975), where protections offered by ERISA do not fully overlap those of the anti-fraud provisions of the securities acts. *Cf. Califano v. Sanders*, 45 LW 4209, 4210-4211.

[57] Moreover the denial of pension benefits to John Daniel occurred before the effective date of ERISA. Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides a right of action for a pension fund beneficiary "to obtain * * * appropriate equitable relief * * * to redress * * * violations" of any provision of Title I of ERISA ("Protection of Employee Benefit Rights") 29 U.S.C. §§ 1001-1144. However, there is no provision of Title I which generally prohibits the making of false or misleading representations to an employee concerning the pension fund.

[58] "ERISA § 102(b) (29 U.S.C. § 1022(b)) requires that summary plan descriptions include a statement of 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.' In theory, employees should be able to infer from this information in the plan description that there is a risk of loss, and perhaps the nature of that risk. The Department of Labor has interpreted the statutory language very narrowly, however, in proposed rules issued on June 9, 1975, 40 Fed. Reg. 24654, on which the Department has stated plan administrators may rely. 41 Fed. Reg. 16957 (April 23, 1976). Plan administrators are permitted to describe the benefits of the plan in positive language, leaving the employee to deduce the negatives implicit in the affirmative language. (IPIR Br. at 21 n *)

Judge Kirkland's disposition is not repugnant to the regulatory scheme outlined by ERISA. Although the defendants assert any remedy given plaintiff would contravene Section 203(b)(1)(F) of ERISA (29 U.S.C. § 1053(b)(1)(F))[59] because that Section permits pension plans to disregard nonforfeitable years of service before the September 2, 1974, effective date of that statute if, as here, the employee would not have been entitled to benefits because of a break in continuous service under his pension plan, the district court can fashion relief to avoid a conflict with ERISA if plaintiff should prevail on the merits. Judge Kirkland has not, contrary to ERISA, held defendants' twenty-year continuous service rule invalid. His opinion merely holds that it and other essential matters had to be disclosed, and defendants will doubtless attempt to show at trial that plaintiff was aware of that and other key requirements.

Effect on Labor-Management Relations

Even if ERISA does not exempt pension plans from the securities acts, it is argued that a resultant devastating effect on labor-management relations in and of itself should require an exemption in the absence of specific inclusory language in the securities acts. But holding the anti-fraud provisions to be applicable here will not destroy labor-management relations as defendants and the *amici* who support their position insist, for the anti-fraud provisions only probe fraudulent conduct such as the making of false or misleading representations. They do not require any complex filings. Moreover, most pension plans have been specifically exempted from the registration requirements of the 1933

[59] Section 203(b)(1)(F) provides:

"(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

"(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date."

Act. 15 U.S.C. § 77c(a)(2)(A). Since a sale triggering the anti-fraud provisions would normally occur when an employee decides to accept or continue in a job, the holding below would not be disruptive of the collective bargaining process. Indeed, the application of the anti-fraud provisions of the securities laws should enhance federal labor policy by augmenting the unchallenged statutory right of workers to be fairly represented by their union (Local 705 Br. 14 n. 31; 29 U.S.C. § 185; *Vaca v. Sipes*, 386 U.S. 171). And as *amicus* Gray Panthers point out, such an application will further the purpose of Section 302(c)(5) of the Labor Management Relations Act (29 U.S.C. § 186(c)(5)) by letting each employee know to what he is entitled under a union pension fund. 2 NLRB, Legislative History of Labor Management Relations Act of 1947, 1305 (1948). The only negative effect on unions *qua* unions will be in preventing them from defrauding their rank and file with impunity. See *Walsh v. Schlecht*, ... U.S. ....., ..., 45 LW 4126, 4128.

In sum, Congress has nowhere provided that the anti-fraud provisions of the securities acts should not apply to pension funds. The Secretary of Labor's arguments that affirmance will undermine a union's authority as exclusive bargaining agent for its employees vis-à-vis the employer or will disrupt the bargaining process are specious. Of course a finding of liability implies nothing about the entirely separate and not uncomplicated question of the form of relief which is a matter for the trial court, and the construction of formulae giving the measure of damages is for the trial court in the first instance. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386; *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 241 (2d Cir. 1974). Furthermore, as *amicus* Institute for Public Interest Representation has shown, current employees need not be disadvantaged because of the generous amortization and waiver provisions contained in Sections 302, 303 and 304 of ERISA (29 U.S.C. §§ 1082-1084). It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants.

The Parade of Horribles

The parade of horribles offered by defendants and the *amici* who support their position (including their predictions of $200 billion liabilities) results mainly from their zeal as advocates and should not distract a court from enforcing the Congressional policies contained in the anti-fraud provisions of the securities laws.[60] Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds.[61] We do not require the filing of any document or establish judicial control over pension fund operations. There should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage because all of the material information will be readily available to the plan trustees since their actuaries needed all of the information in order to set up the plan in the first place.

[60] See *Northern Securities Co. v. United States*, 193 U.S. 197, 351-352 (plurality opinion).

[61] Because of the longtime and consistent administrative practice, these pension funds might be deemed beyond the scope of the registration requirements even if they are not already exempted by 15 U.S.C. § 77c(a)(2)(A). The SEC maintains 96% of all pension plans are so exempted apparently because most funds, including Local 705's, are invested by the trust departments of major banks. (Hansen Ex. 1, App. 184a at 14-15):

> "There is only one affirmative condition — qualification under Section 401 of the Internal Revenue Code — that a pension plan must meet in order to qualify for this exemption. It has been estimated that 96% of pension plans satisfy this condition. See S. Rep. No. 92-1150, 92d Cong., 2d Sess. 110 (1972). There is also a negative condition; the exemption is lost if the plan invests an amount greater than the employer's contributions in securities of the employer." (SEC Br. at 59 n. 81).

Because the seller is the pension trust operating through the trustees, the amended complaint does not include Daniel's employers as defendants. Therefore, this opinion does not consider any possible obligations of employers under the 1933 and 1934 Acts with regard to pension plans.

Moreover, plan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing him injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws. *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1049-1051 (7th Cir. 1977). Thus if the plan documents sent to a plan beneficiary understandably disclose this information, a retiree who does not meet the vesting requirements will have no remedy under the securities acts, even if he subjectively did not comprehend the disclosed information. In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability.

ORDER AFFIRMED.

TONE, *Circuit Judge*, concurring. I am able to agree with much that Judge Cummings says in his scholarly opinion for the court, but certain doubts lead me to write separately.

For me, this is a close and difficult case. I am beset by the same doubts arising from the ordinary meaning of the words "security," "investment contract," and "sale" and from Congress' basic purpose in adopting the Securities Acts that must have influenced the several district judges who have reached conclusions inconsistent with ours. *Hurn v. Retirement Trust Fund, Etc.*, 424 F.Supp. 80 (C.D. Cal. 1976); *Wiens v. International Brotherhood of Teamsters*, BNA Securities and Law Report (No. 397, April 6, 1977, p. A-13) (C.D. Cal. 1977); *Robinson v. United Mine Workers of America Health and Retirement Funds*, Civ. No. 77-0698 (D.D.C. July 29, 1977) (as yet unreported). The series of transactions by which Daniel acquired his interest or expectancy, such as it was, do not fit neatly into the traditional concept of a sale of a security. In addition, it may well be, as Judge Gesell believes (see *Robinson, supra*), that the *Forman* case *(United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975)) and other recent Supreme Court decisions indicate "a pronounced disfavor with attempts to stretch the securities laws beyond their traditional scope." Nevertheless, considering the breadth of the definitions of "investment contract" and "sale" in the statutes themselves and the interpretation of those terms in cases we must still regard as authoritative, I believe the balance tips in favor of the plaintiff's position.

In reaching this conclusion, I have found little comfort in the opinion expressed by the SEC, as *amicus curiae*. Apparently for the first time ever, it now takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws. The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position. As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan

might well be an investment contract, the element of sale was lacking.[1] Before that, not even the existence of a security was acknowledged. It is true that the Commission's attention seems to have been focused largely on registration requirements rather than the antifraud provisions,[2] but there appears to have been no intimation over the years that it viewed the antifraud provisions as applicable. The statement in the *Institutional Investor Study* that the Commission staff "has taken the position that the Securities Act [of 1933] does not apply"[3] seemed to refer to all the disclosure provisions of that Act, not merely its registration provisions. It should be added, however, that the SEC's former position appears to have initially been based in large part on the unduly restrictive view that the employer's contribution on behalf of the employee was a gift and that a necessary volitional element was lacking; and, so far as its public statements disclose, the Commission persisted in that position without any real reexamination of its basis.

Members of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before us. It is realistic, however, to believe that most members of Congress understood that the SEC is not infallible, that the Supreme Court has been known to disagree with that agency's interpretation of the securities acts, and that the applicability of those acts to various kinds of transactions, including non-contributory

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[1] 3 SEC *Institutional Investor Study* 996 (1971).

[2] Between which a distinction can rationally be drawn. See *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969).

[3] Cited at note 1, *supra*.

pension plans, has yet to be determined by the Supreme Court. It appears likely that Congress has chosen to leave the matter in that posture. I find no persuasive evidence to the contrary in the legislative history subsequent to the adoption of the securities laws.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Order Granting Certiorari

77-753

INT. BRO. OF TEAMSTERS, et al. v. DANIEL, JOHN

77-754

LOCAL 705, TEAMSTERS, et al. v. DANIEL, JOHN

The motion of American Bankers Association for leave to file a brief, as *amicus curiae,* in No. 77-753 is granted. The motion of National Association of Manufacturers for leave to file a brief, as *amicus curiae,* is granted. The motion of ERISA Industry Committee for leave to file a brief, as *amicus curiae,* is granted. The motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief, as *amicus curiae,* is granted. The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief, as *amicus curiae,* is granted. The motion of Gray Panthers for leave to file a brief, as *amicus curiae,* is granted. *The petitions for writs of certiorari are granted, the cases are consolidated and a total of one hour is allotted for oral argument.*

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

vs.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT JOHN DANIEL IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753 and 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

VS.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT JOHN DANIEL IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

The Court of Appeals for the Seventh Circuit has unanimously affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, denying petitioners' motions to dismiss the Complaint. Respondent John Daniel opposes the issuance of a writ of certiorari to review the decision of the Seventh Circuit because of the lack of any conflict with other courts of appeal, the interlocutory nature of the judgment below, and the fact that the decision below was clearly correct and consistent with the statutory language and the applicable case law.

OPINIONS BELOW

The opinion of the district court (Pet. Local 705 App. pp. 55-80) is reported at 410 F. Supp. 541. The opinion of the Court of Appeals for the Seventh Circuit (Pet. Local 705 App. pp. 1-53) is reported at 561 F.2d 1223.[1]

QUESTION PRESENTED

The question presented in the petitions for writs of certiorari is whether plaintiff's interest in the Local 705 Pension Fund constitutes a "security" acquired by way of a "sale", as those terms are defined in the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"), for the sole purpose of applying the antifraud provisions of the federal securities laws?

STATEMENT OF THE CASE

A. Plaintiff's Claim.

The plaintiff, John Daniel, has brought this lawsuit to seek relief for certain fraudulent and illegal activities undertaken by defendants in connection with the sale of interests in the Local 705 International Brotherhood of Teamsters Pension Fund (the "Local 705 Pension Fund"). The defendants include the IBT, Local 705, the Local 705 Pension Fund, and the officers of Local 705 and trustees of the Local 705 Pension Fund. The only claims in issue on this interlocutory appeal involve Counts I and II of the Complaint relating to violations of the antifraud provisions of the federal securities laws.

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[1] Petitioners Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, and Louis F. Peick will hereinafter be referred to as "Local 705" and their petition for writ of certiorari and appendix as "Pet. Local 705" and "Pet. Local 705 App." respectively. Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America will hereinafter be referred to as "IBT" and its petition for a writ of certiorari as "Pet. IBT". The appendix filed by Petitioners in the Court of Appeals will hereinafter be referred to as "C.A. App."

Counts I and II seek relief for defendants' fraudulent and intentional misrepresentations and omissions of material fact relating to the sale to plaintiff of interests in the Local 705 Pension Fund, all in violation of Section 17(a) of the Securities Act of 1933 (the 1933 Act), 15 U.S.C. §77a-77aa, and Section 10(b), and Rule 10b-5 thereunder, of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. §78a-78jj, and 17 C.F.R. §240.10(b)-5.

B. The Plaintiff.[2]

The plaintiff, John Daniel, invested in the Local 705 Pension Fund over the period from 1955 through November, 1973, and his investment is now *worthless*. Local 705 established the multi-employer Local 705 Pension Fund as of January 1, 1955. Pursuant to the terms of the labor contracts negotiated by Local 705, part of the consideration received by Daniel and all other Local 705 members for labor services provided to Local 705 covered employers has been invested into the Local 705 Pension Fund.[3] These investments were made, pursuant to such contracts, directly

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[2] See generally the affidavit of Respondent, John Daniel, which is reproduced in Respondent's Appendix (hereinafter referred to as "R. App.").

[3] The investments by Local 705 union members into the Local 705 Pension Fund are substantial. Thus, a member of Local 705 invests $24 per week, or $1,248 per year, through employer contributions into the Local 705 Pension Fund. A. S. Hensen, Inc., Affidavit, p. 11; C.A. App. 185a p. 11. The aggregate value of all such monies invested by a Local 705 member over his trucking career are likely to be very large. Indeed, this investment is probably the largest investment a union member will ever make in his lifetime, "exceeding in value the owner-occupied single-family home, as well as the automobile." Drucker, *The Unseen Revolution*, p. 43 (1976). The aggregate value of all monies invested by Local 705 members in the Local 705 Pension Fund totals over $91 million. A. S. Hansen, Inc., Affidavit, p. 8; C.A. App. 185a p. 8.

into the Local 705 Pension Fund on behalf of such Local 705 union members by their employers as part consideration for labor services provided. The monies so invested into the Local 705 Pension Fund have been held in trust and invested and managed by Local 705 Pension Fund trustees for the benefit of all such Local 705 members who have invested in the Fund.

Daniel worked for Local 705 covered employers for a period of 22½ *consecutive years* and was denied a pension from the Local 705 Pension Fund. He first became a member of Local 705 in April, 1950, and at the same time entered into employment as a truck driver with an employer who had a labor contract with Local 705. Until his retirement at age 63 on account of poor vision, he only worked as a truck driver for employers who were under collective bargaining agreements with Local 705. Daniel has not worked at all since his retirement on December 1, 1973.

Over the whole 22½ year period of his employment career with Local 705 covered employers, Daniel's *sole* absence was a forced four month absence due to an economic lay off from his job. Although this brief absence was strictly involuntary, Local 705 has seized upon it to deny Daniel a pension for not complying with its 20 year *continuous* service vesting rule,[4] notwithstanding his admitted 22½ years of service.

The establishment of the Local 705 Pension Fund was an important element in Daniel's decision to continue working

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[4] Presumably, under the Local 705 Pension Fund continuity requirement, a Local 705 union member whose 20 years of covered service from 1955 to 1975 was interrupted by a 1 month, or even a 1 day, break in service in 1965, would be denied a retirement benefit from the Local 705 Pension Fund. This Draconian result befell plaintiff here: John Daniel was denied a pension benefit, notwithstanding his total 22½ years of covered service, because of a 4 month involuntary break-in-service in 1960.

with Local 705 covered employers.[5] Daniel understood the Local 705 Pension Fund to insure the financial security of his old age. He recognized that he would be investing in the Local 705 Pension Fund through contributions made on his behalf into the Fund by his covered employers as part of his compensation for labor services performed; and that these contributions (together with the profits earned thereon) would, in part, finance the pension benefits he counted on receiving after retirement.[6] Indeed, the economic inducements to Daniel to invest in the Local 705 Pension Fund were substantial.[7] As a result, Daniel and the other members of Local 705 consistently voted in favor of collective bargaining agreements which provided for employer contributions on their behalf into the Local 705 Pension Fund in lieu of additional direct cash wage increases.

Daniel learned of the Local 705 Pension Fund only through mailings from and other communications with the Fund itself, the trustees of the Fund, Local 705, and the officers of Local 705. However, these communications intentionally misrepresented and failed to disclose certain material facts pertaining to the value of an interest in the Local 705 Pension Fund. For example, such materials did not disclose the minimum length of time considered to con-

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[5] Daniel Affidavit Para. 7; R. App. p. 3.

[6] *Id.* Para. 6; R. App. pp. 2-3.

[7] *Id.* Para. 9-10; R. App. pp. 4-5. In fact, the economic pay off promised from a Teamster pension fund is a key selling point used both by an employer to convince an employee to enter into employment and by the IBT and its various affiliate unions to convince an employee to certify a Teamsters union as his exclusive representative in labor negotiations. For example, articles in the first eight issues of the 1976 edition of *International Teamsters* (the union's magazine) were devoted to the Teamster pension plans. Further, a Federal Mediation and Conciliation Service Study concluded that pensions were second only to cash wages as a determinate of employee decisions. Simkin, Union Membership Rejection of Contract Settlements, *Labor Relations Yearbook*, pp. 334, 342 (1967).

stitute a break-in-service in the Local 705 Pension Fund 20 years continuous service vesting rule; such materials did not disclose that all contributions made on behalf of a Local 705 member into the Local 705 Pension Fund (and all accumulated profits on the aggregate of such contributions) would be forfeited following any proscribed break in service; such materials did not disclose that service credit in one Teamster pension fund would not count toward service credit in most of the other 229 teamster pension funds; and such materials did not disclose the fact that very few Local 705 members would ever receive a pension benefit.[8]

The importance of such information is revealed by a recent statistical survey of employee pension plans which concludes that *fewer* than 10 percent of all participants in those plans which require 11 or more years of service for vesting will ever receive any pension benefits.[9] Interim Report on the Activities of the Private Welfare & Pension Plan Study, Senate Committee on Labor and Public Welfare, S. Rep. No. 92-634, 92d Cong., 2d Sess. 15, 115-153 1972) (hereinafter referred to as *Senate Pension Study*). A more material fact relating to the value of an interest in an employee pension plan could not be imagined.[10]

Finally, such materials do not disclose the success or failure of the Local 705 Pension Fund trustees in managing

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[8] Daniel Affidavit Para. 11 and 12; R. App. p. 5.

[9] See Pet. Local 75 App. p. 8.

[10] If only 10 percent of the Local 705 members participating in the Local 705 Pension Fund ever receive any pension benefits, the question arises as to who benefits from the forfeitures resulting from the unlucky 90 percent. A clue to the answer of this question may be found in a recent study of the Teamster unions. PROD, *Teamster Democracy and Financial Responsibility*, pp. 81-89 (1976). However, any real effort to uncover the basic facts relating to the operation of Teamster pension funds has been thwarted by the chilling effect of Teamster violence. See A. A. Raskin, "Can Anybody Clean Up The Teamsters," *N.Y. Times Mag.*, Nov. 7, 1976.

the monies in the Fund and the type of investments in which such monies are placed.[11] This information is vital because the performance of the Fund affects the economic return to a participant on his investment. Higher performance will ultimately lead to larger retirements benefits, and poor performance underscores the risk of loss of a participant's investment.

In brief, plaintiff John Daniel was induced to invest substantial value into the Local 705 Pension Fund by defendants' intentional misrepresentations of material facts and omissions to state other material facts relating to the value of plaintiff's investment. Daniel was induced to invest on the promise of substantial economic profits. While misrepresenting the profits to be made, the defendants also failed to set out, or even mention, the substantial risks of loss. As a result of defendants' securities fraud, Daniel's investment into the Local 705 Pension Fund is worthless.

C. The Plaintiff's Investment Vehicle.

The interest of the plaintiff in the Local 705 Pension Fund is indistinguishable from an interest in a mutual fund acquired through a periodic investment plan. This has been recognized by the SEC for over 35 years:

> "In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large." Testimony of then SEC Commissioner Purcell in Hearings on Proposed Amendments to the 1933 and 1934 Acts before the House Comm. on Interstate and For. Commerce, 77th Cong., 14 Sess., at 895-96 (1941) (the *1941 Hearings*).

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[11] Daniel Affdavit Para. 12; R. App. p. 5. The recently authorized Department of Justice criminal investigation into the management of various Teamster pension funds suggests that these monies have been unlawfully diverted from their proper purposes. See generally PROD, *Teamster Democracy and Financial Responsibility*. (1976).

Moreover, plaintiff's interest in the Local 705 Pension Fund constitutes his sole investment vehicle in the American capital markets. This is no longer unusual. Private employee pension plans, such as the Local 705 Pension Fund, are today the primary investment vehicle for most working Americans:

> "In 1940, an estimated four million employees were covered by private pensions; in 1950, the figure had more than doubled to 9.8 million; in 1960, over 21 million employees were covered; and in 1973, approximately *30 million workers participated.* Currently, *one-half* of the industrial work force in the United States are members and participants of private pension plans. It is projected that by 1984, 42.3 million workers will be covered by private pension plans. The growth of the assets owned or controlled by pension funds has closely paralleled this expansive growth. Total estimated assets of pension plans have accelerated from $2.4 billion in 1940 to *$150 billion in 1973* and are increasing at a rate projected to exceed $250 billion by 1980." S. Rep. No. 93-127, 93rd Cong., 2d Sess. 2-3 (1973). (Emphasis added)

Further, private non-insured pension funds are now the largest investors in the American capital markets. At the end of 1972, they held 11% in value of *all* New York Stock Exchange listed stocks, and in 1972 they accounted for over 23% of the dollar value of all shares traded on the New York Stock Exchange. New York Stock Exchange, *1973 Fact Book* pp. 51-52, 75 (1973).

One highly informed commentator has characterized this profound change as "The Unseen Revolution", noting that the investment by a fund participant in an employee pension plan is likely to be "the largest single asset for the middle aged American family." Drucker, *The Unseen Revolution,* p. 43 (1976); see n. 3, *supra.* However, "Unseen" or seen, what 35 years ago was perhaps a novel way of investing is now widely spread. No reason appears,

moreover, why working Americans should be excluded from the protection of the antifraud rules because of the form of their investment vehicle.[12] As the court of appeals has noted below (Pet. Local 705 App. p. 33):

> "Because employee pension plans are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of investment vehicle that the securities acts were passed to regulate. To proclaim that the securities laws encompass securities consisting of interests in pension plans is 'quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it * * *.' *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 737, . . . The type of fraud allegedly perpetrated on the plaintiff is among those the securities laws were passed to prevent and remedy."

Thus, the appropriate inquiry should not be "whether" employee pension plan securities are included, but rather "why" as a vital investment vehicle should they be excluded from the protection of the antifraud provisions of the federal securities laws. Other federal statutes are not designed to remedy the type of securities fraud present here.

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[12] The general counsel for the SEC thus stated on oral argument below:

> "The real issue . . . before this Court, is whether there can ever be any set of facts which would give rise to a cause of action under the Anti-Fraud provisions of the Federal Securities Laws for fraud and misrepresentation in the inducement of entering into a pension fund plan. This is the sole issue . . . before this Court . . . whether [under] allegations of . . . lying, stealing and cheating, [the] anti-fraud provision[s] can ever be applicable to an interest in a pension fund. We assert that they can." Transcript pp. 33-35.

D. The Course of Proceedings in the Court of Appeals

The Court of Appeals for the Seventh Circuit on interlocutory review unanimously affirmed the decision of the district court below denying petitioners' various motions to dismiss Counts I and II of plaintiff's Complaint. In holding that plaintiff's interest in the Local 705 Pension Fund was a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws, the court of appeals employed a "modality of analysis" stressing in order of attention the statutory language, the legislative history, Securities and Exchange Commission ("SEC") administrative interpretation, and economic reality and policy considerations. Pet. Local 705 App. p. 9. See generally *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 212-14 (1976).

1. Noting that the statutory definition of "security" in both the 1933 and 1934 Acts includes an "investment contract," the court applied the definition of "investment contract" as set out in *SEC* v. *W. J. Howey Company,* 328 U.S. 293, 298-99 (1946), and reiterated in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 852 (1975), to conclude that plaintiff's interest in the Local 705 Pension Fund was a security. The first element of the *Howey* test, that there be an investment of value,

> "requires that the employer-paid contributions to the pension fund . . . be properly considered to be economic compensation to the employee. This proposition is *universally accepted by the courts and commentators.* Accordingly, the investment of money prong of the *Howey* rule has been satisfied." Pet. Local 705 App. p. 16-17.[13] (emphasis added).

The second element of the *Howey* test, the presence of a common enterprise, is found in the Local 705 Pension Fund.

[13] Indeed, even petitioner IBT has conceded in its brief to the court of appeals that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for employee's labor." IBT Brief, p. 12.

And, the third element, profits from the efforts of others is also present both in the form of a

> ". . . traditional return on the pension fund participant's investment, *a dollar-profit element* in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustee's management of the pension fund." *Id.* at 19. (emphasis added).

and by virtue of the fact that

> "It is conceded that the expected payout to a beneficiary will [otherwise] exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit. . . . [Indeed, it] is precisely this promise of retirement benefits far in excess of the pensioner's investment that forms the economic inducement to invest in a pension fund." *Id.* at 18-19.[14]

2. Having determined that under the *Howey* test an interest in the Local 705 Pension Fund is a security, the court found support for its conclusion from an analysis of both the legislative history and SEC interpretation. For example, the court noted that a proposed 1934 amendment—which would exempt from the 1933 Act registration requirements "an offering made . . . in connection with a bona fide plan for the payment of extra compensation" to employees—was eliminated in conference because of the need of such employees for the protection provided by registration mandated disclosure. Pet. Local 705 App. p. 24-27. That Congress thus considered interests in employee pension plans as securities (not automatically exempt from registration) was confirmed some seven years later by then

[14] Not only do defendants "not contest that whatever is expected from the common venture will be solely derived from the efforts of persons other than the venture's investors," Pet. Local 705 App. p. 17 n.21, but also "even defendants concede [a substantial part of Daniel's gain equal to] at least 25% . . . will derive from traditional [forms of] return." *Id.* at 19.

SEC Commissioner Purcell, who in commenting on the proposed 1934 amendment stated:

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employee's plans which involve the sale of a security . . . *Any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract". 1941 Hearings* (emphasis added).

More importantly, the court noted that Congress as recently as the Investment Companies Amendments Act of 1970 recognized that interests in pension funds are securities, and codified a long standing administrative practice of the SEC by exempting such interests from the registration requirements of Section 5 of the 1933 Act. Pet. Local 705 App. p. 28 et seq. Finally, the court noted that:

> "Professors Mundheim and Henderson have characterized the SEC's interpretation of 'security' . . . as including an interest in employee pension plans *as that 'traditionally taken.'*" *Id.* at 27. (emphasis added)

3. In the next step of its analysis, the court found that its conclusion resulting from an analysis of the statute, the legislative history, and SEC interpretation—that an interest in the Local 705 Pension Fund is a security—was consistent with both economic reality and the policy considerations underlying the federal securities laws. Analogizing an interest in the Local 705 Pension Fund to an interest in both a mutual fund and a variable annuity contract, *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959) (*"VALIC"*), *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), the court stressed:

> "If the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized." Pet. Local 705 App. p. 24.

4. Having determined that an interest in the Local 705 Pension Fund is a security,[15] the court next concluded that the plaintiff acquired such security by way of a "sale," because there was a "disposition for value" or "other disposition" of such security as the statutory definitions of sale in the 1933 and 1934 Acts, respectively, require. Certainly, because plaintiff has acquired an interest in the Local 705 Pension Fund, the court noted "there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts." *Id.* at 34. Furthermore, "plaintiff's giving of his services and the employer's contribution on behalf of the employee constitutes value, thereby meeting the 'for value' requirement." *Id.* at 35. Although the court noted that

> "the definitions of sale in the 1933 and 1934 Acts do not require volition . . . [i]n any case, volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union." *Id.* at 36.

5. Finally, citing the standard for pre-emption set out in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682-83 (1975), the court concluded that the antifraud provisions of the federal securities laws had not been pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"). Pet. Local 705 App. p. 42 et seq. Indeed,

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[15] Petitioner IBT has itself conceded the presence of a "security" in the context of this case. Thus, petitioner IBT stated in its Reply Brief in Support of its Motion To Dismiss (filed Feb. 27, 1975):

> "Much of Plaintiff's argument is devoted to the proposition that interest in an employee pension plan may be 'securities' under the Federal securities laws. *This is not disputed by IBT.*" *Id.* at p. 1. (emphasis added).

See Pet. Local 705 App. p. 15, n.18.

Section 514(d) of ERISA specifically saves *all other federal legislation*[16] and Section 514(b)(2)(A) of ERISA even specifically saves *all state securities laws.*[17] Further, defendants' confusion of the requirements of the 1933 Act's registration provisions with the antifraud provisions of the

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[16] Section 514(d) of ERISA specifically repeals only the Welfare and Pension Plans Disclosure Act of 1958 (and certain provisions of Title 5 of the U.S. Code relating to administrative procedure) and *specifically saves* all other legislation:

> "Nothing in [ERISA] . . . shall be construed to alter, amend, modify, impair, or supersede, any law of the United States . . . or any rule or regulation issued under any such law."

[17] Section 514(b)(2)(A) states:

> "Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates . . . securities."

Most state securities laws consider interests in pension funds to be securities. For example, the Illinois Securities Law of 1953 definition of "security" is for our purposes identical to that found in the federal securities laws. Ill. Rev. Stat. Ch. 121½, Section 137.2-1. That it includes interests in employee pension plans is made clear by the exemption of such "securities issued by or pursuant to . . . employee pension trusts or plans" from the registration requirements. Ill. Rev. Stat. Ch. 121½, Section 137.3-0. A similar definition of "security" and exemption from registration for "any investment contract issued in connection with an employees' . . . pension . . . plan" is found in the Uniform Securities Act, 7 Uniform Laws Ann., Uniform Securities Act §§501(1) and 402(a)(11) (1970), which has been adopted in 32 jurisdictions. *Id.* at Cum. Annual Pocket Part 342 (1976). Of course, the relevance of what is considered a "security" under state law to the definition of "security" under the federal securities laws is demonstrated by the approval by this Court in *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211-212 (1967), of Professor Loss' statement:

> At the state level the Uniform Securities Act makes explicit what seems to be the view of the great majority of blue sky administrators to the effect that variable annuities are securities. 1 Loss, *Securities Regulation* 499.

1933 and 1934 Acts constitutes "defendants' quintessential error." *Id.* at 44.[18]

> "The registration provisions are designed to assure that investors will be furnished with all material information concerning an informed investment decision. The mechanism to implement this objective includes filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer. In contradistinction, the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather the anti-fraud provisions are essentially a generalized self-executing prohibition against fraudulent activity." *Id.*

Noting that the requirements of ERISA differ from the requirements of the antifraud rules, the court thus concludes that "Reading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA makes good sense." *Id.* at 46.

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[18] The court of appeals has thus noted that "the defendants concede that certain voluntary and contributory pension plans are subject to both the securities laws' registration requirement and ERISA (Rep. Br. 206). The securities laws have not torpedoed such plans. This seems to follow from the continuing registration of such plans. In fact, the disclosure requirements are becoming complementary as the SEC in its revisions of Form S-8 attempts to avoid duplication of, but not defer to the ERISA requirements." *Id.* at 45 n.54.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The unanimous decision of the Seventh Circuit Court of Appeals holding plaintiff's investment in the Local 705 Pension Fund to be a "security" acquired by way of a "sale" pursuant to the antifraud provisions of the federal securities laws is clearly correct and should not be upset. It is soundly based on statutory analysis, legislative history, administrative interpretation, judicial precedent, and public policy. It is not the type of decision for which this Court normally exercises its certiorari jurisdiction. Indeed, it is for this reason that petitioners have filed confusing petitions of great length in their search for reasons to grant the writ. However, the petitions do not establish any of those reasons set out in Supreme Court Rule 19(1)(b) as the type of considerations governing review on certiorari. Surprisingly, neither do the petitions examine the logical application of the *Howey* rule to the plaintiff's investment in the Local 705 Pension Fund.

Three reasons may be distilled from the petitions as to why a writ of certiorari should issue. First, in a rather desultory fashion petitioners argue that the decision below is incorrect. Because of the strong foundations of the opinion, petitioners' effort to undermine it are *not* directed to the statutory language or to the six Supreme Court decisions[19] interpreting the definition of "security." In-

[19] The issue of what constitutes a security under the federal securities laws has been the subject of six decisions by the Supreme Court, all of which have applied the definition of security broadly and five of which have held a security to be present:

(1) *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), holding an oil exploration program offered together with a land lease to be a security;

(2) *SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946), holding

(footnote continued)

deed, as the court of appeals has noted, see n.15 *supra*, even petitioner IBT itself has conceded the presence of a "security" in the context of this case. The definition of an investment contract was set out by this Court in *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1945), and reaffirmed in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852 (1975). After an exhaustive analysis, the court of appeals has concluded that all elements of the *Howey* rule are present here. This conclusion is consistent with the prior six Supreme Court decisions. Because the principles established in *Howey* and re-affirmed in *Forman* were applied here, there is no need for Supreme Court review. This is not a case where improper principles have been applied. It is merely one of many where a par-

(footnote continued)

a land sales contract for an orange grove accompanied by a service contract on the maintenance and harvesting of the orange trees to be a security;

(3) *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), holding a variable annuity insurance contract to be a security;

(4) *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), holding a variable annuity contract to be a security even though the contract contained a guaranteed minimum feature;

(5) *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), holding a withdrawable capital share in a savings and loan association to be a security; and

(6) *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), holding an interest in a low income cooperative housing project not to be a security because of the absence of any profit element, but stating that the touchstone of an investment contract is "the presence of an investment in a common enterprise *premised on a reasonable expectation of profits to be derived* from the *entreprenurial or management efforts* of others." *Id.* at 852.

Certainly, an investment in a pension fund is no more novel a security than an interest in an orange grove, oil lease program, or variable annuity contract.

ticular scheme utilized to make use of other people's money has been declared a security.[20] The certiorari jurisdiction of this Court is better directed to those fewer cases in which guiding principles of law can be announced rather than to those many more cases in which previously established principles are applied.

The major argument relied on by petitioners, in fact, is *not* directed to the correctness of the decision below. In emphasis, the petitioners ignore the correctness of the decision—that plaintiff's investment in the Local 705 Pension Fund is a "security" acquired by way of a "sale"—and argue the "horribles" of the effect. Indeed, petitioners disclose the weakness of their own position by relying in essence on an emotional appeal to a doomsday argument characterized by what the courts of appeals has called a "parade of horribles." Not surprisingly, this scare tactic cannot overcome the solid judicial reasoning of the court below. More importantly, these "horribles" do not bring this case within the certiorari jurisdiction of this Court.

The first "horrible" are the vast dollar damages which would allegedly result from a finding of liability here. Petitioners are, however, misguided if they believe the extent of the remedy for their securities fraud can bring this case within the certiorari jurisdiction of the Court. The size of the damages which may be awarded in a securities case is irrelevant to the question of certiorari jurisdiction. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 66-67 (1949) (J. Frankfurter, concurring). In any event, the whole question of damages is not now before the Court. Indeed, this Court has clearly held that the finding of liability in a securities fraud case is unrelated to a determination of the appropriate remedy. *Mills* v. *Electric Auto-Lite*, 396 U.S.

[20] Of course, "novel or atypical methods should not provide immunity from the securities laws." *Superintendent of Insurance* v. *Banker's Life and Casualty Company*, 404 U.S. 6, 10 n.7 (1971).

375, 386 (1970). It is for the district court at first instance to fashion an appropriate remedy where federally secured rights are invaded. *J. I. Case* v. *Borak*, 377 U.S. 426, 433 (1964).

The second "horrible" is an alleged irreconcilable conflict between the federal securities laws and the newly enacted ERISA. Here, however, petitioners are completely misguided. Petitioners inexplicably fail to note that this lawsuit involves a pre-ERISA securities fraud.[21] Because the provisions of ERISA only take effect prospectively, the plaintiff has no remedy here under ERISA. Because the provisions of ERISA only take effect prospectively, there can be no issue in this case as to the relationship between ERISA and the federal securities laws. ERISA Sections 111, 211 and 414. A determination by this Court of the nature of such a relationship must thus await some future case. Not being present here, this issue can not bring this case within the certiorari jurisdiction of the Court. In any event, as discussed below, there is no conflict between ERISA and the federal securities laws.

The third "horrible" is the alleged havoc the decision below will wreak upon the nation's collective bargaining system. Without support in either law or fact such predictions of ruin cannot withstand analysis. The decision below in no way denigrates the exclusive representative status of the collective bargaining representative. Section 9 of the National Labor Relations Act, 29 U.S.C. Section 159. The plaintiff below does not have the right to bargain individually with his employers. What he does have is the right to vote to ratify any Local 705 labor contract with covered employers. And, this right to vote arises from the Local 705 constitution and not from this lawsuit. The court of appeals has thus called petitioners' argument "specious" and concluded that:

[21] See n. 36, *infra*.

"The only negative effect on unions *qua* unions will be in preventing them from defrauding their rank and file with impunity." Pet. Local 705 App. p. 49.

The final "horrible" is the effect the decision below would allegedly have on other non-Teamster pension funds. Here, too, however, petitioners prophesize doom without support in either law or fact. To the extent that petitioners believe the decision below requires the registration of pension fund securities under Section 5 of the 1933 Act, they have made their "quintessential error." Pet. Local 705 App. p. 44. Most pension fund securities are exempted from registration by Section 3(a)(2) of the 1933 Act as amended by the Investment Companies Amendments Act of 1970; the rest are exempted by "longtime and consistent [SEC] administrative practice." Pet. Local 705 App. p. 50 n.61. "In contradistinction [to the registration requirements] the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents." *Id.* at 44. To the extent that petitioners believe most non-Teamster pension funds will be exposed to ruinous liability, they fall back on questions of remedy not now before the Court. In any event, petitioners here cannot avoid the fact that the fraud engaged in by the Teamster defendants is particularly glaring. In contrast, there is absolutely no evidence of any sort that other non-Teamster pension funds have engaged in the type of *intentional* securities fraud complained of here. *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

The most telling point is that petitioners concede certain employee pension plans are subject both to ERISA and the federal securities laws. Petitioners acknowledge that certain "voluntary and contributory" pension plans are subject to the antifraud rules as well as to the registration requirements of the 1933 and 1934 Acts. Notwithstanding petitioners' fears, the application of the federal securities laws to these plans has not wreaked havoc on them. Indeed, the continuing creation of such plans indicates well the

lack of any alleged burden. See Form S-8, Sec. Act. Release No. 33-5488 (1974), CCH Fed Sec. L. Rep. ¶7,197. In fact, the securities laws and ERISA have become increasingly complementary as the SEC continues its efforts to revise Form S-8 to avoid duplication of, but not defer to, the ERISA requirements. Sec. Act. Release No. 5767 (Nov. 22, 1976), CCH Fed. Sec. L. Rep. ¶80,809 at 87,110-11; *SEC* v. *Garfinkle*, CCH Fed. Sec. L. Rep. Para. 95,020 (S.D.N.Y. 1975). Petitioners have thus suggested no good reasons why the Local 705 Pension Fund should be treated any differently from such other employee pension plans.

Finally, petitioners' argument that various conflicts of decision bring this case within the certiorari jurisdiction of the Court is mistaken. There are no decisions in either this Court or other courts of appeal which hold an investment in a pension fund not to be a "security" acquired by way of a "sale" for purposes of the antifraud rules. The alleged presence of differing decisions in federal district courts in other circuits does not justify the granting of certiorari.

The decision below is, therefore, not the type of decision for which this Court should exercise its certiorari jurisdiction. No constitutional issue is involved; there is no conflict among the circuits; there is no conflict between federal statutes. All that the decision below involves is the application of a particular principle of law, the *Howey* rule, accepted as controlling by the petitioners, to a particular set of facts. And, with respect to this question, Supreme Court review is clearly premature because the decision below is on an interlocutory order. See, e.g., *American Construction Co.* v. *Jacksonville, T. and K.R. Co.*, 148 U.S. 372, 384 (1893). With or without Supreme Court review of the court of appeals decision, a trial on the remaining counts must be held on the issues raised by plaintiff's Complaint. And, indeed, if plaintiff does not

prevail on the facts at trial, ultimate review by this Court will prove unnecessary. Accordingly, the interlocutory decision below is not now ripe for review by this Court, and the expressed concern of several interested *amici* cannot make it so.

I. THE DECISION BELOW IS CLEARLY CORRECT

The Court of Appeals for the Seventh Circuit has in a closely reasoned and comprehensive opinion unanimously held that plaintiff's investment in the Local 705 Pension Fund was a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws. See pp. 10-15, *supra*. The mode of analysis by which the court below reached this decision is in accord with that mandated by this Court. See *Ernst and Ernst, supra*. The decision is, furthermore, supported by legislative history, economic reality, and policy considerations.

A. The Presence of A Security

The first question addressed by the court of appeals was whether an interest in the Local 705 Pension Fund is a security. Sections 2(1) of the 1933 Act and 3(a)(10) of the 1934 Act. To answer this question, the court applied the *Howey* rule,[22] finding all three elements of this rule present. Petitioners attack this conclusion on the unlikely grounds that no investment has been made and no profits are expected. To so argue is to argue in the dark. To establish the first element of the *Howey* rule all that need be shown is that an investment of value by the plaintiff has taken place. Whether viewed as an investment of services direct or an investment of money through the form of employer contributions made on behalf of the employee into the Local 705 Pension Fund, such an investment has clearly

[22] *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1945) defines an "investment contract" as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."

been made. *This proposition is now universally accepted*—by Congress,[23] by the courts,[24] and by commentators.[25]

The Local 705 Pension Fund which receives the investments of the Local 705 union members constitutes without dispute the common element of the *Howey* rule. Finally, the presence of profits from the efforts of others, the third element of *Howey*, also cannot be disputed. However, petitioners attempt to discredit the profit Daniel expects to receive by claiming it derives from the forfeited pensions of other union members. This attempt must fail. First, as noted by the court of appeals and even by petitioners themselves, a substantial part of the profits from

[23] "Regardless of the form they take, the employer's share of the cost of these plans or the benefit the employers provide are a form of compensation." S. Rep. No. 1440, 85th Cong., 2nd Sess. at 4 (1958).

[24] See, e.g., *Lewis* v. *Benedict Coal Co.*, 311 U.S. 459, 469 (1969) ("another form of compensation to the employees"); *Inland Steel* v. *NLRB*, 77 NLRB 1 (1948), enforcement granted 170 F.2d 247 (7th Cir. 1948), *cert. den.* 336 U.S. 960 (1949) (realistically viewed such plans are part of the entire wage structure); *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Tex. 1961) (the investment may take the form of property or services).

[25] Former SEC Chairman Cohen has thus commented:

> "Both [an] investor [in a mutual fund] and employee [in an employee pension plan] are *investing money which they have earned*. Realistically, the employee is simply putting into a fund for his future use that which he would otherwise get in his paycheck." (emphasis added)

Hearings on S.3598 before the Subcomm. on Labor, 92d Cong., 2nd Sess. at 231 (1972) (the *"1972 Hearings"*). And, the noted commentator Peter F. Drucker has said:

> "Payments into a pension fund, whether made by employer, employee, or both, are 'deferred wages' and 'labor costs'."

The Unseen Revolution at 8 and 34 (1976). Indeed, even petitioner IBT concedes that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for an employee's labor." See n.13, *supra*.

an investment in the Local 705 Pension Fund derives from traditional forms of return. See p. 11 and n.14, *supra*. Second, the source of gain is irrelevant to the presence of profits. Profits exist when the return received, regardless of their source, exceeds the investment. Thus, profits are defined in *Black's Law Dictionary* at 1376 (1957):

> An excess of the value of returns over the value of advances

And, in *Webster's New Collegiate Dictionary* at 919 (1973):

> The excess of returns over expenditures in a transaction

Because the expected payout to Daniel is conceded to exceed Daniel's investment in the Local 705 Pension Fund, the profit element of *Howey* is satisfied by this fact alone.[28]

The conclusion that an interest in the Local 705 Pension Fund is a security has, moreover, the support of both legislative history and SEC interpretation. As early as 1941, both SEC commissioner Purcell[27] and the assistant general counsel of the SEC[28] noted that an interest in an

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[26] For example, in both *SEC* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974), and *SEC* v. *Glenn W. Turner, Enterprises, Inc.*, 474 F.2d 476 (9th Cir.), *cert. den.* 414 U.S. 921 (1973), the profit there present for any particular investor in the pyramid sales scheme had as its source a substantial part of the investment of another investor in the scheme. Likewise, the payout to an annuitant in *VALIC*, *supra*, was more likely to come from the investments of new annuitants than from a return to the maturing annuitant of his original investment and the income earned on it.

[27] See p. 12, *supra*.

[28] "The security which is involved within the meaning of Section 2(1) of the Act in connection with the offer or sale of interests in certain types of [employees pension] plans is normally an 'investment contract.' Frequently the interests may come also within the phrases 'certificate of interest or participation in a profit sharing agreement.'" Opinion of Ass't Gen. Counsel of SEC, [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. Para. 75,195 (1941).

employee pension plan is a security. This position has been further confirmed by Manuel F. Cohen, former chairman of the SEC, who has stated categorically:

> "The first and perhaps the most important point I can make to this subcommittee [is that] . . . *Pension plans represent an investment medium. Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933*, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute . . ." *1972 Hearings* at 231. (emphasis added)

It is thus not surprising that this consistent interpretation[29] by the SEC has been characterized by Professors Mundheim and Henderson as that "traditionally taken" by the SEC. Mundheim and Henderson, Applicability of the Federal Securities Laws To Pension and Profit Sharing Plans, 29 *Law and Contemp. Prob.* 795, 811 (1964). Petitioners "quintessential" error in their review of the legislative history is their reliance on statements made in the context of whether all such employee pension plan interests have to be registered under the 1933 Act.[30]

Petitioners equally misread the Investment Companies Amendments Act of 1970 (the 1970 Act). There, Congress *specifically recognized* that interests in employee pension plans are securities, and, as such, provided for the exemption of certain of those securities from the registration re-

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[29] See also Chapter VII of the Summary Volume of the *Institutional Investor Study* (1971), which concludes (at p. 69) that: "interests of participants in [employee pension] plans meet the definition of 'security' under the Securities Act of 1933."

[30] For example, Commissioner Purcell has stated in the *1941 Hearings* (at 898):

> "Now, in anything I have said, I do not mean to imply that every employees' plan requires registration. . . . Even where the plan involves securities, registration is not required in many cases. . . ."

quirements of the 1933 Act.[31] Whether the employee pension plan is maintained at a bank, and thereby exempt from registration, or maintained elsewhere and not exempt, the clear Congressional implication is that interests in employee pension plans are securities not automatically exempt from registration. And, of course, exemption from registration does *not* mean exemption from the antifraud rules.

Petitioners' attempt to restrict the clear language of the 1970 Act is clearly wrong. As the court of appeals has noted:

> "Defendants . . . seek to downplay the importance of the 1970 Amendments by arguing that the 1970 exemption relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds, claiming that the sale to employees of interests in the underlying pension funds is entirely outside the scope of the 1970 Act. However, these arguments relate to legislative history concerning an earlier version of the Act which referred only to 'collective' trust funds. A close study of the legislative history shows that the version of the Act which was finally adopted contemplated the interests sold to employees in the underlying pension fund." Pet. Local 705 App. p. 30.

The language of Section 3(a)(2) of the 1933 Act, as amended by the 1970 Act, clearly refers to "any interest or participation in a single . . . trust fund . . . which interest

[31] Section 3(a) of the 1933 Act now reads:

> Section 3(a). Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities: . . . (2) . . . any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under Section 401 of [the Internal Revenue Code of 1954]. . . .

or participation is issued in connection with . . . a pension plan." This is an exact description of the interest plaintiff has acquired in the Local 705 Pension Fund. Petitioners can not avoid the clear statement of Congressional intent:

> "[This section] would exempt . . . bank . . . *administered corporate pension plans* from the registration and reporting requirements of the Federal Securities Act, *but it does not exempt them from the antifraud provisions of those acts.*" (emphasis added)

Report of the House Comm. on Inters. and For. Commerce on the Investment Company Amendments Act of 1970, H. Rep. No. 91-1382, 91st Cong., 2d Sess. at 10 (1970).

B. The Presence of A Sale

The second question addressed by the court of appeals was whether plaintiff acquired his security in the Local 705 Pension Fund by way of a "sale". Petitioners' argument that no sale has occurred ignores the express words of the statute. Section 2(3) of the 1933 Act defines "sale" to include "*every* disposition of a security or interest in a security for value." (emphasis added). And, Section 3(a)-(14) of the 1934 Act does not even include the "for value" requirement, defining "sale" to include "any contract to sell or *otherwise dispose of.*" (emphasis added). Since without dispute the plaintiff has acquired an interest in the Local 705 Pension Fund, and since that interest is a security, there has been a *disposition* of this security to the plaintiff. The broad and unambiguous definition of "sale" in the 1934 Act has thus been satisfied. Moreover, the "for value" requirement of the 1933 Act definition is also satisfied, as noted above, by the plaintiff's giving of services, or, alternatively, by the contribution on plaintiff's behalf by his employer of a portion of plaintiff's economic

compensation. See pp. 22-23, *supra; Collins* v. *Rukin,* 342 F. Supp. 1282 (D. Mass. 1972).[32]

This straightforward application of the unambiguous statutory definition is not overcome by petitioners' characterization of the Local 705 Pension Fund as "non-contributory." To call a pension plan non-contributory is a misnomer if it is also to mean that members of the plan do not give value in exchange for the acquisition of securities in the plan.[33] Here, value is concededly given.

Likewise, calling the Local 705 Pension Fund "compulsory" does not overcome the unambiguous definition of sale. As this Court has clearly stated, the language of the statute governs and the words "dispose" and "disposition" are not modified by the adjective "voluntary." There is thus no "volitional" element in the definition of sale in

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[32] The court of appeals has thus concluded:

"The defendants maintain there is a controlling conceptual distinction between "non-contributory" plans and plans where the employee first receives cash and then pays over such cash into the pension fund. We refuse to subscribe to undue literalism. An employee's performance of services satisfies the for value requirement of the 1933 Act. See *Collins* v. *Rukin*, 342 F.Supp. 1282 (D.Mass. 1972); *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Tex. 1961); *Lawrence* v. *SEC*, 398 F.2d 276 (1st Cir. 1968); . . . Recent SEC interpretations also support the view that an interest in a non-contributory plan is gained for value. *Oklahoma National Gas Co.* [71-72 Transfer Binder] CCH Fed.Sec.L.Rep. ¶78,583 (1971); *Allis-Chalmers Corp.* [72-73 Transfer Binder] CCH Fed.Sec.L.Rep. ¶78,803; . . . *Missouri Research Laboratories, Inc.* [72-73 Transfer Binder] CCH Fed. Sec.L.Rep. ¶79,036." Pet. Local 705 App. p. 35.

[33] "The reality of the situation is that the employee contributes the fruits of his labor, regardless of the form of contribution. All benefit plans are compensation for employment; therefore all plans are contributory. Likewise, all employment choice is voluntary; therefore all plans are voluntary." Note, Employee Compensation Plans: The Need for Stricter Regulations, 6 *St. Mary's L.J.* 192, 204 (1974).

either the 1933 or the 1934 Act. In fact, this volition argument was impliedly rejected by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). And, it is as stale as old Rule 133 which was rescinded in 1972. Compare (the now rescinded) old Rule 133, 17 C.F.R. Section 230.133 (1964) with Sec. Act. Release No. 5246 (1972).

In any event, if required the volitional element has been met here either by accepting and continuing employment or by express ratification of the collective bargaining agreement which provides for investment into the Local 705 Pension Fund. As the court of appeals concluded:

> "volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union. Similarly, in the corporate merger context (where a vote by the shareholders to merge is binding notwithstanding any individual shareholder's vote to the contrary), cases under the anti-fraud provisions have held that a sale occurs where there is no voluntary action by the alleged purchaser. *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir. 1967); *Zeller* v. *Bogue Electric Manufacturing Corp.*, 476 F.2d 795 (2d Cir. 1973); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334 (2d Cir. 1974), certiorari denied, 417 U.S. 932." Pet. Local 705 App. p. 36.

The decision below is in fact a narrow opinion. It merely applies long established definitions under the federal securities laws to a particular set of facts. Indeed, the facts themselves are not really novel for all parties to the case concede that interests in certain employee pension plans are securities subject to the antifraud rules. The petitioners have not given any good reasons why an investment in the Local 705 Pension Fund should be treated any differently. Neither have the petitioners established a conflict between the decision below and the prior six

Supreme Court cases interpreting the definition of "security" under the federal securities laws. There is no need now for a seventh opinion on the same question.

II. THE PARADE OF HORRIBLES DO NOT BRING THIS CASE WITHIN THE CERTIORARI JURISDICTION OF THE COURT

The thrust of petitioners' confusing arguments is that somehow the effects of the decision below are so horrible as to bring this case within the certiorari jurisdiction of the Court. A doomsday argument is, of course, a mainstay of any defendant's brief. However, this doomsday argument has been duly considered by the court of appeals on its merits and unanimously rejected:

> "The parade of horribles offered by defendants and the *amici* who support their position (including their predictions of $200 billion liabilities) results mainly from their zeal as advocates and should not distract a court from enforcing the Congressional policies contained in the anti-fraud provisions of the securities laws. Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds. We do not require the filing of any document or establish judicial control over pension fund operations. There should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage because all of the material information will be readily available to the plan trustees since their actuaries needed all of the information in order to set up the plan in the first place." Pet. Local 705 App. pp. 49-50.

A. The Question of Damages Is Not Now Before The Court.

Petitioners most incredible argument is the doomsday prophecy that application of the securities antifraud rules will result in "vast retroactive liabilities." Pet. IBT at p. 11. The size of this king's ransom is estimated by *amicus* to be 200 billion dollars ($200,000,000,000). ERISA Industry Committee *amicus* brief before the court of appeals at p. 29. As might be expected with such an incredulous figure, petitioners' apprehension of disaster rests on a misconception of this case and of the federal securities laws. More importantly, the size of damages which may be awarded in a securities case is irrelevant to the question of certiorari jurisdiction. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 66-67 (1959) (J. Frankfurter concurring) ("importance of the outcome merely to the parties is not enough" to warrant granting certiorari).

Petitioners are, in fact, rather presumptuous to set out at this stage of the litigation their own preferred remedy for their own securities fraud, and then to object to the arithmetic consequences. Indeed, the issue of what is an appropriate remedy for petitioners' fraud is not before the Court. Rather, the question presented is *solely* whether the antifraud rules of the federal securities laws are applicable to the fraudulent sale to plaintiff of a security in the Local 705 Pension Fund. The question of damages is for the district court to decide.[34] This is particularly so

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[34] Petitioners' implication that a proper remedy here for their securities fraud would endanger the pensions due presently vested Local 705 members is also both wrong and irrelevant. It is wrong because vested union members should not benefit from fraud perpetrated against fellow employees. It is irrevelant because this case involves "no issue of priority of claims" against the Local 705 Pension Fund. Indeed, this Court has rejected just such an argument:

> "The respondents have argued that we should not declare the petitioners' withdrawable capital shares securities under § 3(a)(10) because the petitioners, if they are successful in their suit for rescission, will gain an unfair advantage over other investors in City Savings in the distribution of the limited assets of that Association, which is now in liquidation. *This argument, at best, is a non sequitur. This case in its present posture involves no issue of priority of claims against City Savings.* This case involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners—a

(footnote continued)

here where the decision below is on an interlocutory order denying defendants' motions to dismiss. This Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970), has stated quite clearly that a finding of liability is unrelated to a determination of the appropriate remedy:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation *implies nothing about the form of relief to which they may be entitled.* We held in *Borak* that upon finding a violation the courts were 'to be alert to provide such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief." (Emphasis added)

See *J.I. Case* v. *Borak*, 377 U.S. 426, 433 (1964). Also directly in point is *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 241 (2d Cir. 1974), where the second circuit stated:

> "Finally, having held that all defendants violated Section 10(b) and Rule 10b-5 and that they are liable to plaintiffs in this private action for damages, we leave

(footnote continued)

> question which turns on our construction of the term 'security' as defined by § 3(a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to that narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in the Association." (Emphasis added)

Tcherepnin v. *Knight*, 289 U.S. 332, 346 (1967). The court of appeals has thus noted:

> "Furthermore, as *amicus* Institute for Public Interest Representation has shown, current employees need not be disadvantaged because of the generous amortization and waiver provisions contained in Sections 302, 303 and 304 of ERISA. . . . It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants." Pet. Local 705 App. p. 49.

> to the district court the appropriate form of relief to be granted, including the proper measure of damages. This comports with the procedure followed in other cases where appellate courts have determined issues of liability for violations of the securities laws. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-89 (1970); *J. I. Case* v. *Borak*, 377 U.S. 426, 433-35 (1964);
> . . .
> In the instant case there are *especially compelling reasons for following this procedure. Since the appeal comes to us from an interlocutory order denying defendants' motion for judgment on the pleadings, there was no issue before the district court and of course no adjudication below on the form of relief to be granted.*" (Emphasis added)

Thus, it is for the district court, at first instance, to fashion a remedy so as to grant the necessary relief where federally secured rights are invaded.

Petitioners' financial doomsday argument is not only improper, it is also just plain wrong. The 200 billion dollar liability prophesized is absurd. Petitioners ignore the fact that this lawsuit involves not a breach of the 1933 Act registration requirements, but a violation of the antifraud rules. The decision below expressly does not find the registration requirements of Section 5 of the 1933 Act applicable here:

> "Finally, we wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds. We do not require the filing of any document or establish judicial control over pension fund operations." Pet. Local 705 App. p. 49-50.

The sale of securities by most pension funds—estimated by the court of appeals to be as high as 96 percent, *Id.* at p. 50 n.61—are exempted from the registration requirements by Section 3(a)(2) of the 1933 Act. And, those not exempted by Section 3(a)(2) "might be deemed beyond the scope of the registration requirements . . . because of . . . longtime and consistent [SEC] administration practice." *Id.* Furthermore, what is considered a "sale" for purpose of the

antifraud rules is not necessarily a "sale" for purposes of the registration requirements. For example, in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), this Court held that a corporate merger involved a "sale" for purposes of the antifraud rules, notwithstanding the existence of a SEC rule providing that no "sale" was involved for purposes of the registration requirements. See, e.g., *Exchange National Bank of Chicago* v. *Touche Ross & Co.*, [76-77] CCH Fed. Sec. Law Rep. ¶95,614 at p. 90,064 (2d Cir. 1976) ("the purposes of the registration and antifraud provisions differ. . .").

In any event, the extent of any liability for pension fund securities fraud is limited by the applicable statute of limitations, the requirement of scienter, the extent of plaintiff's knowledge, and remedy considerations. The decision below is restricted to the particular facts of a Teamster union multi-employer pension fund. It is not necessarily applicable to a non-union corporate employee pension fund which may have characteristics unlike those of the Teamsters pension fund here involved. These limitations have been expressly recognized by the court of appeals:

> "Moreover, plan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws. . . . Thus if the plan documents sent to a plan beneficiary understandably disclose this information, a retiree who does not meet the vesting requirements will have no remedy under the securities acts, even if he subjectively did not comprehend the disclosed information. In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability." Pet. Local 705 App. pp. 50-51.

The securities fraud engaged in by the Teamster pension funds has been particularly egregious. The fraud complained of involves not merely the omission to disclose one particular fact, but the whole complex scheme whereby the Teamster defendants have conspired to cause the Teamster rank and file to invest their savings in Teamster pension funds substantially more attractive in appearance than in reality.[35] The Teamster pension funds stand out because they typify the whole host of abuses that can develop when one has the use of other people's money. L. Branders, *Other People's Money* (1914). They stand out because the abuses engaged in are particularly glaring. They stand out because of the *scienter* underlying the fraud perpetrated against the rank and file. Petitioners' implied assertions that all, or even most, other pension funds are sold by means of an *intentional* securities fraud simply have no basis in fact. Following *Ernst and Ernst*, the negligent or innocent misrepresentation or omission to state a material fact about a pension fund security is not grounds for a cause of action under Sections 17(a) and 10(b) of the 1933 and 1934 Acts respectively.

Finally, petitioners fail to note that this lawsuit involves a pre-ERISA securities fraud.[36] Assuming, *arguendo*, that ERISA somehow pre-empts the federal securities laws, petitioners still would be unable to avoid liability under the

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[35] See generally pp. 5-7 and n.10 and n.11, *supra*.

[36] The plaintiff invested in the Local 705 Pension Fund on the fraudulent inducement of defendants over the period from April, 1955, through November, 1973. In contrast, ERISA was enacted on September 2, 1974, and its provisions *only* take effect prospectively. ERISA Sections 111, 211, and 414; See, e.g., ERISA Section 203(b)(1)(F).

antifraud rules because the provisions of ERISA only take effect prospectively. To apply the shield of ERISA pre-emption retroactively would be to deny plaintiff relief both under the federal securities laws and under ERISA. This Congress did not intend. Petitioners' argument based on ERISA is, therefore, of no use to them. However, the adoption of petitioners' ERISA pre-emption argument would provide a shield from liability for pension fund securities fraud *subsequent* to the enactment of ERISA. In this way, too, the extent of any liability for pension fund securities fraud would be limited.

B. There is No Conflict with ERISA

Petitioners place their primary reliance on ERISA as a shield from liability for their intentional securities fraud. This reliance is completely misplaced. There is no conflict between ERISA and the court of appeals decision below. As noted, this case involves a pre-ERISA securities fraud. Petitioners thus must fail in their effort to use ERISA to bring this case within the certiorari jurisdiction of the Court. Moreover, even were ERISA applicable here, it would not immunize petitioners from liability under the antifraud rules of the federal securities laws.

There is nothing in the language of ERISA to support the conclusion that ERISA was intended to pre-empt the antifraud rules of the federal securities laws. *To the contrary*, Section 514(d) of ERISA, for our purposes, *specifically saves* all other legislation:

> Nothing in [ERISA] . . . shall be construed to alter, amend, modify, impair, or supersede, any law of the United States . . . or any rule or regulation issued under any such law.

In addition, not only does ERISA not pre-empt the federal securities laws, it also does not pre-empt state securities laws. The ERISA provisions pre-empting all state laws relating to employee benefit plans expressly do not pre-

empt state securities laws relating to employee benefit plans. Section 514(b)(2)(A) states: "Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates . . . securities."

Not only the express language of ERISA, but also its legislative history supports the conclusion that ERISA was not designed to pre-empt the federal securities laws. This legislative history makes plain the Congressional understanding that interests in employee pension plans are "securities"—in most cases exempt from registration under the 1933 Act. See Pet. Local 705 App. pp. 43-44. In any event, Congressional intent in the securities law area is best seen by looking directly to the federal securities laws, including the recent Investment Companies Amendments Act of 1970, all of which is specifically saved by ERISA.

In fact, only when both ERISA and the antifraud rules of the federal securities laws apply to employee pension plans does the regulatory pattern make good common sense. ERISA contains, for example, specific provisions regulating the funding of employee benefit plans, establishing a plan termination insurance program, and outlining a voluntary program for the portability of vested pension benefits. As such, ERISA is designed to cure a variety of abuses in the pension area, including primarily those dealing with the ongoing administration of employee pension funds. However, ERISA does not mandate full and fair disclosure to an employee *prior* to his making an investment in an employee pension plan. ERISA *does not regulate the circumstances of entry* into an employee pension plan. Instead, ERISA mandates minimum standards relating to the *operation* of an employee pension plan. The substantive regulation of an industry by one statute (viz., ERISA) together with the regulation of the sale of securities by issuers in that industry by another statute (viz., the federal securities laws) makes good sense. *It is not unusual in our federal*

scheme.[37] The question of overlapping jurisdiction of employee pension plans was specifically recognized by Congress and dealt with in the Investment Company Amendments Act of 1970.

The plaintiff here has no remedy under ERISA because he was injured by a pre-ERISA securities fraud. More importantly, he would have no remedy under ERISA even were ERISA applicable. Indeed, this has not been disputed by petitioners, and it is recognized by the court of appeals. "*There is no provision of Title I [of ERISA] which generally prohibits the making of false or misleading representations to an employee concerning the pension fund.*" Pet. Local 705 App. p. 46 n.57 (emphasis added).

Disclosure under the federal securities laws differs in content and timing from ERISA disclosure. For example, under the federal securities laws disclosure of all material facts, when required, must be made prior to or at the time an investment decision is taken and a security purchased. In contrast, the disclosure required by ERISA is limited to the substantive plan provisions and need only be made 90 days *after* an employee becomes an investor in an employee pension plan. ERISA Section 104(b)(1)(A). The court of appeals has thus concluded:

> "The anti-fraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan,

[37] For example, the Investment Company Act of 1940 provides for the substantive regulation and administration of mutual funds—while the sale of mutual fund securities still must comply with the disclosure and antifraud rules of the 1933 and 1934 Acts. In like fashion, although banks are subject to extensive state and federal substantive regulation, bank securities are still securities subject to the antifraud rules, even though exempt from registration. *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967).

> protecting them from losing benefits through ignorance of the plan provisions. Consequently, we conclude it would be unwarranted to impute an intent on the part of Congress for ERISA to override the federal or state securities laws, *SEC* v. *Garfinkle* [74-75 Transfer Binder] CCH Fed.Sec.L.Rep. ¶95,020 (S.D.N.Y. 1975), where protections offered by ERISA do not fully overlap those of the antifraud provisions of the securities acts." Pet. Local 705 App. p. 47.

The effective application of both the federal securities laws and ERISA to employee pension plans will in no way impede or interfere with either statutory scheme. They work together.

III. THERE IS NO CONFLICT OF DECISION

There is no conflict of decision between the decision of the court of appeals below and any other decision of this Court or any other courts of appeal. Petitioners' respective assertions of the type of conflict necessary for certiorari are thus misguided. There are *no* decisions in either this Court or other courts of appeal which hold an interest in a pension fund not to be a "security" acquired by way of a "sale" for the purposes of the antifraud rules of the federal securities laws.

One of the prime purposes of certiorari jurisdiction is the attempt to bring about uniformity of decisions on a matter among the federal courts of appeal—those courts where decisions are otherwise final in the absence of Supreme Court review. A conflict between decisions of courts of appeals will thus often justify the granting of certiorari. Here, there is concededly no such conflict. A conflict of decisions between circuits also helps to frame the issues for review by this Court. Not only are the issues in *Daniel* thereby not ripe for review due to the lack of circuit conflict, but also these issues are not ripe in the context of *Daniel* itself because of the interlocutory nature of the decision. See pp. 47-48, *infra*.

The presence of differing decisions in federal district courts in other circuits will thus not justify the granting of certiorari. Rule 19(1)(b) of the Supreme Court of the United States. Petitioners' reliance on such district court decisions elsewhere is, therefore, misplaced.[38] In addition

[38] In any event the district court cases cited by petitioners provide no support for petitioners' position because they are either inapposite or conclusory. For example, *Hurn* v. *Retirement Trust Fund*, 434 F. Supp. 80 (C.D. Cal. 1977), can provide no support for petitioners because only two sentences in *Hurn* are directed to the issues decided in *Daniel*, and such two sentences are strictly conclusory, with no reasons or analyses given. And, *Wiens* v. *International Brotherhood of Teamsters*, BNA Sec. Reg. and L. Rep. No. 397 (C.D. Cal. 1977), provides no support because, as a ruling from the bench, it likewise is merely a conclusory opinion. See Pet. Local 705 App. p. 39 n.43. Both *Hurn* and *Wiens* were thus not followed by the court below. *Id.*

Robinson v. *United Mineworkers of America*, 435 F. Supp. 245 (D.D.C. 1977), similarly provides no support for petitioners because it is inapposite. There, surviving spouses and dependents of deceased coal miners sought an order declaring their right to permanent health care coverage by the defendant United Mine Workers of America Health and Retirement Funds. In holding that plaintiff's interest in such Health Funds was not a "security", the court in *Robinson* expressly stated that: "*Daniel* is distinguishable from the instant case." 435 F. Supp at 246, n. 1. Given this recognition by the *Robinson* court itself, it is surprising that petitioners do not themselves see the distinction. In *Robinson*—and unlike *Daniel*—the plaintiffs as spouses and dependents of the deceased coal miners could:

> "in no sense . . . be viewed as investing in the [Health Funds] . . . since they contributed nothing to the employers in return for the employers' payment of per-tonnage royalties into the [Health Funds] . . . on behalf of and in return for the services of the union miners. The *Robinson* plaintiffs were donees instead of purchasers." Pet. Local 705 App. p. 20.

More importantly, *only* the length of time health care coverage was to be extended to the plaintiffs was in issue in *Robinson*.

> "That case therefore involved merely the consumption of 'free'

(footnote continued)

to such district court decisions, petitioners also seek without success to establish a conflict between *Daniel* and other circuit court decisions and certain decisions of this Court. For example, petitioner Local 705 cites four completely irrelevant cases *interpreting completely different statutes* in its vain effort to locate a conflict.[39] In citing these cases, petitioner ignores the statutory definition of "security" and "sale" under the federal securities laws, and the mandate of this Court that "the starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (J. Powell concurring). *Other statutes are irrelevant to this inquiry*:

(footnote continued)

> medical care rather than, *as in Daniel, an actual dollar financial return on investment*, i.e., 'an expectancy of dollar benefits', *which the investor could then use to purchase anything* he chose." Pet. Local 705 App. p. 21. (emphasis added)

In contrast to *Hurn*, *Wiens* and *Robinson*, the recent district court decision in *Schlansky* v. *United Merchants & Manufacturers, Inc.*, No. 76 Civ. 5799 (S.D.N.Y. Nov. 10, 1977) is both directly in point and rigorous in its analysis. There, following the decision in *Daniel*, the court held that an interest in the United Merchants Pension Plan was "an investment contract as defined in *Howey* . . . acquired in a sale and subject to the anti-fraud provisions of both the 1933 and 1934 Acts." *Id.* (mem. opinion pp. 9-11).

[39] For example, *Joint Industry Board* v. *U.S.*, 391 U.S. 224 (1968), and *U.S.* v. *Embassy Restaurant*, 359 U.S. 29 (1959), hold that unpaid pension contributions in the hands of a bankrupt are not entitled to priority as "wages" under the Bankruptcy Act; *SIPC and SEC* v. *Morgan, Kennedy & Cox, Inc.*, 533 F.2d 1314 (2d Cir. 1976) holds that certain beneficiaries of a profit sharing trust are not "customers" of a bankrupt broker-dealer under the Securities Investor Protection Act; and *Alabama Power Co.* v. *Davis*, ... U.S. ....., 52 L.Ed. 2d 595 (1977), holds that a returning veteran is entitled to a pension as a benefit to be included within the rights of "seniority" secured by the Military Selective Service Act.

> "The Local defendants attempt to erect a dichotomy between wages *per se* and the fringe benefits of employment which together make up an employee's total compensation by referring to sections of the Bankruptcy Act, the Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act and the Sherman Act which purportedly raise such a distinction for the purposes of those Acts. *The existence of a wage/compensation dichotomy in other unrelated statutes is wholly irrelevant to whether a union member has made an investment under the Howey rule.*" Pet. Local 705 App. 16 (emphasis added).

Finally, petitioners seek also without success to establish a conflict between *Daniel* and three recent decisions of this Court interpreting the federal securities laws. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), an offeree declined to purchase certain securities because of the defendant-offeror's alleged misleading statements. There, this Court decided against expanding the scope of persons protected by Rule 10b-5 to frustrated buyers and, therefore, beyond the scope of the purchaser-seller requirement of *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952). *Blue Chip Stamps* thus is not in conflict with the decision below because the plaintiff, John Daniel, as a purchaser of securities, clearly falls within the *Birnbaum* rule. The decision below does not expand the class of persons protected by the antifraud rules of the federal securities laws beyond that allowed by *Blue Chip Stamps* and *Birnbaum*.[40]

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[40] The other elements of *Blue Chip Stamps* also provide no support for petitioners. Respondent rejects petitioners' allegations and asserts that the instant lawsuit can in no way be construed as "vexatious" or as a "strike suit". The fraud of petitioners here is particularly egregious because of its continuing nature: even now, over three years from the filing of the Complaint, petitioners have failed to disclose the material facts attendant to an investment in

(footnote continued)

The recent case of *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), also provides no support for petitioners. There, this Court concluded that "scienter" was an essential element of a private cause of action for damages under Section 10(b), and Rule 10b-5 promulgated thereunder, of the 1934 Act. *Ernst & Ernst* is thus not in conflict with the decision below because plaintiff's Complaint is based on defendants' fraudulent *and intentional* misrepresentations and omissions of material fact relating to the sale to plaintiff of an interest in the Local 705 Pension Fund. Indeed, the securities fraud here engaged in by the International Brotherhood of Teamsters is particularly egregious because of its continuing nature, the unique risk of wholesale loss in a Teamster pension fund,[41] and the Draconian

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(footnote continued)

the Local 705 Pension Fund. Petitioners thus cannot be allowed to turn their continuing fraud into a shield from liability under the federal securities laws.

The concern of *Blue Chip Stamps* over the problems of proof which would result from the abandonment of the *Birnbaum* rule also provides no support for petitioners because the *Birnbaum* rule was not breached by the decision below and because proof of the fraud here may be established by independent documentary evidence. The problems of proof of concern to this Court in *Blue Chip Stamps* relate to the burden of showing that an offeree did not rely on a misleading statement in deciding *not* to purchase a security. *Blue Chip Stamps*, 421 U.S. at 745-47. Because a security was *not* purchased, if *Birnbaum* were *not* followed, a whole universe of investors would have standing and of necessity only oral testimony could be relied on:

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock." *Id.* at 746.

Here, Daniel's purchase of an interest in the Local 705 Pension Fund is subject to independent documentary verification.

nature of the vesting requirements. The materiality of the undisclosed facts is glaring.

In fact, it is just this element of scienter which distinguishes the Teamster pension funds from other pension funds. Had the defendants been truthful in their disclosures to plaintiff, there would be no lawsuit. Their fraud is singular and unique. The Teamster pension funds have been established and marketed to Teamster rank and file investors by defendants with the knowing intent to defraud most of the Teamster rank and file out of their entire investments. Plaintiff knows of no other pension fund in the country where such securities fraud has been practiced on its investors. The Teamster funds stick out like a sore thumb.

Finally, the *Daniel* decision is not in conflict with the recent case of *United Housing Foundation, Inc.* v. *Forman,*

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[41] For example, one highly reputable financial newspaper has characterized the risk of loss of an investment in a Teamster pension fund as follows:

> "As of Feb. 29, 1972 . . the [Teamster's Central States, Southeast and Southwest Areas Pension Fund] . . . listed total assets of $917.9 million, of which $819 million, or 89% was either already invested or firmly committed to real estate loans—against less than 5% for the average similar fund, according to a survey in 1973 by the Securities and Exchange Commission. . . . Morever, it wasn't all prime real estate. For one thing, much was invested in second and even third mortgages. . . . As of 1972 at least, it wasn't coming up roses, not for the half million Teamsters relying on the fund for their retirement income, anyway. The fund records state that real estate deals accounting for 30% of these mortgage loans were delinquent, not including properties acquired by the fund from borrowers, presumably in lieu of payment. With these properties thrown in, it appears that some 36.5% of the real estate loans were coming a cropper. *Wall St. J.*, Thursday, July 22, 1975."

See generally PROD. *Teamster Democracy & Financial Responsibility* (1976).

421 U.S. 837 (1975). In *Forman* the court applied the economic reality test to hold that an interest in a state subsidized and supervised non-profit housing cooperative is not an "investment contract" and thus not a security under the federal securities laws. *Forman* is thus inapposite because it does not involve the entrusting of money to others to manage with the expectation of profits. Neither does it involve a multi-employer union pension fund. In finding the interest in *Forman* not to have the requisite profit element needed for an investment contract, the Court emphasized:

> "The Bulletin [explaining the housing co-operative] repeatedly emphasizes the 'nonprofit' nature of the endeavor. . . . It also informs purchasers that they will be unable to resell their apartments back to Riverbay [the co-operative] at a profit since the apartment must first be offered back to Riverbay 'at the price . . . paid for it.'"

Id. at 854. The Court continued by stating: "In short, the inducement to purchase was solely to acquire subsidized low cost living space; it was not to invest for profit." *Id.*

Nothing could be further from the facts in the instant case. As the court of appeals noted below, the requisite profit element is present here in its *traditional forms*. Pet. Local 705 App. pp. 17-19. This is conceded by petitioners. See pp. 10-11 and n. 14, *supra*. In addition, Daniel purchased his security in the Local 705 Pension Fund not with "the desire to use or consume the item purchased," *Id.* at 852, but with the expectation of substantial profit to be returned to him, together with his initial investment, in the form of retirement benefits.

Petitioner IBT's reading of *Forman* thus is misguided. It is, for example, clear from this Court's decision in *Superintendent of Insurance,* 404 U.S. 6 (1971), that Sec-

tion 10(b) is not limited to transactions on the organized markets.[42] It is clear from this Court's decision in *SEC* v. *W. J. Howey, supra,* that a security need not be evidenced by a formal certificate. *Id.* at 299. And, it is clear from this Court's decisions in *Valic* and *United Benefit Life Insurance* that the security involved can be separated from other aspects of the transaction. In *Valic* and *United Benefit Life Insurance,* for example, the Court separated the conventional life insurance attributes from the security involved.[43] So here, the employment relationship entered into by plaintiff is separate from the security he has purchased. There is no reason why plaintiff cannot be both an investor and an employee. Indeed, other courts have found no problem with this. *Collins* v. *Rukin,* 342 F. Supp. 1282 (D. Mass. 1972); *SEC* v. *Addison,* 194 F. Supp. 709 (N.D. Tex. 1961); *SEC* v. *Koscot Interplanetary, Inc., supra,* at 476 ("case law countenanced the fragmented approach"). And, certainly, those employees who invest in employee pension plans *which concededly involve securities* subject to the 1933 Act registration requirements *are both employees and investors.* See n. 18, *supra.*

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[42] "Section 10(b) bans the use of any deceptive device in the 'sale' of any security by 'any person'. And the fact that the transaction is not conducted through a securities exchange or an organized over-the-counter market is irrelevant to the coverage of Section 10(b)." *Superintendent of Insurance, supra,* at 10.

[43] "We do not agree with the Court of Appeals that the 'Flexible Fund' contract must be characterized in its entirety. Two entirely distinct promises are included in the contract . . ." *United Benefit Life Ins.* at 207.

IV. THE INTERLOCUTORY DECISION BELOW IS NOT NOW RIPE FOR REVIEW

The interlocutory decision of the court of appeals below affirming the district court's denial of petitioners' various motions to dismiss was rendered pursuant to the Interlocutory Appeals Act, 28 U.S.C. Section 1292(b). As such, it is a *nonfinal judgment.* If certiorari is not granted, the case will be remanded to the district court for trial.[44] At trial, the plaintiff must prove up the various elements which make up a violation of the antifraud rules of the federal securities laws. The court of appeals has expressly recognized this. Pet. Local 705 App. pp. 50-51. See pp. 34-35, *supra.*

The decision of the court of appeals is thus not now ripe for review. See *American Construction Co.* v. *Jacksonville, T. & K. R. Co.,* 148 U.S. 372, 384 (1893) ("This court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment."); *Cobbledick* v. *United States,* 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.,* 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This is particu-

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[44] Indeed, even if the conrt of appeals had reversed the district court's denial of petitioners' motions to dismiss, the case would have been remanded to the district court for trial on the remaining federal causes of action not in issue on this appeal. It is thus clear that a reversal of the court of appeals decision by this Court on certiorari will not help lighten the federal docket.

larly the case here where a trial must in any event be held by the district court, even were the court of appeals decision reversed. See n. 44 *supra*. An immediate review of the court of appeals interlocutory decision will therefore neither add to judicial economy nor increase judicial efficiency.

A trial on the issues presented in this lawsuit will help frame such issues for any ultimate review—or, indeed, *make any such ultimate review unnecessary*. For example, it is possible that the plaintiff will be unable to meet his burden of proving that defendants acted with scienter as required by *Ernst & Ernst, supra*. Or, plaintiff might be unable to avoid the statute of limitations bar. Any such finding of fact would prevent plaintiff from recovering under the antifraud rules of the federal securities laws. In that event, the questions presented by petitioners in their writs for certiorari would be moot. Accordingly, the interlocutory decision below is not now ripe for review by this Court.

CONCLUSION

For all of the reasons set forth above, we respectfully submit that the petitions for writs of certiorari should be denied.

Respectfully submitted,

PETER J. BARACK
LAWRENCE WALNER
Attorneys for Respondent
John Daniel

APPENDIX

APPENDIX

Affidavit of John B. Daniel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted]

JOHN B. DANIEL, being first duly sworn under oath, does hereby state as follows:

1. I am a resident and citizen of the State of Illinois, and now reside at 1355 N. Paulina Street, Chicago, Illinois.

2. My highest educational level was the completion of elementary school, Wells School in Chicago. I began working at the age of 12, in a box factory operating a nail machine. Later I worked in a packing house involved in sausage making. I served 3 or 4 years in the U. S. Army infantry, serving in the European theater in combat in World War II.

2. I first became a member of Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 705) in April of 1950. At the same time, I entered employment as a truck driver with an employer who had entered into a collective bargaining agreement with Local 705.

3. I continued in employment as a truck driver with Local 705 contracting employers continuously from April, 1950, through November, 1973. At no time

during that 22½ year period did I ever work for a trucking employer who had not entered into a labor contract with Local 705. On December 1, 1973, at age 63, I retired from employment because of an extreme vision problem caused by cataracts which would not permit safe driving over long periods of time. Since my retirement, I have not worked at all.

4. In December, 1960, I was working as a truck driver for Rohde Transfer Company, an employer who had entered into a collective bargaining agreement with Local 705. On December 5, 1960, because of economic conditions, and without any fault on my part, I was laid off involuntarily by Rohde Transfer Company. This involuntary lay off continued until I was called back by Rohde Transfer Company in April, 1961. I tried unsuccessfully to find any trucking work during this period of time.

5. Subsequent to my returning to work for Rohde Transfer Company and for an approximate four month period, April to July 5, 1961, the bookkeeper for Rohde Transfer Company embezzled certain funds, including all those monies which should have been remitted to Local 705 on my behalf as employer contributions to the Local 705 Pension Trust Fund on account of my employment. Upon learning of this financial embezzlement after the bookkeeper was fired, I reported what had happened and its effect on me to Local 705. At that time I was told by Local 705 that they would take care of whatever had to be done on account of the embezzlement.

6. In 1955, I was notified by a letter sent by an officer of Local 705 to all Local 705 members that Local 705 had established a pension fund for its members who worked for employers who had entered into

labor contracts with Local 705. At that time, and at all times thereafter, I understood and believed that a Local 705 member would be eligible to receive a retirement benefit upon completing 20 years of employment with Local 705 covered employers. I also understood and believed that any years of service with a Local 705 covered employer prior to the establishment of the pension plan would count towards the 20 year requirement. I further understood and believed that all employer contributions on my behalf to the Local 705 Pension Trust Fund would be to my benefit, to finance, in part, the retirement payments which I would receive upon retirement after 20 years of employment.

7. Because of my limited educational background and my concern for financial security in my old age, the pension plan adopted by Local 705 on my behalf and on behalf of my colleagues was a material factor in my continuing in employment with Local 705 covered employers. Had I known of the way in which Local 705 and the Local 705 Pension Plan Trustees would interpret the eligibility requirements for a retirement benefit, I would have sought employment (and, if necessary, retraining for new employment) elsewhere—with retirement benefits of the type I understood Local 705 to be offering.

8. Over the period from the establishment of the Local 705 pension plan to my retirement in December, 1973, I received various communications, both through the mails and otherwise, from Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, and the Trustees of Local 705 Pension Trust Fund, pertaining to and describing the Local 705 pension plan. Those communications included

such items as various letters and booklets. After receiving all such communications it remained my understanding and belief that I would receive a pension were I to complete 20 years of employment with Local 705 covered employers.

9. In June, 1971, I received a letter from Local 705 and Louis F. Peick, Secretary-Treasurer of Local 705, describing the pension benefits to be received as follows:

"Years of Covered Service	*Age at Retirement*	*Monthly Pension*
20	57	$250.00
20	58	300.00
20	59	350.00
20	60 or over	400.00"

Because I planned to retire sometime after reaching age 60 and because at such time I would have more than 20 years of covered service or employment with employers who had entered into collective bargaining agreements with Local 705, I expected to receive on retirement a pension of $400 per month or more.

10. The various communications which I received from Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, and the Trustees of the Local 705 Pension Trust Fund, all stressed that the Local 705 Pension Trust Fund had been established for the retirement benefits of Local 705 members. For example, a 1958 booklet stated: "The purpose of these Funds is to take care of you and your family in case of retirement." And, a 1969 booklet stated: "*These funds afford protection to you and your wife and unmarried children under eighteen years of age.*" Over the years I have relied on such assurances that the Local 705 Pension Trust Fund would provide for my financial security in my old age.

11. At no time have I ever been told by Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, or the Local 705 Pension Trust Fund Trustees, or otherwise learned prior to December, 1973, that the completion of 20 years of employment with Local 705 covered employers did not satisfy the eligibility requirements of the Local 705 pension plan, or that all employer contributions made on my behalf into the Local 705 pension trust fund and all accumulated earnings on such contributions would be forfeited following a three month involuntary lay off, or that any funds have been unlawfully diverted from the Local 705 pension fund trust, or that the actuarial bases on which the Local 705 pension plan has been established is arbitrary and unreasonable, or that the actuarial likelihood that any Local 705 member will ever receive a pension benefit is relatively small.

12. At no time have I ever been told by Local 705, the Officers of Local 705, the Local 705 Pension Trust Fund, or the Local 705 Pension Trust Fund Trustees, or otherwise learned of the success or failure of the Trustees in managing the monies held in the Local 705 Pension Trust Fund. Nor have I ever learned or been told of the type of investments being made by the Local 705 Pension Trust Fund.

13. Over a period of several months prior to my retirement on December 1, 1973, I personally visited the Local 705 office from 5 to 8 times in an attempt to fill out those necessary papers and otherwise ar-

range for my pension. At no time during such visits was I ever told that I was not eligible to receive a pension.

14. After my retirement on December 1, 1973, I completed my application for a pension and was then told that I was ineligible because of a so-called "break in service" over the three to four month involuntary layoff period, December, 1960, to April, 1961. This was the first time that I was ever told that 20 years of employment with Local 705 covered employers was not enough to qualify a Local 705 member for a retirement pension.

15. After my request for a pension was denied, I asked for a review of such a decision by the Trustees of the Local 705 Pension Plan. On December 26, 1973, I appeared before the Local 705 Trustees for such review, and sometime later learned of their decision to deny my request for a pension. Thereafter, I asked for an opportunity to appear again before the Local 705 Trustees in order that they reconsider their December 26 decision. On March 28, 1974, I again appeared before the Local 705 Trustees and again requested that I receive a retirement pension. I, thereafter, learned that the Local 705 Trustees had again denied my request for a pension. (See Exhibit A).

16. Since the inception of the Local 705 Pension Plan and the Local 705 Pension Trust Fund, the retirement benefits to be provided to Local 705 members by such arrangements have at times been the subject of discussion between me and many of my fellow Local 705 members. At all such times, it was the common understanding of me and my fellow Local

705 members that a Local 705 member would receive a retirement benefit upon completing 20 years of employment with Local 705 covered employers and that no employer contributions on behalf of a Local 705 member could be forfeited. After my application for a pension with the Local 705 Pension Trust Fund was denied, I discussed this matter with other Local 705 members and they were all shocked to learn that a Local 705 member with my record of employment could be denied a pension and could be denied any and all benefit from the many years of Local 705 covered employer contributions on my behalf.

/s/ JOHN B. DANIEL
JOHN B. DANIEL

Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

v.

JOHN DANIEL

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners

v.

JOHN DANIEL

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' JOINT REPLY MEMORANDUM

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' JOINT REPLY MEMORANDUM

Respondent asserts that because the decision below is interlocutory it is not "ripe for review" (Br. in Opp. 47). But while that circumstance may be a factor in determining whether certiorari should be granted, it is also clear that this Court frequently reviews judgments which do not terminate the action. It suffices to recall recent

securities laws decisions previously cited herein in which a Court of Appeals had sustained the complaint and remanded the action to the District Court for trial when this Court granted the defendant's Petition for Certiorari: *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462.

Respondent also notes that if the securities counts are dismissed the case must be "remanded to the district court for trial on the remaining federal causes of action not in issue on this appeal." (Br. in Opp. 47, n. 44). The presence of these other claims (described at Local 705 Pet. 6) shows that if the denial of benefits to plaintiff was indeed arbitrary and capricious he will be able to obtain relief without adopting the Court of Appeals' novel and far-reaching interpretation of the securities laws,[1] but it in no way detracts from the desirability of prompt review of the Court of Appeals' decision. It cannot be denied that this Court's resolution of the issues presented by the Petitions will be "fundamental to the further conduct of this case", see *United States* v. *General Motors Corp.*, 323 U.S. 373, 377. Reversal of the securities counts will obviate a lengthy and complex trial on the elements which any plaintiff must prove on this theory—e.g. scienter, (see App. 42, n. 47), and "justifiable reliance on a material misrepresentation or omission causing him injury" (*id.* 50). And it would sharply reduce the size of the plaintiff class from all present and past members of Local 705 who have contributed to or on whose behalf a

[1] This point is reinforced by the Gray Panthers' Brief in Opposition. For the true lesson of the cases under § 302(c)(5) which they discuss is not that the decision below "flesh[es] out th[e] obligation" embodied in the "exclusive benefit" standard (*Id.* p. 11) but that it is not necessary to apply the sledgehammer of the securities laws where Congress has provided a scalpel through legislation specifically addressed to collectively-bargained employee trust funds.

contribution has been made to the Local 705 fund (see IBT Pet. 17, n. 21) to at most those individuals who were actually denied benefits because of what are alleged to be arbitrary and capricious actuarial assumptions and eligibility requirements.[2]

Faced with briefs by the United States and an extraordinary range of organizations which stress the public importance of prompt review, respondent resorts to the assertion that "the decision below is restricted to the particular facts of a Teamster Union multi-employer pension fund." (Br. in Opp. 34).[3] We submit that review by this Court would be imperative if, as respondent contends (*id.* 34-35), the Court of Appeals' decision were susceptible to such a reading, for it would then "verg[e] too closely towards the wholly unacceptable proposition that the rules of the game vary with the players." Cf. *Communist Party of the U.S.A.* v. *C.I.R.*, 332 F.2d 325, 329 (C.A.D.C.). But we submit that certiorari should be

[2] Such individuals would not be adversely affected by eliminating as potential claimants the vast majority of class members who were denied benefits because they failed to satisfy plainly reasonable eligibility requirements; indeed they would benefit by avoiding any conflict between themselves and present participants on the one hand and those for whom any recovery would be a windfall on the other, over what the court below recognized are limited assets. (Pet. App. 49; cf. AFL-CIO Br. 3-6). The enlargement of potential liability to all participants who were not told of the actuarial probability that any individual will ultimately qualify is one reason why the decision below is so potentially devastating to all pension plans, for none have made such disclosures. (See e.g. ERIC Br. 13, NCCMP Br. 4-5; IBT Pet. 12.) The IBT Petition inadvertently stated the combined assets of pension funds as "over $150 million"; the correct figure, of course, is over $150 billion. See App. 24.

[3] In light of respondent's irresponsible charge against "Teamster pension funds" as a class, we feel obliged to point that the Court of Appeals stated that "A large portion of Local 705's Pension Fund is maintained by the trust departments of major Chicago banks." (App. 29, n.35); the remainder is, as the record below shows, held in short-term or government securities and "real estate limited to not more than 10% of the portfolio" (C.A. App. 185a-15).

granted instead on the basis of the fairer, and, if anything, conservative assessment made by the United States: "The decision of the court of appeals directly affects the operation and administration of many privately sponsored pension benefit plans, which cover millions of the nation's active and retired workers." (Mem. for U.S. pp. 1-2).

Respectfully submitted,

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Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The United States urges that the petitions for a writ of certiorari be granted. The decision of the court of appeals directly affects the operation and administration of many privately sponsored pension benefit plans, which cover

millions of the nation's active and retired workers. The decision not only involves the applicability of the antifraud provisions of the federal securities laws, but the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation believe that the decision also will substantially affect the execution of their statutory responsibilities.

The questions the petitions present are whether, for purposes of the antifraud provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.* ("the Securities Acts"), an employee's interest in a collectively bargained, involuntary, non-contributory, employee pension fund is a "security," and whether the employee's acquisition of that interest is a "sale," as those Acts define those terms.

The decision below is the first and so far the only decision to have answered those questions affirmatively.

Respondent Daniel worked from 1950 to 1973 as a union truck driver for employers who made contributions on his behalf to the Local 705, International Brotherhood of Teamsters Pension Trust Fund ("Fund"), a collectively bargained, non-contributory, defined benefit pension plan. Upon his retirement, Daniel was told he was ineligible for a pension because a four-month layoff in 1961 prevented him from having 20 years' continuous employment, which the plan required for eligibility (Pet. App. 3-4). Daniel brought suit against the trustees of the Fund, Local 705, the International Brotherhood of Teamsters and others, alleging violations of the Securities Acts and other state and federal laws, and seeking, *inter*

alia, recovery for harm suffered in reliance upon the defendants' alleged false and misleading representations concerning eligibility requirements.[1]

Defendants moved to dismiss the Securities Acts claims. The United States District Court for the Northern District of Illinois denied those motions, holding that Daniel had stated a claim upon which relief could be granted under the antifraud provisions of the Securities Acts. The court of appeals stated: "The effect of the [district court's] opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8%, that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts" (Pet. App. 8; citation omitted).

The court of appeals affirmed. It held that the employee's interest in the pension fund is a "security" and that the employee's acquisition of that interest is a "sale," as the Securities Acts define those terms. The decision obligates pension funds, their officials, and the unions and employers who sponsor such funds to comply with the antifraud provisions of the Securities Acts.[2]

---

[1]The complaint also alleged violations of the union's duty of fair representation under federal labor laws, failure to comply with Section 302(c)(5) of the Labor Management Relations Act, 61 Stat. 157, 29 U.S.C. 186(c)(5), common law fraud and breach of fiduciary duty.

[2]The court of appeals emphasized that it was not holding the registration or reporting requirements of the Securities Acts applicable to pension funds (Pet. App. 49-50).

The decision has left the administrators and plan sponsors of many pension plans in considerable uncertainty as to possible liability which may arise from their past, as well as their future, conduct, and raises the possibility of significant liability for such plans as have not heretofore complied with the antifraud provisions.[3]

The Secretary of Labor and the Securities and Exchange Commission participated as *amici curiae* in the court below on opposite sides, the Secretary of Labor urging reversal of the district court's decision and the Commission urging affirmance. We have not determined what position we would take on the merits if the petitions are granted. However, we believe that the decision of the court of appeals warrants this Court's review.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[3]The disclosure requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 840, 29 U.S.C. (Supp. V) 1021, *et seq.*, which did not take effect until January 1, 1975 (29 U.S.C. (Supp. V) 1031(b)(1)), and thus did not apply to this case, nevertheless were discussed by the court of appeals. The court stated that, in its view, ERISA did not preempt the antifraud provisions of the Securities Acts (Pet. App. 42-48). The court said (Pet. App. 46-47):

> Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information [at times not required by ERISA], including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits. Thus the antifraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan, protecting them from losing benefits through ignorance of the plan provisions.

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Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

vs.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT JOHN DANIEL IN REPLY TO AMICUS CURIAE MEMORANDUM OF THE UNITED STATES

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

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Petitioners,

VS.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT JOHN DANIEL IN REPLY TO AMICUS CURIAE MEMORANDUM OF THE UNITED STATES

The United States has filed an *amicus curiae* memorandum in support of the petitions for a writ of certiorari *subsequent* to the filing of the Respondent's Brief in opposi-

tion to such petitions. Because no persuasive reasons are set forth in the *amicus curiae* memorandum for granting certiorari, the Respondent now files this supplemental brief in reply to the *amicus curiae* memorandum. Supreme Court Rule 24(5).

The United States sets out two reasons in support of the petitions for a writ of certiorari. First, the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation are said "to believe" that the decision below "will substantially affect the execution of their statutory responsibilities." U.S. Br. at 2. However, such a belief—set out in a mere conclusory fashion—has no grounding in fact. The *amicus* memorandum cites *no* statutory responsibilities of the Departments of the Treasury and of Labor or of the Pension Benefit Guaranty Corporation which will be affected by the decision below. Indeed, no statutory responsibilities of any sort of these government departments and agency are referred to. The only statute outside of the securities area referred to in this context is the Employee Retirement Income Security Act of 1974 ("ERISA") which *admittedly* "did not take effect until January 1, 1975, . . . and *thus did not apply to this case* . . ." U.S. Br. at p. 4 n.3 (emphasis added). ERISA is thus not at issue here,[1] and it cannot bring this case within the certiorari jurisdiction of the Court.

The *amicus* memorandum also expresses a concern that the decision below "has left [pension plan] administrators

[1] Even were ERISA applicable here, it would not immunize petitioners from liability under the antifraud rules of the federal securities laws because there is no conflict between ERISA and the federal securities laws. See Brief of Respondent at pp. 37-39. This is also the conclusion of the court of appeals below in dictum. See Pet. Local 705 App. pp. 42-48.

. . . in considerable uncertainty as to possible liability which may arise from their past, as well as their future, conduct . . ." U.S. Br. at 4. If this is a concern over the extent of possible damages, it is a question not now before the Court. A finding of liability in a securities fraud case is unrelated to a determination of the appropriate remedy. *Mills* v. *Electric Autolite Co.*, 396 U.S. 375, 386 (1970); *J. I. Case* v. *Borak*, 377 U.S. 426, 433 (1964).

If this is a concern over the breadth of possible liability for past or future misrepresentations, it is also misplaced. The decision below merely holds that the plaintiff has stated a claim on which relief *could* be granted. However, in order to prevail the plaintiff must clear the statute of limitations bar, and prove up the elements of a cause of action under the antifraud rules—including, for example, the existence of a false or misleading material statement, causation, damages, and intent to defraud.[2] *Ernst and Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). Indeed, it is the presence of scienter

[2] These limitations have been expressly recognized by the court of appeals below:

> "[P]lan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all materials facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws . . . In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability." Pet. Local 705 App. pp. 50-51.

and the egregiousness[3] of the securities fraud that distinguishes the Teamster pension funds in this case. This has been expressly recognized by the Chairman of the Securities and Exchange Commission.

> "I appreciate your concern about the threat of lawsuits asserting liability for past events, but, honest plan sponsors, who have operated pension plans honestly, need not fear retroactive liability under the antifraud provisions of the federal securities laws." Letter from SEC Chairman Williams to Senator Williams dated January 5, 1978.

There is just no evidence of any sort that other non-Teamster pension funds have engaged in the type of intentional securities fraud complained of here.

The *amicus* memorandum neglects to point out that the antifraud provisions of the federal securities laws do *not* establish a system of affirmative disclosures to investors; they are merely a direction not to be deceptive or misleading.[4] U.S. Br. at p. 3 n.2. Neither does the *amicus*

[3] The egregiousness of the Teamsters fraud is heightened by, among other facts, the unnecessary establishment of over 200 pension plans with (until recently) no practical rights of portability or reciprocity, the establishment of 20 year vesting rules for the rank and file (in contrast to a five year vesting rule for officers of the international union), and the diversion of monies held in trust from their lawful purposes. See generally PROD, *Teamster Democracy and Financial Responsibility* (1976).

[4] The *amicus* memorandum has thus misread the opinion below if it infers that the court of appeals would in all circumstances require disclosure of the actuarial probability of ever receiving a pension benefit or disclosure of any other particular fact. First, the only issue before the court of appeals was whether the antifraud rules of the federal securities laws were applicable, and not what disclosures were required. Second, the remarks of the court of appeals as to what should have been disclosed were made within the context of the deceptive and misleading statements made by the Teamster defendants in the instant case.

memorandum point out that certain types of employee pension plans are, concededly, not only subject to the federal securities laws, but also must qualify under Section 401 et seq. of the Internal Revenue Code and meet the requirements of ERISA. Pet. Local 705 App. p. 45 n.54. It is thus not surprising that the Chairman of the SEC has concluded that:

> "I do not believe that the antifraud provisions will have [such] adverse consequences . . ., either in terms of cost or in terms of uncertainty." Letter from SEC Chairman Williams to Senator Williams dated January 5, 1978.

Because the antifraud rules only require that any disclosure that is made be done so truthfully, they "do not impose an undue burden on anyone . . ." Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 *Law and Contemp. Prob.* 795, 814 (1964). Consequently, the matters raised in the *amicus* memorandum do not support certiorari review by this Court of the unanimous court of appeals decision below.

Respectfully submitted,

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IN THE

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October Term, 1977
Nos. 77-753, 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Gray Panthers in Opposition to the Petitions for Writs of Certiorari.

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IN THE

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JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in opposition to the petitions for certiorari. In support of this motion, the Gray Panthers show as follows:

1. The parties filing the writs of certiorari in this action have refused to consent to the Gray Panthers filing an amicus curiae brief in opposition to the writs.

2. The Gray Panthers are a national organization whose membership is composed of both young and old persons throughout the United States who seek to reform and improve various institutions and laws that affect the lives of senior citizens. Among the major concerns of the Gray Panthers is assuring that older Americans receive all their entitled benefits from private pension plans.

3. The views of amicus Gray Panthers are particularly important because they are the only organization offering their views in this case which represents the interests of plan participants. Amicus is in fact a unique elderly organization because its members include persons currently employed in work covered by private pension plans, retired workers who have been denied pension benefits and retirees now receiving pensions. Numerous other organizations have sought to participate in this action as amicus curiae in support of the writs of certiorari, however, all of these potential amici have a strong self-interest in the current structure of the pension industry. Amicus ERISA Industry Committee (ERIC) and National Association of Manufacturers (NAM) are composed of corporations who sponsor private pension plans and receive favorable financial and tax benefits for their plans. Amicus AFL-CIO, although a labor organization, also has strong attachments to the pension industry because its leaders are the trustees of numerous private pension plans. Labor unions' interests are essentially those of management rather than that of rank and file workers. Renfrew,

"Fiduciary Responsibility Under the Pension Reform Act," 32 BUS. LAWYER 1829 (1977). The Gray Panthers feel it is critical for the views of plan participants—the consumers of the pension industry—to be heard by this Court.

4. Amicus Gray Panthers further believe that their views are supplemented and aided by the knowledge and experience of their counsel at the National Senior Citizens Law Center. Attorneys from the Law Center have had extensive involvement with the private pension system solely on behalf of pension consumers. National Senior Citizens Law Center has represented individual workers and classes of workers in attempts to gain benefits from dozens of major private pension plans governed by the Taft-Hartley Act and thus similar in structure to the plan negotiated by petitioner Local 705. In addition to litigation, Law Center attorneys were actively involved in the congressional deliberations surrounding the passage of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq*. This experience has given amicus' attorneys a unique perspective on the impact of this decision on other federal labor statutes and policies.

5. Amicus Gray Panthers were, because of their unique position as pension consumers, allowed to participate as amicus curiae in support of Mr. Daniel in the proceedings below in the Court of Appeals. Further, the specific views of amicus Gray Panthers on federal labor policy and the integration of the securities laws, ERISA and the Taft-Hartley Act were adopted by the court below. Since the petitions for writs of certiorari directly attack the Court of Appeals holding on this area, amicus contends it is of extreme impor-

tance that they be allowed to file this brief to further explain their views that were affirmed by the court below.

WHEREFORE, it is respectfully moved and requested that the Gray Panthers be granted leave to file the accompanying brief as amicus curiae.

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By BRUCE K. MILLER,
Attorneys for Amicus Curiae.

BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI.

The Gray Panthers hereby submit this brief in opposition to the petitions filed in Nos. 77-753 and 77-754 for writs of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 20, 1977. The views expressed in this brief are offered in support of the position of respondent John Daniel.

Interest of the Amicus Curiae.

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

REASON FOR DENYING THE WRITS REQUESTED BY PETITIONERS.

The Decision of the Circuit Court Advances Rather Than Retards Attainment of Federal Labor Policy.

Both petitioners and the amici who support their position have contended at every stage of this litigation that application of the anti-fraud provisions of the federal securities laws to private pension plans conflicts with important and long-standing federal labor policies. If allowed to persist, their argument continues, this conflict will seriously disrupt the orderly processes of collective bargaining which, thanks to experience and the genius of our labor laws, have come to govern the conditions under which employees work and the compensation which they earn.

This argument was thoroughly briefed before the Circuit Court and received careful consideration in that court's opinion upholding the applicability of the securities laws' protections against fraud to respondent's pension claim. *Daniel v. International Brotherhood of Teamsters, et al.*, 561 F.2d 1223 (7th Cir. 1977). The Circuit Court was not, however, persuaded that its decision presented the sort of grave threat to established relationships between management and labor portrayed by petitioners and their amici. Instead, concurring with this amicus, the court found that to apply the anti-fraud provisions of the securities laws to worker investments in private pension plans, and especially to investments in union negotiated, jointly administered pension plans, would aid in the achievement of the

policy goals reflected in federal labor laws pertaining to such plans. 561 F.2d at 1249-1250.

Petitioners and their supporting amici would now point once again to their concern for the fate of orderly and coherent collective bargaining as reason for this court to relieve them from the modest changes in their own practices entailed by compliance with the Circuit Court's decision. The harmful consequences feared by petitioners are many and not always easy to follow. Each of them depends, however, on the validity of a single, simple premise, perhaps best summarized by petitioner Local 705's contention that every aspect of an employee's interest in a union negotiated pension fund, including the "funding and administration" of the fund, is the exclusive "business of the employees' collective bargaining representative . . . subject only to the duty of fair representation." Petition for Writ of Certiorari of Local 705, International Brotherhood of Teamsters, *et al.*, at 36. This premise is manifestly false.

The pension plan from which respondent Daniel has claimed benefits has been described by petitioner International Brotherhood of Teamsters as "typical of collectively bargained, compulsory non-contributory plans." Petition for Writ of Certiorari of International Brotherhood of Teamsters, at 4. It is on the structure and administration of plans of this sort which petitioners focus their concerns about the disruptive effects of the Circuit Court's decision for federal labor policy. Such a focus is instructive, for a deliberate and specific

federal labor policy for collectively bargained pension plans has been in effect for some 30 years. And it is this policy, not the Circuit Court's decision, which embodies petitioners' worst fear—the removal of control over a worker's interest in pension benefits from the collective bargaining arena.

Since 1947, collectively bargained, compulsory noncontributory pension plans, of which the Local 705 plan is concededly representative, have been organized and operated under the authority of Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5). A major purpose of Section 302(c)(5), as explained by its chief sponsor, Senator Taft was that a pension fund

> "Shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it *shall not be, therefore, in the sole discretion of the union or union leaders or usable for any purpose which they may think is to the advantage of the union or the employee.*" 2 NLRB, LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1305 (1948) (emphasis supplied).

The means settled upon by Congress for accomplishing this purpose was a general prohibition against employer payments to unions or union officials for any purpose, coupled with an exception for employer payments to an employee welfare or pension fund established and operated in conformity with a number of specific statutory requirements. The most important of these requirements are that such a fund must be held in trust and that control over the trust must

not rest with the union which represents some all) of the employees for whom it was established, but rather with a board of trustees consisting of equal numbers of union appointed and employer appointed members. Above all, the trust must be operated by its trustees "for the sole and exclusive benefit of the employees" of employers contributing to it. Sec. 302(c)(5)(A), (B), 29 U.S.C. §186(c)(5)(A), (B).

The choice of a trust structure, legally separate from the union, as the medium for operating a collectively bargained pension fund, and especially, the adoption of the "sole and exclusive benefit" standard as the measure of trustee obligation to workers covered by the fund, have carried legal and policy consequences which far surpass in their importance anything contemplated by the opinion of the Circuit Court here. Most fundamentally, these decisions removed power over an individual employee's pension rights from his chosen representative and vested that power instead in the board of trustees of his pension plan, an entity owing duties to him that are very different from his union's duty fairly to represent him. The United States Court of Appeals for the District of Columbia Circuit has defined these duties with considerable care in a series of decisions involving the eligibility conditions for benefits from the United Mine Workers Welfare and Retirement Fund. In the most thoroughly elaborated of these decisions, *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968), the D.C. Circuit described the relationship between trustees and covered workers as fiduciary in nature, analogous to the relationship between trustee and beneficiary at common law:

> "[Sec. 302(c)(5)] explicitly casts authority to create such a [pension] fund in trust terms, con-

> sequently the scope of court review of trustees' action has been defined as one of determining whether their action was arbitrary or capricious. If it was, then potential beneficiaries of the trust may justly complain that they were entitled to have a higher standard of conduct exercised on their behalf." 401 F.2d at 426-427.

The striking incompatibility of this standard of conduct with the role and function of a union in its representative capacity has recently been described with some force in a thoughtful opinion by Judge Charles Renfrew of the United States District Court for the Northern District of California:

> "The function of pension fund trustees is significantly different from the roles of union and management in ordinary labor affairs such as contract negotiations or grievance matters. The duty of fair representation is imposed upon a union because by law it is the exclusive representative of the bargaining unit. Pension fund trustees, on the other hand, are not advocates; they are fiduciaries. All trustees, labor and management representatives alike, have a duty to take those actions which they believe to be in the best interests of the fund's beneficiaries.
>
> . . .
>
> ". . . It is for this reason that the proper standards of conduct are the fiduciary duties set forth in ERISA and the requirement of § 302(c)(5) that such funds be administered for the 'sole and exclusive benefit of the employees.' Nothing can be gained by casting trustees in the role of labor negotiators who represent the interests of only

> one side." *Morgan v. Laborers Pension Trust Fund for Northern California,* 433 F. Supp. 518, 530 (N.D. Cal. 1977).

Thus, federal labor policy concerning collectively bargained pension plans places control over such plans in the hands of a joint, union-management board of trustees but tempers that control by requiring that the joint board observe the general fiduciary obligation to avoid arbitrary or capricious treatment of covered workers. It is this legal principle, established by Section 302(c)(5), and not the sanctity of the collective bargaining process or the power of exclusive representation vested in workers' chosen representatives, which has governed the structure, funding, coverage, benefit eligibility, administration and every other aspect of pension funds like that negotiated by Local 705, since the enactment of the Taft-Hartley Act in 1947. It is evident that the dire consequences predicated by petitioners have been matters of settled law for a generation—and have scarcely produced the chaotic effects petitioners now claim to fear.

When measured against the policies of Section 302 (c)(5), the effects of the Circuit Court's decision are plainly complementary rather than disruptive. The central requirements of the securities laws' anti-fraud provisions pertain to disclosure of salient information to workers covered by a pension plan. Comprehensive disclosure from trustees to covered workers of all information relevant to their status as trust beneficiaries lies, of course, at the heart of the fiduciary obligations codified by the "sole and exclusive benefit" standard. *See, e.g., Burroughs v. Board of Trustees,* 542 F.2d 1128 (9th Cir. 1976), *cert. denied* 97 S.Ct. 1113

(1977). The major impact of the decision of the Circuit Court is to flesh out this obligation by specifying certain particular information, relating chiefly to the probability of qualifying for the benefits provided by a pension plan, which must be disclosed to a covered worker at various stages of his participation in that plan. Because information of this sort is derivable largely through the application of actuarial techniques, it is nearly always within the exclusive domain of the trustees of a pension plan. For plan trustees (uniquely among the parties concerned with the establishment and operation of a pension fund) must invariably retain actuarial consulting help in order to fashion a sensible eligibility and benefit structure for the plan they administer. The obligations entailed by the decision of the Circuit Court are thus entirely consistent with the range of functions and duties already assumed by boards of trustees of collectively bargained pension plans. It was this basic congruence of responsibilities to which the Circuit Court referred in its finding that application of the anti-fraud requirements of the securities law to such plans "will further the purpose of Section 302(c)(5) of the Labor Management Relations Act by letting each employee know to what he is entitled under a union pension fund." 561 F.2d at 1250.

Conclusion.

In sum, petitioners' fears of a collision between the requirements imposed by the Circuit Court and established federal labor policy are baseless, and cannot therefore serve as a proper basis for this court's issuance of a writ of certiorari. The collective bargaining practices by which petitioners set their store have indeed been disrupted, albeit by Congress through the enact-

ment of the Taft-Hartley Act rather than by the decision of the Circuit Court here. That decision, by providing specific guarantees of pertinent information to workers covered by pension plans, merely augments a federally created fiduciary obligation that is by now nothing less than venerable. Amicus Gray Panthers therefore respectfully submits that the petitions for writs of certiorari should be denied.

Dated: January 13, 1978.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1978.

_____

_____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 561 F.2d 1223. It is reproduced at A. 209-262.[1] The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is officially reported at 410 F.Supp. 541, and is reproduced at A. 106-134.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 20, 1977. Petition for a writ of certiorari was granted on February 21, 1978 (A. 263). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] "A." refers to the Appendix filed in this Court. The Securities and Exchange Commission will be referred to as "SEC" or the "Commission;" its brief in the court below will be referred to as "SEC Br." Other references to "Br." preceded by a name will similarly refer to a brief filed in the court below or in this Court by that party or *amicus*.

QUESTIONS PRESENTED

Does an employee's coverage under an employer funded pension plan, as a compulsory incident of his employment, involve the "sale" of a "security" to the employee and hence a transaction subject to the federal securities laws? If so, can a cause of action be posited on each of the several antifraud provisions of those laws by one who alleges that there were material misrepresentations and failures to disclose in connection with such a "sale?"

STATUTES AND RULE INVOLVED

This case involves §§ 2(1), 2(3), 3(a)(2), and 17(a) of the Securities Act of 1933, 48 Stat. 74 as amended (15 U.S.C. §§ 77a *et seq.*); §§ 3(a)(10) and 10(b) of the Securities Exchange Act of 1934, 48 Stat. 881 as amended (15 U.S.C. §§ 78a *et seq.*) and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; §§ 9(a) and 302(c)(5) of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, etc., 49 Stat. 449, 61 Stat. 136, 73 Stat. 519 (29 U.S.C. §§ 141 *et seq.*) and §§ 102 and 3004 of the Employment Retirement Income Security Act of 1974, 88 Stat. 832 (29 U.S.C. §§ 1001 *et seq.*). They are reproduced in an Appendix *infra*.

STATEMENT OF THE CASE

A. Plaintiff's Complaint and the Proceedings Below.

The complaint in this case was filed on October 3, 1974 as a class action brought on behalf of all members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") (A. 1, 24).[2] Plaintiff alleges that he has been a member of

[2] The claimed plaintiff class was subsequently refined by plaintiff's motion for class action certification to include all members of all local affiliates of the IBT who have an interest in any Teamster pension fund "which requires for the payment of a full retirement benefit a

Local 705 of the IBT since 1951; that payments have been made on his behalf into the Local 705 pension fund for a period of 22½ years (including what the complaint denominates as "past service contributions"); that the vesting provisions of the Local 705 pension plan require 20 consecutive years of uninterrupted service; and that by reason of an involuntary break in service of four or seven months in 1960-61 he has been denied all benefits under the Local 705 pension plan (A. 31). The complaint further alleges that beginning at least as early as 1955, Local 705, the IBT, all the locals of IBT, their officers and the individual Trustees of all Teamster pension funds have knowingly misrepresented material facts and omitted to state other material facts relating to the value of a member's participating interest in a pension fund including, *inter alia*, misstatements and omissions with respect to vesting, length of service and continuity requirements, the actuarial basis on which a fund has been created, the actuarial likelihood that a member will receive a pension benefit, and the diversion of funds from their lawful purpose to the benefit of defendants or others (A. 33). The complaint does not specify in what way the omnibus allegation with respect to diversion of funds is applicable to the Local 705 fund.

The complaint consists of six counts. Only the first two, based on Section 10(b) of the Securities Exchange Act of 1934 and Commission Rule 10b-5 and Section 17(a) of the Securities Act of 1933 respectively, are directly before this Court (A. 25-38). Count III, based essentially on the same factual allegations as Counts I and II, alleges that these facts constitute a violation of defendants' statutory duty of fair representation under

total period of service in excess of ten years" (A. 98). There are 230 such pension funds (A. 195). The district court has certified a class consisting of all persons who are now or ever were members of Local 705 who acquired an interest in the Local 705 pension fund through contributions made on their behalf. (Opinion and Order, June 29, 1977)

Section 9(a) of the National Labor Relations Act (A. 38-42). Count IV, again based on the same factual allegations as the federal securities counts, asserts that these facts constitute common law fraud and deceit (A. 42-43). Count V repeats the former allegations, alleges that the defendants owe plaintiff and the members of his class a fiduciary duty to establish and operate fair and reasonable pension plans for the sole and exclusive benefit of employees and that duty has been breached (A. 43-47). Finally, Count VI alleges violation of Section 302 (c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), through the establishment and use of arbitrary and unreasonable length of service and continuity requirements and by reason of fund diversion. (A. 89-93).

The identical relief (except of a declaratory nature) is sought with respect to all counts, to wit: reformation of all pension fund agreements to delete the allegedly arbitrary length of service and continuity requirements, money judgment for plaintiff and all members of the class in an amount equal to all pension benefits claimed to have been unlawfully denied and a money judgment for all funds which are said to have been diverted from their lawful purposes.

The court below treated an affidavit filed by the plaintiff some months after the filing of the complaint as part of the pleadings for purposes of its review of the district court's order denying the motion to dismiss (A. 213). In his affidavit plaintiff swears that from 1955 on he understood that he would be eligible to receive a retirement benefit upon completing 20 years of employment with Local 705 covered employers; that this was a "material factor" in his continuing in employment with such employers; and that had he known the manner in which the eligibility provisions of the Pension Plan would be interpreted, he would have sought employment (and if necessary retraining for new employment) elsewhere. He further states that although he from time to

time received various communications pertaining to the Local 705 pension plan, it remained his understanding and belief that he would receive a pension if he completed 20 years of service, and that the first time he became aware that his break in service in 1960-1961 made him ineligible to receive a pension was after his retirement when he filed his pension application. Finally he states that his understanding was the common understanding of Local 705 members. (The affidavit is reproduced as an appendix to the Brief of Respondent John Daniel in Opposition to The Petitions for Writs of Certiorari).

The complaint purported to satisfy the threshold requirements of the antifraud provisions—that there be a "sale" of a "security"—on the unprecedented theory that plaintiff Daniel and other employees in the group covered by the plan "have purchased and acquired an interest in [the plan] * * * by agreeing to provide their labor services to employers who have labor contracts" requiring such contributions (A. 34). Defendants moved to dismiss the securities counts[3] on the ground that there is no "sale" of a "security" in connection with such a "compulsory noncontributory" union pension plan, coverage under which is a mandatory incident of employment and which is wholly funded by employer contributions. The District Court accepted plaintiff's theory with some modification and denied the motions to dismiss. The District Court determined (1) that interests in pension plans are "securities" (A. 112-124) and (2) that there is a "sale" of an interest in a collectively bargained pension plan when union members vote to ratify an agreement negotiated by their union, if that agreement provides for employer contributions to a pension fund (A. 125-128). The Court was undeterred by its

[3] Defendant Local 705 also moved to dismiss all of the other counts of the complaint on a different basis including statutes of limitations, lack of subject matter jurisdiction and absence of indispensable parties (A. 49-52). The District Court denied all aspects on the motion (A. 107-111, 129-134).

recognition that "the SEC had taken the position that with respect to those employee pension plans characterized as 'involuntary' or 'noncontributory', there is no sale within the meaning of the Securities Acts." (A. 126)

The defendants sought and were granted leave to appeal under 28 U.S.C. § 1292(b) from so much of the order as denied the motions to dismiss the securities law counts. In the Court of Appeals, the Department of Labor filed a brief *amicus* in support of the defendants' position; the SEC filed a brief *amicus* in support of the appellee.

The Court of Appeals affirmed. In an opinion by Judge Cummings, the court agreed with the District Court that "Plaintiff's Interest in the Pension Fund is a Security'" (A. 219). It characterized the union member as an "investor" (A. 222-225), and concluded that the *Howey*[4] standards for an "investment contract" were satisfied (A. 225-230). The court concluded also that "plaintiff's security was acquired in a 'sale'" (A. 242-247). But unlike the District Court, it determined that there is the sale of an interest in a pension plan whenever an employee accepts or remains in employment covered by a pension plan.[5] The court determined there was a sale not only for purposes of § 10(b) of the 1934 Act, but also under § 17(a) of the 1933 Act which it held, in accordance with prior Seventh Circuit decisions, creates an implied private cause of action. (A. 247-250)

The Court of Appeals incorrectly stated that "defendants and *amici* who support their position urge that the Employment Retirement Income Security Act of 1974

[4] See *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 301, reaffirmed in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852.

[5] The court did not expressly approve or disapprove the district court's theory that ratification of a collective bargaining agreement which provides for employer contributions to a pension plan constitutes a sale. Compare A. 229, 242-247 with A. 254-255.

(ERISA) has repealed the anti-fraud provisions of the 1933 and 1934 Acts insofar as they apply to union pension funds," and went on to conclude that ERISA did not effect such a repeal (A. 250-254). Actually, the argument was that Congress had enacted ERISA with the understanding that the securities laws were inapplicable to the relationship between plans such as this and their participants and that this Congressional action should be respected in construing the securities laws, particularly since securities laws coverage would conflict with several policy decisions Congress had made in enacting ERISA. Yet, the court made a policy judgment that the anti-fraud provisions of the securities laws would provide a desirable addition to the ERISA requirements (A. 254-255). To the extent it discussed the demonstration by defendants and *amici* on their side that affirmance of the District Court's decision would create enormous potential liabilities for all pension funds, the court's opinion characterized those arguments as a "parade of horribles" and dismissed them out of hand as the product of the "zeal [of] advocates." (A. 258-259)

Judge Tone filed a separate concurring opinion in which he professed "certain doubts" about the opinion of the court, calling this "a close and difficult case." He said that some of his doubts flowed from the "ordinary meaning" of the words employed in the federal securities laws and from "Congress' basic purpose in adopting" those laws. He believed, however, that "considering the breadth of the definitions of 'investment contract' and 'sale' in the statutes themselves and the interpretation of those terms in cases we must still regard as authoritative, * * * the balance tips in favor of the plaintiff's position." (A. 260). Judge Tone also indicated some discomfort with "attempts to stretch the securities laws beyond their traditional scope" and acknowledged this Court's recent decisions indicating "pronounced disfavor" with such attempts (*Id.*). He expressed a quite different view

of the SEC's historical and present position regarding the securities laws' applicability to noncontributory pension plans than that stated by Judge Cummings (Compare A. 260-261 with A. 233-235), protested that the "Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position" (A. 260), and agreed with the defendants that "[m]embers of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before [the court]" (A. 261). He concluded, however, that Congress should be deemed to have left the matter in a posture where the applicability of the securities laws to noncontributory pension plans would be "determined by the Supreme Court." (A. 262)

B. The Characteristics of Pension Funds and Plans.

The details of the Local 705 plan are set forth in the Brief of Local 705. However, because we believe that an understanding of the characteristics of pension plans is essential to an understanding of the issues in this case, we briefly describe those characteristics and their major variations.

Prior to the adoption of the Employee Retirement Income Security Act of 1974 ("ERISA") pension plan sponsors (employers or joint boards of trustees in the case of many collectively bargained plans), had almost unlimited flexibility with respect to the design of retirement plans. Plans differed with respect to the scope of coverage, the nature and amount of benefits to be provided, funding methods and formulas, eligibility requirements and vesting provisions, and the inclusion of a wide variety of optional features. Since the effective date of ERISA many more substantive requirements must now be met, but the freedom of the plan sponsor to fashion the terms of the plan still remains very broad.

As to the scope of coverage, pension plans fall into two general categories: single employer and multi-employer plans. A multi-employer plan covers the employees of two or more financially unrelated employers. Under this type of plan, contributions are payable into one common fund and benefits are payable to eligible claimants from that fund. Multi-employer plans are usually the product of collective bargaining[6] and are most prevalent in industries where employees' work and union affiliation remain stable while their specific employers may change.[7] See, *e.g.* McGill, *Fundamentals of Private Pensions*, Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 3rd ed. 1975) at 78-79.

Pension plans are categorized as contributory or non-contributory. Under a contributory plan both the employee and the employer make contributions to the plan. *E.g., Los Angeles Dept. of Water & Power* v. *Manhart*, —— U.S. ——, No. 76-1810 (decided April 25, 1978). A contributory plan will contain provisions for the return, at a minimum, of the employee's contributions plus interest if his employment is terminated before the anticipated retirement age. In a non-contributory plan the full cost of the plan is borne by the employer. Melone, *Collectively Bargained Multi-Employer Pension Plans*, Pension Research Council, Wharton School of Finance and Commerce (Homewood, Ill., Richard D. Irwin, Inc., 1963) at 35-36. *E.g., Alabama Power Co.* v. *Davis*, 431 U.S. 581; *Fleck* v. *Spannaus*, No. 77-747, Brief for Appellant Structural Steel Co. at 10a.

Where an employee has the option not to participate in a pension plan, such a plan is denominated "voluntary."

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[6] While multiemployer plans are jointly administered by the employers and the union, single employer plans may be either jointly administered or administered solely by the employer.

[7] Many single employer plans are also the product of collective bargaining.

Those plans, such as the Local 705 plan, which provide for automatic participation as a mandatory incident of employment are "involuntary" or "compulsory" plans, *e.g.*, *Malone* v. *White Motor Corp.*, —— U.S. ——, No. 76-1184 (decided April 3, 1978); *Alabama Power Co.* v. *Davis*, 431 U.S. at 590. Contributory plans can be entirely voluntary or compulsory both with respect to participation and employee contributions. Alternatively, they can be compulsory with respect to participation based upon employer contributions and voluntary with respect to employee contributions.

There are two major types of benefit arrangements, defined benefit plans and defined contribution plans. Under a defined benefit plan "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Alabama Power Co.* v. *Davis*, 431 U.S. at 593, n.18.

Under a defined contribution plan, individual accounts are kept for each eligible employee during the period while he is still working, and an amount is credited annually to each of those individual accounts. The funds are invested and the earnings or the losses serve to increase or decrease the amount in the account. Since the amount in each individual employee's account is used to provide benefits for that employee upon retirement, the investment experience affects quite significantly the amount of the benefits that will be received.

Under a defined benefit plan, such as the Local 705 Pension Plan, the level of pension benefits is fixed and eligibility requirements are based on length and continuity of service and age. Compare *Johnson* v. *Botica*, 537 F.2d 930, 932-933, 936-937 (C.A. 7). The rate of

pension payments that can be given to retirees is determined by the following actuarial factors, as enumerated by a leading text, Melone, *Collectively Bargained Multi-Employer Pension Plans*, Pension Research Council, Wharton School of Finance and Commerce (Homewood, Ill., Richard D. Irwin, Inc. 1963): (1) "[t]he mortality experience of both active employees and pensioners"; (2) "turnover" by "[e]mployees who terminate their coverage under the plan for reasons other than death or retirement"; (3) "investment income earned on the accumulated assets of [the] * * * fund"; (4) "the expense of administering a pension program"; (5) "[t]he age at which employees retire"; (6) employers' "future contribution levels", which are "one of the most important factors . . ." *Id.* at 77-85. Melone further notes the actuarial impact of the "initial accrued liability" (or "past service liability") for employees who—like Mr. Daniel and others grandfathered into the Local 705 Plan—are given pension credit ("past service credit") for years prior to the commencement of contributions. *Id.* at 88-89.[8]

Typically pension plans provide that an employee shall have no interest or right in the fund itself until vesting has occurred, usually as a consequence of the period during which the employee has been a participant in the

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[8] See also, *e.g.*, *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 590. Past service is normally recognized in a newly-created plan but is commonly funded on a deferred basis, *e.g.*, *Malone* v. *White Motor Corp.*, —— U.S. ——, No. 76-1184 (decided April 3, 1978) slip op. 2-3. The District Court in *Malone* noted: "Deferred funding of past service liability is a common feature of pension plans. In essence, past service liability is met by continued business operations and continued contributions by the employer to the pension fund. If the plan is terminated, the pension fund will not be increased and as a result some past service liability will remain unfunded," *White Motor Corp.* v. *Malone*, 412 F.Supp. 372, 374 (D.Minn.), *rev'd*, 545 F.2d 599 (C.A. 8), *rev'd sub nom. Malone* v. *White Motor Corp.*, —— U.S. ——, No. 76-1184 (April 3, 1978).

plan. *E.g., Malone* v. *White Motor Co., supra*;[9] *Alabama Power Co.* v. *Davis*, 431 U.S. at 590; *Fleck* v. *Spannaus*, No. 77-747, Brief of Appellant Structural Steel Co. at 17a. The Local 705 Trust Agreement so provides in Article 13 (A. 64, p. 7). While plans vary as to the time and extent of vesting, ERISA § 202 now sets certain minimum vesting standards.

An important variable which affects the ability of pension funds to pay benefits is the fact that contributions are made with respect to potential beneficiaries who never attain vested rights.[10] To the extent a particular plan has a given forfeiture or drop-out rate the amount of money available may be sufficient to pay benefits to those satisfying all the requirements of the plan, benefits may be increased or employer contributions may be reduced. See also, generally, Bernstein, *The Future of Private Pensions* (New York, N.Y., The Free Press of Glencoe, 1964), at 39-46; Allen, Melone & Rosenbloom, *Pension Planning* (Homewood, Ill., Richard D. Irwin, Inc., 1976) at 72-77.

Pension plans may also be divided into funded and unfunded plans. In an unfunded plan the employer disburses the benefits as they become due as a payroll cost. The beneficiaries must look solely to the employer's present ability to pay. Since ERISA this system is no longer available for pension plans of employers in interstate commerce or plans of employee organizations with members in interstate commerce. While ERISA provides for certain minimum funding standards for defined benefit plans, § 302, there are still a multitude of funding op-

[9] Section 6.17 of the White Motor Corp. plan stated: " 'No benefits other than those specifically provided for are to be provided under this Plan. No employee shall have any vested right under the Plan prior to his retirement and then only to the extent specifically provided herein.' " *Id.* slip op. p. 2, n. 2.

[10] See *e.g., Walsh* v. *Schlecht*, 429 U.S. 401, 408-410; *Johnson* v. *Botica*, 537 F.2d 930, 935, 936 (C.A. 7); *Local Union No. 5, Sheet Metal Workers' International* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636 (C.A. 6).

tions open to complying employers. Under a funded plan, the employer makes annual contributions to a trust fund. Some plans are funded in whole or in part with the employer's own stock. In the instance of contributory plans, employee contributions may or may not be invested in the employer's stock, a difference which has significance under the federal securities laws.

Funded plans may be either insured or non-insured although some plans use a combination of the two. Under an insured plan, the employer enters into a contract with an insurance company (ordinarily a group annuity contract and sometimes individual insurance or annuity contracts for each employee). The employer pays contributions (also called premiums) to the insurance company which holds and invests the funds and agrees to disburse them for the purpose of paying the promised benefits to the employees in the manner provided by the plan and the contract. In many cases, the insurance company will assume a contractual liability directly to the employees, sometimes upon the retirement of each employee and sometimes at an earlier date, to assume the employer's obligations to pay the plan benefits. See also, generally, McGill, *Fundamentals of Private Pensions*, Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 1975) at 225-284.

In a non-insured funded plan, contributions are held by the trustees, which may be a bank or trust company, or any other designee of the employer, or in the case of collectively bargained funds will usually consist of an equal number of employer and union designees. The trustees are responsible, in some instances pursuant to employer direction or concurrence, for the investment of the fund. Such investment often is accomplished through the vehicle of trust funds maintained by banks or separate accounts maintained by insurance companies expressly for that purpose. See also, generally, *id.* at 285-302.

SUMMARY OF ARGUMENT

I.

In *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (*"Forman"*), this Court held:

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

The "economic reality" test which was thus reaffirmed is a principled standard designed to effectuate the Congressional intent to regulate certain transactions through the securities laws, but not others. But the Court of Appeals failed to heed *Forman's* fundamental teaching that the "focus of the Acts" constitutes a significant restriction on their coverage.

When an individual becomes or remains a participant in an involuntary non-contributory pension plan he is not in the capital market; he is in the labor market. As a wage earner and potential pension beneficiary, the employee is not an "investor" in any sense understood by Congress when it was protecting investors in the securities markets; he does not acquire anything which can reasonably be assimilated to any of "the many types of instruments that in our commercial world fall within the ordinary concept of a security" H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933), quoted in *Forman*, 421 U.S. at 847-848; nor does his acceptance of or remaining in covered employment give rise to a "purchase" and "sale"

of an interest or participation in the plan or the fund from which he may receive benefits. The 73rd Congress was surely able to distinguish between an individual's taking of and remaining on a job, and an individual's purchasing of a share of stock or otherwise placing capital at risk; and to differentiate pension funds—to which employers contribute in order that money will be available for distribution to their employees after a lifetime of labor—from the kinds of enterprise with whose financing it was then concerned.

Forman also teaches, by its disapproval of the Second Circuit's method in that case, that "economic reality" is distorted by fragmenting a complex transaction and then holding it to be subject to the securities laws because one element thereof bears a resemblance to other transactions which are covered. Here the Court of Appeals isolated from the employees' total working conditions a single "fringe benefit"—the contingent expectancy of receiving "pension payments [which] are predominantly rewards for continuous employment with the same employer." (*Alabama Power Co.* v. *Davis*, 431 U.S. 581, 594.) It also characterized the employee's participation in the pension plan on the basis of a single factor which increases the amount of money in the pension fund—its investment performance—although other factors are far more significant, namely, that money is contributed with respect to the labor of persons who will never receive any benefit, and that current contributions are far in excess of those made when the beneficiary was acquiring eligibility. The court also put aside other important determinants of the benefit, if any, which the participant will ultimately receive, such as his own compliance with the eligibility requirements, the award of past service credits, and the trustees' determination of how much can be paid, consistent with the interests of other participants. Each of these factors is entirely foreign to "* * * the many types of instruments that in our commercial world fall

within the ordinary concept of a security.'" 421 U.S. at 847-848.

The Court of Appeals' opinion indulged freely in loose analogies, in denominating covered employees as "investors" who make "investments", and similar torturing of securities law concepts. Its need to do so reflects the incongruity of using those laws to vindicate a pension applicant's claim, which arises out of transactions which are in an entirely different universe of discourse than the transactions in the capital market of the enterprise system on which the Securities Acts focus.

II.

A. The Court of Appeals' holding that a security is present was the product of a series of misconceptions concerning the economic reality of compulsory noncontributory pension plans. Central to its approach was its view that "employees are putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck." (A. 224; see also, *e.g.*, A. 225, n.20, 227, 231). But the reality is otherwise. An employee does not part with money; he performs labor. The money which the fund receives is contributed by the employer for the benefit of the employee group as a whole; a particular employee cannot choose to receive it at the time he works and can ultimately receive any money from the fund only if he satisfies the eligibility requirements. Indeed, the contribution which an employer makes to a pension fund is not even necessarily measured by the hours of work performed by a particular employee. The UMW plan for example, is funded by royalties on tons of coal; see also, *Walsh* v. *Schlecht*, 429 U.S. 401, 409-410. Under no circumstances is the contribution the equivalent of money which the employee would otherwise earn. As this Court held in *Alabama Power Co.* v. *Davis*, 431 U.S.

581, "the 'true nature' of the pension payment is a reward for length of service." (*Id.* at 594).

The court referred throughout to "plaintiff's interest in the pension fund" or in the plan. This terminology is inaccurate and misleading. The pension trust here like most others explicitly provides that no employee "shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund" until he becomes eligible for benefits thereunder. It is, moreover, a group plan and all contributions received from the participating employers are pooled; there are no individual "accounts" for particular employees. An employee has only a contingent expectancy of future pension payments, in amounts to be determined in the future, if he ultimately satisfies the pension eligibility requirements. See *Alabama Power*, 431 U.S. at 594 and *Malone* v. *White Motor Co.*, —— U.S. ——, No. 76-1184, slip op. p. 12, discussing vesting requirements. The employee's expectancy can be defeated either by his quitting or discharge, or by his employer's going out of business, or refusal to continue to fund the plan.

Perhaps the most fundamental objection to the court's "profit" theory is that the investment gain of the fund does not necessarily redound to the advantage of the ultimate pension beneficiary:

> "A participant in a defined benefit plan, particularly a compulsory non-contributory plan, does not expect to derive a profit in an economic or literal sense from employer contributions. The contrary is true. The participant expects to receive a retirement benefit whether derived from profits or from employer contributions, or from any other source for that matter. Even if the fund generates losses from investments, the participant wants, expects, and is entitled to his retirement benefits." Alef and Short, *op. cit.* p. 45, n. 30, *infra*.

The rate of the benefit which an individual receives as a pension is fixed by the pension plan trustees on the basis of considerations which may or may not include the fund's investment performance. It depends significantly on the employee's length of service with the employer, and the employer's or trustees' judgment of what level of payments is fair and necessary to provide some measure of financial security to the retiree. See *Alabama Power Co.*, 431 U.S. at 594. The actual amount received depends not only on the rate of payments but also on how long he lives in retirement.

B. 1. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, admonished against imposing liability under § 10(b) and Rule 10b-5 by "add[ing] a gloss to the operative language of the statute quite different from its commonly accepted meaning." *Id.* at 199. It distorts the "commonly accepted meaning" of those words to say that by performing labor an employee "purchases" an interest in a pension plan to which his employer contributes, even if that contribution is viewed as partial compensation for that labor.

2. The court's finding of a purchase and sale here conflicts with the "policy considerations" on which this court relied, *Blue Chip Stamps* v. *Manor Drug Stores* (421 U.S. 723, 737, 749). Recognizing plaintiff's cause of action would create the very "social cost[s]" identified in *Blue Chip.* (421 U.S. at 741). The holding that continuation in employment is a "purchase" "throw[s] open to the trier of fact many rather hazy issues of historical fact the proof of which depend[s] almost entirely on oral testimony." (*Id.* at 743; see also *id.* at 746.)

An employee's decision to remain on a job for one more day is at least as amorphous a predicate for a right of action under the federal securities laws as an investor's decision to hold his investment one more day rather than sell it and buy something else. In determining whether to keep or quit his job, an employee considers a whole array of factors, and even if the employee believes that

the pension plan is undesirable for him because he is uncertain whether he will qualify, or for any other reason, he may have to remain on the job for lack of better alternatives. Compare *Manhart*, p. 9, *supra* slip op. p. 13, n. 30. And given the importance of oral testimony, further exemplified by the Court's reliance on Daniel's affidavit (A. 245, 246, n. 41), plan trustees would be put to the truly unenviable choice between the substantial expense of defending against securities law claims and subverting the plan's actuarial assumptions or providing pensions to an applicant who is ineligible under the plan's rules.

3. Prior to the decision below no court or agency had ever held that there is a "purchase and sale" under the securities laws when an individual accepts or remains in employment covered by an involuntary, noncontributory pension plan. Even the District Court found the "purchase and sale" in plaintiff's participation in union contract ratification. The SEC's 1971 *Institutional Investor's Study* described the legal status of pension plans, and dealt at length with the extent of their coverage under the securities laws. Of particular significance in this case was the following statement:

> "*(1) Corporate pension and profit-sharing plans—(a) Plans not providing for voluntary contributions.* —In the case of plans * * * where contributions to the funding medium consist of either employer money only or employee contributions which are required as a condition of employment, the Commission staff has taken the position *that the Securities Act does not apply* because there is no 'sale' or 'offer for sale' of a security." (3 *SEC Institutional Investor Study* at 996 emphasis added.)

This interpretation was based on "the absence of a volitional element on the part of the employee * * *" (*id.*). The Study differentiated voluntary and contributory plans, which it discussed in the next subsection:

> "In the situation where the employee may make voluntary contributions to the plan * * * the absence-of-volition rationale cannot come into play. However, the Commission staff has in the past taken a no-action position 'that no question will be raised with respect to the registration of participations in a voluntary contributory pension, profit-sharing, or similar plan that does not invest in the securities of the employer company in an amount exceeding the company's contribution.'" (*Id.* at 997)

As Judge Tone recognized, the Study belies the SEC's contention, accepted by the majority, that its prior "no-sale" position was limited to the Act's registration requirements.

III.

A. Congress has twice enacted legislation designed to protect the interests of participants and beneficiaries in noncontributory involuntary plans, and dealt therein with the precise problem of the nature and timing of disclosure to which plan participants and beneficiaries are entitled. On both occasions the SEC disclaimed either authority or expertise concerning collectively bargained pension plans, and it reinforced the Congressional understandings—first (prior to WPPDA of 1958), that employees were not at all protected by federal law with respect to information concerning pension benefits, and thereafter (prior to ERISA of 1974), that existing law was inadequate, in part because no law provided employees with sufficient information. At no time were the Congressional committees studying pension plans advised that the securities laws already obligated plan administrators or others to provide employees who obtain or choose to retain employment covered by a collectively bargained pension plan with information concerning that plan, or that those laws dealt in any manner with the relationship between such pension plans and their participants. The committees were told just the opposite. And

in both instances they legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to that relationship.

The SEC was particularly active in the legislative process which led to the WPPDA. Acting SEC Chairman Andrew D. Orrick testified that "[t]he functions of the Securities and Exchange Commission are devoted to the regulation of the capital-securities markets . . . But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital-securities markets." In his testimony and in a supplemental memorandum the SEC disclaimed interest in being given responsibility to administer the pending legislation. Against this background, Congress determined to regulate welfare and pension plans and to vest administrative responsibility in the Department of Labor rather than the SEC. See the Senate Report quoted by the court below, (A. 252, n.53).

At the outset of its investigation which led to ERISA the Senate Subcommittee had caused a detailed analysis to be made of all legislative regulation of pension plans, the results of which were set forth in the 1971 Interim Report and were then carried forward in subsequent committee reports in both bodies, in a summary entitled "*The Existing Law*". The Interim Report stated that "pension and profit sharing plans are exempt from *coverage* under the Securities Act of 1933 * * * unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer." It also portrayed the SEC in a peripheral role and did not even mention the securities laws in the section it entitled "Legislative Regulation". The court below simply misread the Interim Report as it had misread the 1971 Institutional Investors Study with which the Interim Report was in full accord.

B. Our brief describes at considerable length the legislative history of the securities laws and administrative

practice thereunder as it pertains to pension plans. The single most important fact is that the Commission at no time asserted the authority to regulate involuntary noncontributory pension plans under the anti-fraud provisions or otherwise, and that its actual practice accords with the description which we have quoted from the Institutional Investors Study. "Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." *Federal Power Commission* v. *Panhandle E.P.L. Co.*, 337 U.S. 498, 513. See also *United States* v. *Enmons*, 410 U.S. 396, 408-410. Of this the court below said nothing.

For purposes of this summary, we shall confine ourselves to a few additional highlights.

1933. Contrary to the court below, by 1933 employee pension plans were by no means a "rarity" (A. 241): they were a significant economic phenomenon affecting over 3,500,000 employees of 360 companies, a phenomenon whose importance Congress had specifically recognized in revenue legislation as early as 1926.

1934. The court below relied on Congress' rejection of Senator Hastings' proposed amendment to Section 4(1) of the 1933 Act which would have given the benefit of the "non-public offering exception" to *employees' stock investment plans.* Since such plans are merely vehicles for the employers distribution of his own stock and since there was no mention of pension plans in the language or legislative history of the proposed amendment, this Congressional action says nothing about compulsory or noncontributory plans.

1940. The court below erred in its view that pension plans are "congruent with" employees' securities companies and therefore are investment companies regulated under the Investment Company Act of 1940 unless exempted. In fact, pension trusts (or plans) were expressly excluded from the definition of investment companies by § 3(c)(13) of the 1940 Act, whereas "employees' securities companies" were defined in § 2(a)(13) as an "investment company," which the SEC could exempt if it satisfied the conditions set forth in § 6(b) of that Act. This distinction was understood by the SEC in a 1941 decision, *Electrical Securities Corporation,* 10 SEC Jud. Dec. 648. That pension trusts were not considered to be investment companies is shown also by their omission from the comprehensive SEC report which was the predicate for the 1940 Act, and which listed by name "all the investment companies known to the Commission."

1941. There were two significant developments in 1941. First, in September the SEC published two opinions of Assistant General Counsel Davis. Second, later that year Commissioner Purcell testified before the House Committee in connection with amendments to the 1933 Act proposed by the Commission. The court below misinterpreted the opinions and the testimony, both of which actually confirm our views (1) that the SEC did not then consider involuntary and noncontributory pension plans to be securities and (2) that the Commission's no-sale theory with respect to such plans was based on its interpretation of the statute rather than any administrative practice limited to its registration requirements.

The position stated in the Davis opinions was:

1. Certain types of voluntary contributory plans involve the sale of a security and are subject to the Act.

2. Compulsory plans and non-contributory plans are not subject to the Act because they do not involve an offer or sale within the meaning of the Act.

> "[I]t is because of the language of Section 2(3) that we have taken the position in the past that no 'offer' or 'sale' is involved in the case of a non-contributory plan, where the employees are not requested to make any contributions, or in the case of a compulsory plan, where there is no element of volition on the part of employees whether or not to participate and make contributions." (Op. cit. p. 103, *infra.*)

Mr. Purcell's testimony was in accord. He did not claim that pension plans generally constitute investment contracts. Rather, he took that position only with respect to employee investment plans to which employees contribute their own money (supplemented in some instances by employer contributions) and perhaps only those plans which in turn are invested in the employer's securities. Copious quotation from his testimony in our brief shows that he considered only voluntary contributory plans to be subject to the Act and that compulsory and noncontributory plans were not so subject. See, *e.g.* 1941 Hearings, 887-888, 895-897, 903.

1941-1970. After the SEC failed in its 1941 effort to gain express statutory authority over voluntary contributory plans, it evidently abandoned further efforts to apply the Securities Act to most plans of that type. In 1953 letters from the Assistant Director of the Commission's Division of Corporation Finance formally announced the much narrower policy that registration was required only for contributory plans which used employee contributions to purchase employer securities. The conclusion in the 1941 opinions that compulsory noncontributory pension plans do not involve a sale and were not subject to the Securities Act was expressly reaffirmed as current staff policy in letters in August and November 1962.

1970. The Court of Appeals placed heavy reliance on an amendment made to § 3(a)(2) of the 1933 Act by § 27(b) of the Investment Companies Amendments Act of 1970 (the "1970 Act"). According to the court, Congress therein exempted "interests in employee pension funds * * * from the registration requirements of Section 5 of the 1933 Act if the employee pension fund was maintained by a bank or in a separate account maintained by an insurance company." (A. 236) The court drew from that interpretation two propositions which were critical to its ultimate judgment. *First*, that Congress thereby "evidenced agreement with the SEC's position that interests

in pension funds are securities"; and *second*, that by virtue of those amendments nearly all pension funds are exempt from registration. (A. 236-238, 252, 258.)

The second proposition is wrong because contrary to the assumption of the court below that 96% of all pension funds are bank maintained and hence exempt from registration by reason of the 1970 amendment (A. 258, n.61), the SEC's own statistics show that funds with assets of at least $50 billion would be nonexempt from registration under the court's interpretation. Because the court did not realize the true consequences of its interpretation, it did not face up to a question which we submit is unanswerable: Why would Congress exempt from registration interests in pension funds maintained by a bank or in a separate account maintained by an insurance company and yet subject interests in all other pension funds to registration?

The first proposition is wrong because the 1970 amendment did not address the relationship between employee participants and pension plans or trusts at all, but rather only the relationship between banks or insurance companies which offer bank trust funds or separate insurance accounts as investment vehicles for pension fund assets and those who are responsible for determining the manner in which such assets will be invested. This interpretation explains why the phrase "maintained by a bank * * *" is used in the 1970 amendment, whereas, as noted, the court's interpretation makes no practical sense. Moreover, our view is confirmed by the legislative history which in view of the importance placed upon the point by the court below the brief is constrained to describe in regrettably elaborate detail.

It is common ground that through the passage of the bill by the Senate in 1969 its purpose was to clarify the status of certain commingled investment accounts maintained by banks and insurance companies. As reported by the House Subcommittee, however the bill contained an

added phrase "single or" to precede the phrase "collective trust fund maintained by a bank." This version, according to the court, "altered the focus of the exemption to encompass interests in the underlying pension funds." (A. 239).

We submit the court was mistaken for several reasons of which we set forth the most important. *First*, the description of § 27(b) in the House Committee Report was identical to the earlier Senate Committee's Report. The House Committee did not even mention the change. *Second*, and we believe independently decisive, a colloquy occurred on the House floor between Congressman Springer, the ranking minority member and Congressman Moss, the chairman of the subcommittee which explained the change. (116 Cong. Rec. 33287, quoted in full at pp. 126-127 *infra*). This deliberate and authoritative colloquy, far from stating that there had been a significant change in "focus", declared that the House bill differed from the Senate bill "slightly", in that "a single trust maintained by a bank where the trust assets were *not* commingled with those of other qualified trusts would *also* be exempted from registration" under the securities laws; that is, they would be treated like "collective trusts maintained by a bank" under the Senate bill. *Third*, the court cites no reference in the legislative history which shows that Congress even knew of the existence of the administrative practice which the court believed was being codified; this omission is not due to oversight, but was unavoidable because there is no such reference. *Fourth*, the court does not even reflect upon the inherent unlikelihood of its scenario, wherein Congress changed the whole focus of major legislation on the basis of a letter from one attorney, without hearing from any of the numerous parties who would be affected, and without spelling out in debate or committee report precisely what it had done. *Finally*, the court's interpretation of the 1970 amendment is flawed by its failure to recognize that the 1971

Institutional Investor Study describes an administrative practice which, insofar as is pertinent here, is the precise opposite of that which the court says was codified in 1970, see p. 3, *supra*. We submit that the 1970 Amendment, properly interpreted, has nothing to do with the issue in this case.

C. The majority below accepted the SEC's revisionist history, of which Judge Tone perforce said: "The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position." (A. 260). In consequence, the majority gave the Commission's present views far greater weight than they deserve under the circumstances (see *e.g.*, *Forman*, 421 U.S. 837, 858, n.25, followed in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143; *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 n.27) and insufficient weight to the position which the SEC took in the first forty years.

But the paramount importance of this history stems from the fact that Congress has twice enacted pension legislation in reliance on the SEC's existing interpretation. Even as the SEC "is not now free" to assert that the securities laws regulate this subject, so, too, is the courts' freedom circumscribed, for the principled basis of this rule of construction is not that the agency should be estopped, but that the manifested Congressional will should be enforced. Thus even if the securities laws are so elastic that the courts could permissibly have applied them to reach involuntary noncontributory pension plans absent intervening Congressional action, the enactment of WPPDA and ERISA under the circumstances detailed herein forecloses this choice. These laws embody Congressional policies concerning the regulation of pension plan disclosure which the courts may not override and frustate by rejecting the assumptions on which Congress justifiably proceeded. Compare *Califano* v. *Sanders*, 430 U.S. 99, 105-108.

IV.

In *Los Angeles Dept. of Water & Power* v. *Manhart*, —— U.S. ——, No. 76-1810 (decided April 25, 1978), this Court held that "* * * the rules that apply to [pension] funds should not be applied retroactively unless the legislature has plainly commanded that result" (slip op. p. 18).

The Court noted that in enacting ERISA Congress "underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." *Id.*, n. 40.

Here, as in *Manhart*, "this is apparently the first litigation" asserting the rule of pension management adopted below, and that rule "represents a marked departure from past practice." (Slip op. p. 19.) "Retroactive liability could be devastating for a pension fund" and "[t]he harm would fall in large part on innocent third parties" (slip op. p. 19), pensioners and current employees. Thus, precisely the same policy and practical considerations militate here also in favor of treating any such rule as only a standard for behavior henceforth and not as a basis for monetary recovery on account of past conduct in reliance upon rules reasonably believed established.

Manhart denied retroactive recovery although this Court had held that in suits under Title VII of the Civil Rights Act of 1964 there is a "presumption in favor of retroactive liability [which] can seldom be overcome." (Slip op. p. 16 citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. The "considerations of policy" found controlling in *Manhart* have even more force where the granting of *any* private remedy is due only to a "judicially implied cause of action" (*Blue Chip*, 421 U.S. at 736; see also *id.* at 737 and 749.) The inequity of imposing financial liability under the securities laws for noncompliance with disclosure standards that were generally understood to be non-existent is well articulated in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1291-1294 (C.A. 2, Friendly, J.)

ARGUMENT

I. EMPLOYEE PARTICIPATION IN A COMPULSORY NONCONTRIBUTORY PENSION PLAN IS NOT THE KIND OF TRANSACTION WHICH CONGRESS SOUGHT TO REGULATE BY ENACTING THE FEDERAL SECURITIES LAWS.

One knowledgeable court has observed:

> The securities laws in question, designed to safeguard the integrity of investment decisions, have been in operation for over forty years. Yet until the 1975 decision in *Daniel* * * * no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws. Congress has repeatedly indicated its belief to the contrary.[11]

The novelty of this case is not due to a paucity of litigation by disappointed pension applicants. Since 1933 many employees have been denied pensions, because they did not meet eligibility criteria, because the plan was insufficiently funded, because the employer shut down a plant or for other reasons. Suits have been brought under a variety of common law and statutory theories; in doubtless many other instances claimants have been advised against suit for want of any colorable basis. Nor can the absence of such claims be laid to a lack of will or resourcefulness on the part of the securities bar or practitioners generally. On the contrary, it reflects a common—and entirely correct—appreciation that the securities laws are not a catch-all for claims of alleged frauds of commission and omission. They regulate an important, but nonetheless discrete segment of our economy.

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[11] *Robinson* v. *United Mine Workers of America, etc.*, 435 F.Supp. 245, 247 (D.D.C., Gesell, J.) (footnote omitted).

As this Court held in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (*"Forman"*):

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

In *Forman* the Court decided that the type of transaction before it, in which the purchasers were interested in acquiring housing rather than making an investment for profit was not within the scope of the federal securities laws. (*Id.* at 859-860.) The reasoning of *Forman* requires reversal of the decision in this case.

The heart of the matter is that when an individual becomes a participant in an involuntary non-contributory pension plan he is not in the capital market; he is in the labor market. In his capacity as wage earner and potential pension beneficiary, the employee is not an "investor" in any sense understood by Congress when it was protecting investors in the securities markets, and he does not acquire anything which can reasonably be assimilated to any of "the many types of instruments that in our commercial world fall within the ordinary concept of a security" H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933), quoted in *Forman*, 421 U.S. at 847-848. And it likewise stretches these laws far beyond their original scope to hold, as the Court of Appeals did, that an individual's acceptance of or remaining in covered employment gives rise to a "purchase" and "sale" of an interest or participation in a pension plan.

Forman adhered to the methodology of the earlier decisions in which the presence of a "security" was in issue. Not form but "economic reality" has been the touchstone, and it was economic reality that led to the determination that a security was present in the cases from *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, through *Tcherepnin* v. *Knight*, 389 U.S. 332. That same test led in *Forman* to the opposite conclusion because the transaction before the Court was "not within the scope of the federal securities laws" (*id.* at 860). Thus, *Forman* adds the insight that "economic reality" is not a result-oriented slogan invented for the benefit of the SEC and private plaintiffs; it is a principled standard designed to effectuate the Congressional intent to regulate certain transactions through the securities laws, but not others. Respect for the Congressional intent compels the conclusion that the securities laws are inapplicable where those realities show, as they did in *Forman*, and as they show here, that the transaction at issue is not within "[t]he focus of the [Securities] Acts." (421 U.S. at 849). *Forman* applied to the securities laws the principle that in construing legislation the courts must, in Learned Hand's words, "reconstitute the gamut of values current at the time when the words were uttered." [12]

Forman also identifies the values of the 73rd Congress. It was concerned with ending abuses "in the capital market of the enterprise system" which had, it was widely believed, caused the collapse of the securities markets and of many enterprises which were fueled by the capital generated through those markets, and, in turn, the Great Depression. To assert that interests in noncontributory involuntary pension plans were within "the focus" of the legislation that resulted is not to reconstitute those values, but to rebel against them. The 73rd Congress knew the

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[12] Letter of Judge Learned Hand, requoted in *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620.

difference between labor and capital; legislation to protect the worker was also on its agenda, and became a reality in the 74th Congress as the National Labor Relations Act, even as when Congress much later turned its attention to protect workers' pension expectancies, it did so through legislation addressed to that subject and administered—its tax aspects aside—by the Department of Labor. Although it was acutely aware that for the average individual his capacity to work is his only source of livelihood, it was able to distinguish between an individual's taking of and remaining on a job, and an individual's purchasing of a share of stock or otherwise placing capital at risk. And it would have recognized—if the thought had not been so remote from its concerns that the idea was never broached—that a pension fund to which employers contribute in order that money will be available for distribution to their employees after a lifetime of labor is not the kind of enterprise whose managers strive to achieve earnings for distribution in proportion to the capital provided, and whose financing was the subject of the securities laws.

Forman also teaches, by example, that "economic reality" is not preserved by taking a complex transaction, breaking it into small parts and then determining that the totality is covered by the securities laws because one element bears a resemblance to other transactions which are covered, but whose other characteristics are entirely different. Precisely such fragmentation was the line of analysis there advocated by the SEC in misplaced reliance on *SEC* v. *United Benefit Ins. Co.*, 387 U.S. 202.[13] So here, the economic reality of the transaction is doubly distorted by characterizing an individual's acceptance and performance of a job which is covered by a collectively bargained pension plan as the "purchase" of a "security".

[13] See Brief for the Securities and Exchange Commission in *Forman*, No. 74-157, Oct. Term, 1974, p. 17.

First, it necessitates isolating from the employees' total working conditions the contingent expectancy of receiving "pension payments [which] have some resemblance to compensation for work performed," but which "are predominantly rewards for continuous employment with the same employer." (*Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592, 594.) Common sense indicates that when a person takes a job the predominant considerations are the nature of the work and the rate of pay; the possibility of future pension rights is one of a number of what are commonly referred to as "fringe benefits" which also include vacation pay, health and welfare benefits and with increasing frequency, group legal services.[14]

Second, it characterizes the employee's participation in the pension plan on the basis of a single factor which increases the amount of money in the pension fund—its investment performance—to the exclusion of other factors which are more important, the use of a pooled fund where contributions are made with respect to the labor of individuals who will never become beneficiaries, and the advantage of current contributions to the fund far in excess of those made when the beneficiary was acquiring eligibility. And it also excludes consideration of other more important determinants of the benefit, if any, which the participant will ultimately receive, such as the participant's compliance with the eligibility requirements, the award of past service credits, and the trustees' determination of how much can be paid, consistent with the interests of other participants. Each of these factors is entirely foreign to "the many types of instruments that in our commercial world fall within the ordinary concept of a security." 421 U.S. at 847-848. While the SEC argued in *Forman* that "an investment contract type of

[14] See LMRA §§ 302(c)(5), (7) and (8), 29 U.S.C. §§ 186(c)(5), (7) and (8).

security may exist where investors are motivated by any significant economic inducement",[15] that view did not prevail.

In driving to the result that the securities laws applied, the Court of Appeals was evidently prompted by its strong feeling that such coverage is both necessary and desirable. (A. 232, 241-242, 244, n.40, 246, n.41, 254-259). Not only is this contrary to *Forman* (421 U.S. at 859, n.26), but it is particularly inappropriate since Congress addressed the disclosure obligations of pension plans with legislation enacted in 1958 and again in 1974. Coverage under the securities laws does not result from the undoubted importance of the pension to the employee,[16] nor from the importance of pension funds in the capital market (A. 232), for the transactions by which those funds are invested are, of course, within the coverage of the securities laws.

Again, it is only by ignoring economic context, by fragmentation, by allowing analogy to proceed wherever the mind may find a way to go, and thereby losing sight of

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[15] Brief for the Securities and Exchange Commission, No. 74-157, Oct. Term, 1974, p. 15. See also Brief for Respondents, quoted at n. 16 *infra*.

[16] Compare the plaintiffs-respondents' brief in *Forman*:

> "It cannot be seriously urged that plaintiffs, all people of limited means, willingly invested what for many was their life savings without any hope of financial gain. Defendants appear to contend that plaintiffs paid out $32,303,200 in hard cash merely to further defendants' cooperative effort. Plaintiffs, however, made their purchases for the total package which defendants offered: stock ownership in a giant cooperative real estate enterprise, tax deductions, the possibility of dividend income, and decent living accomodations at a real dollar saving. Defendants' attempt to deprive plaintiffs of the protection of the federal securities laws by artificial formal distinctions between kinds of economic inducements was properly rejected by the Court of Appeals" (Brief for Respondents, No. 74-157, Oct. Term, 1974, p. 27.)

that to which the securities laws were directed, that noncontributory pension plans can be analogized to pyramid schemes,[17] stock options,[18] mutual funds[19] and variable annuities,[20] and a union member's vote on ratification of a collective bargaining agreement analogized to a stockholder's vote on approving a statutory merger which results in the loss of statutory appraisal rights.[21]

Finally, economic reality is only camouflaged by calling a covered employee an "investor" who makes "investments" even if that is done over and over and over again. From there, the mind readily progresses to calling a contingent expectancy of a pension benefit a "security" (A. 224), the acceptance or continuation of covered employment a "purchase" (A. 245), the difference between the contributions which are hypothetically attributable to an individual's employment and the value of his pension a "profit" (A. 226), and the possibility that the employee will never obtain a pension his "risk of loss" (A. 254), and ultimately to calling the initial formation of a pension plan "primary distribution" and the amendments thereto "secondary distributions", thereby providing the "conceptual predicate" for bringing the plaintiff's claim within § 10(b) of the 1934 Act. (A. 249-250, n.46.) [22] Such word play not only contravenes the

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[17] See A. 226 discussed at p. 49, *infra*.

[18] See A. 227 discussed at p. 50, *infra*.

[19] See A. 231, 234, 235, 241 discussed at p. 43, n. 29, *infra*.

[20] See A. 226-227, 231 discussed at p. 43, n. 29, *infra*.

[21] See A. 244-45 discussed at pp. 63-67, *infra*.

[22] In securities laws parlance, a "primary distribution" is any sale by the "issuer", which, under the Court of Appeals construct would be the defendant trustees. A "secondary distribution" does not refer to additional sales of securities by the same issuer but to resales by controlling persons of outstanding securities which were

teaching of *Forman* (421 U.S. at 849) but "ignore[s] the ancient wisdom that calling a thing by a name does not make it so" (*Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174).

The Court of Appeals' need to torture securities law concepts reflects the incongruity of utilizing those laws to vindicate the claim of a pension applicant, for that claim arises out of transactions of an entirely different purpose and character than transactions in the capital market of the enterprise system on which the securities acts focus. They are simply not in the same universe of discourse.

II. BECAUSE THE COURT MISCONCEIVED THE ECONOMIC REALITY OF A COMPULSORY NONCONTRIBUTORY PENSION PLAN, IT ERRONEOUSLY CONCLUDED THAT THERE WAS A PURCHASE AND SALE OF A SECURITY.

The Court of Appeals' primary error was its failure to recognize the fundamental economic reality that an employee's coverage under a compulsory noncontributory pension plan does not render him an investor in the capital market for whose protection the securities laws were enacted; in consequence, it subjected plaintiff's participation in the Local 705 plan to the same securities law analysis which the courts have traditionally followed in determining whether a commercial transaction involves the sale of a security. And in undertaking this inquiry

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previously issued; since "interests" in a pension plan are nontransferable and nonnegotiable, there can be no secondary distribution. For that matter there can be no resales of any kind and for that reason alone, there would appear to be no liability under § 10(b) of the 1934 Act, as the court below implicitly recognized when it created its strained and erroneous primary-secondary dichotomy. As to the nonexistence of a private cause of action for a violation of § 17(a) of the 1933 Act we adopt the position in the point III of the Local 705 brief.

the court's misperceptions of this economic reality resulted in its erroneous conclusions that "the elements of the *Howey* rule [for finding an 'investment contract'] are present here" (and hence there is a security within the meaning of the federal securities laws) (A. 221), and that an employee's performance of services in an employment covered by a compulsory, noncontributory plan involves a "purchase" and "sale" (A. 242-247).

A. There Is No "Security."

1. *An Employee Does Not "Invest" Money In A Compulsory Noncontributory Plan.*

The court below said: "Realistically speaking, employees are putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck" (A. 224, see also, *e.g.*, A. 225, n.20, 227, 231-232). But the reality is otherwise. An employee does not part with money; he performs labor. The money which the fund receives is contributed by the employer for the benefit of the employee group as a whole; a particular employee cannot choose to receive it at the time he works and can ultimately receive any money from the fund only if he satisfies the eligibility requirements. The Court of Appeals has simply obliterated the essential differences between involuntary noncontributory plans and voluntary contributory plans. Its description also disregards a basic element of all collectively bargained plans, namely that they are negotiated by a union as representative of the entire group, rather than of any individual. As the court said in *Robinson*:

> "The miners cannot be said to have 'invest[ed] * * * money' within the meaning of *Howey*, for all contributions are made by the operators on a per-tonnage basis, and miners have no power to increase or de-

crease payments or to convert them to personal use." (435 F. Supp. 247).[23]

The miner example is indeed instructive. Employer contributions to the UMW health, welfare and pension plans are measured by tons of coal produced, which, of course, can in no way be allocated to the work performed by any particular miner and under other agreements. So too, in *Walsh* v. *Schlecht*, 429 U.S. 401, payments were made to multiemployer funds in part on the basis of labor performed by individuals who, because they work for non-signatory employers, can never be eligible, *id.* at 409-410. Under some single employer agreements and many non-bargained plans the amount of the contribution is not predetermined at all.

In short, the contribution which an employer makes to a fund may or may not be measured by the hours of work performed by a particular employee, but to the extent that it is, it is a matter of convenience and (in the case of multiemployer plans) equitable allocation of obligations

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[23] The court below sought to distinguish *Robinson* as follows:

> "Unlike *Daniel*, where Local 705 members could affect the employers' payments into the pension fund or the allocation of contributions between pension fund payments and current wages by failing to ratify a given contract with set contribution levels, the *Robinson* plaintiffs were powerless to increase or decrease payments or convert them to their personal use." (A. 229).

But Judge Gesell said not that "the *Robinson* plaintiffs [who were the miners' dependents and survivors] were powerless", but that the "miners have no power * * *." And this Court can take judicial notice that miners in the UMW also enjoy the ratification rights which members of the IBT have. Thus, there is not even a factual difference in the situations, even if the fact on which the court below seized could be deemed relevant.

among employers. Under no circumstances is the contribution the equivalent of money which the employee would otherwise earn. And it is of course wholly artificial and arbitrary to attempt to quantify the amount attributable to an employee's work and thereupon to assert that "a Local 705 member invests $1,248 per year through his employer contributions into that fund." (A. 231) Far more realistic was this Court's perception of compulsory noncontributory pension plans in *Alabama Power Co.* v. *Davis*, 431 U.S. 581. While the Court recognized "that pension payments should have some resemblance to compensation for work performed" and that "[f]unding a pension program is a current cost of employing potential pension recipients, as are wages", it concluded "that the 'true nature' of the pension payment is a reward for length of service." (*Id.* at 592-593).[24]

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[24] See also Comment, *Application of the Federal Securities Laws to Noncontributory, Defined Benefit Pension Plans*, 45 U. Chi. L.Rev. 124, 142-143 (1977):

> "The *Alabama Power* opinion provides the more accurate portrayal of noncontributory pension plans. The relationship between pension benefits and forgone wages is tenuous at best. Elimination of a pension plan would not necessarily produce an increase in current employee compensation. The vesting provisions generally present in pension plans tend to promote personnel stability by providing an incentive for employees to remain with their employer. As the Court said in *Alabama Power*, 'By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force.' One of the benefits of personnel stability may be increased employee productivity, and it is conceivable that the reduction in training costs and higher productivity might actually "pay" for some pension plans.
>
> "Even if elimination of pension plans would free some resources, it is not clear, especially in view of the tax advantages of pension arrangements, that those resources would necessarily be passed on to employees in the form of increased wages." (footnotes omitted)

2. *There Is No Employee "Interest".*

Throughout its opinion the court below refers to the "plaintiff's interest in the pension fund" or in the plan.[25] While it is convenient, for want of a better term, to describe a participation in a pension plan, and the contingent expectancy of becoming a beneficiary as an 'interest', that word is highly misleading insofar as it conveys either the notion of a legal right or of something akin to a share of stock. The pension trust here, like most others, is quite explicit in providing that no employee "shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund" until he becomes eligible for benefits thereunder. (See A. 64, p. 7, Trust Agreement, Article 13.)

It is, moreover, a group plan and all contributions received from the participating employers are pooled. There are no individual "accounts" for particular employees, and no employee has any claim upon or right in any portion of the pooled fund until he may ultimately become entitled to a pension. Although contributions are made for each week of work by each employee in the covered group, no employee receives anything of any present economic value by reason of such contributions. All he has is a *contingent expectancy* of future pension payments, in amounts to be determined in the future, if he ultimately satisfies the pension eligibility requirements determined by the trustees selected by the union and the employers.

In response to the identical submission below (IBT Br. 18) the Court of Appeals responded:

> "[M]ere contingent expectancies are the rule rather than the exception in the equity markets. Profits in an equity security require that the market value plus accrued dividends of a stock be greater than the stockholder's cash basis. Thus profits are contingent on the successful operation of the common enterprise, there the issuing corporation." (A. 224)

[25] *E.g.*, A. 219, 230, 234, 235, 236, 242, 245, 259.

But while a stockholder is not *assured of a profit* unless the enterprise is successful, even if it is unsuccessful he does own a present share of the enterprise, stock which he can sell for *some* money as long as the corporation is in existence, at least short of its bankruptcy. On the other hand, a participant in a pension plan can never convey any "interest" therein, no matter how successful the pension fund is in accumulating "earnings." Before he has satisfied the eligibility requirements for vesting he has nothing, and any pension he receives (or lesser right under some plans) is not transferable. Although the *Robinson* court used the word "interest", it was not thereby misled:

> "As in *Forman*, interests in the Trust are inalienable, and any surplus will be converted into extended benefits for all rather than invested for the individual miner's profit." (435 F. Supp. at 247.)

The court below acknowledged that the analogy it drew between covered employment before benefits vest and the situation of a stockholder forced to sell his stock at a net loss "is not exact", but it regarded the difference to be immaterial:

> "[W]e think that a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer, is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future." (A. 224)

But here again the court erred, because the right to receive benefits *is* subject to unilateral withdrawal by both pension trustees and the employer.[26] The broad power of

[26] ERISA limits the powers described in this paragraph but not sufficiently so that it would affect the analysis even if plaintiff could assert any rights under ERISA.

pension trustees to establish and modify pension eligibility requirements is well established.[27] And there are many ways in which the employer can effectively destroy the potential eligibility of some or all of his employees. Such action is completely unilateral where the employees are unrepresented; and even where the employees are represented, it is elementary that the employer is not obligated to acquiesce in the union's demands. See *e.g.*, *Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 109. Thus, where the obligation to contribute to the fund is established by collective bargaining, the employer can withdraw from the plan by agreement with the union (if it determines this to be in the employees' interest) or, if the union objects, by succeeding in a test of economic strength. Moreover, this Court has recognized the employer's unilateral right to go out of business, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, which would likewise put an end to that employer's funding of a single-employer plan or contributing to a multiemployer fund. So, too, the cases are unfortunately legion where an employer has shut down a plant, thereby depriving many employees of their jobs and their pension expectations as well.[28] And of course the employer can foreclose an individual employee from ever attaining eligibility by discharging him, which he may do unilaterally, except insofar as a collective bargaining agreement restricts the exercise of that power.

[27] See, *e.g.*, *Local Union No. 5, Sheet Metal Workers International* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (C.A. 6); *Johnson* v. *Botica*, 537 F.2d 930, 935 (C.A. 7); *Pete* v. *United Mine Wkrs. of Am. Welf. & R. F.*, 517 F.2d 1275, 1283 (C.A.D.C.); *Gomez* v. *Lewis*, 414 F.2d 1312, 1314 (C.A. 3).

[28] See, *e.g.*, *Malone* v. *White Motor Company, supra; Dwyer v. Climatrol Industries, Inc.*, 544 F.2d 307 (C.A. 7), *cert. denied*, 430 U.S. 932; *Craig* v. *Bemis Co., Inc.*, 517 F.2d 677 (C.A. 5); *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128 (C.A. 3), *cert. denied*, 409 U.S. 1126; *Baake* v. *General American Transportation Corp.*, 351 F. Supp. 962 (N.D. Ill.).

In short, the critical fact is that an employee obtains no rights to any lesser benefit until he has satisfied the vesting requirements established under the pension plan (see *e.g.*, *Alabama Power*, 431 U.S. at 593-594; *Malone, supra*, slip op. p. 12), establishes that the term "interest in a pension fund" conveys an image which does not reflect economic reality. See also p. 52, *infra*.[29]

3. *There Is No "Profit" In The* Howey-Forman *Sense.*

a. The Court of Appeals determined that a pension plan participant obtains "Profits from the Efforts of Others" (A. 226) on the following theory: "It is conceded that the expected payout to a beneficiary will exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit" (*id.*). There are, however, several independent reasons why the pension fund does not generate profits in the *Howey-Forman* sense (*id.*).

[29] The court's hypostatization of an "interest in a fund" was apparently the first step to the court's assimilating pension funds to mutual funds and variable annuities. But there are many differences between these investments and participating in a pension fund of which we shall mention some of the most salient. A participant in a pension fund does not contribute specified sums of money, he may not sell, trade or redeem his interest, he does not have a proportionate share of the underlying portfolio and he does not entrust his personal capital to the pension plan administrators; moreover, the amount of his benefit is fixed by the trustees on the basis of numerous considerations which do not include the specific amount of money paid in because of his labor, but do include many factors, of which investment income is only one, as we shall elaborate in the next subsection.

The Court of Appeals also observed that former SEC Chairman Cohen "commented on the similarities between a pension fund and a mutual fund investment." (A.235). But Mr. Cohen also commented on the differences, including that: "Unlike the mutual fund investor, the employee's investment is usually mandatory. It comes with the job . . ." 1972 Hearings cited at p. 76, n. 68, *infra* at p. 231.

Perhaps the most fundamental objection to the Court's "profit" theory is that the investment gain of the fund does not necessarily redound to the advantage of the ultimate pension beneficiary, since in a deferred benefit plan such as this the amount of the benefit which an individual receives as a pension is fixed by the pension plan trustees on the basis of considerations which may or may not bear a significant relation to the fund's investment performance. The point is well made in one critique of the decision below:

> "It appears, though, that the court and the SEC fail to distinguish between two inherently different concepts: The defined benefit plan and the defined contribution plan. In the defined contribution plan (such as a profit-sharing plan and money purchase pension plan), the participant is assigned an account and this account is credited with his pro rata portion of employer contributions. The profits which are generated on his account balance determine the benefit which the participant will receive some time in the future when distribution takes place. The amount of the participant's benefit will be in direct proportion to the profit or loss generated by the fund. The defined benefit plan, on the other hand, does not allocate employer contributions to accounts of participants and, in fact, participants do not have an undivided interest in plan assets. The participants' sole interest in the plan is a predetermined level of accrued benefits normally payable on retirement. A participant in a defined benefit plan, particularly a compulsory non-contributory plan, does not expect to derive a profit in an economic or literal sense from employer contributions. The contrary is true. The participant expects to receive a retirement benefit whether derived from profits or from employer contributions, or from any other source for that matter. Even if the fund generates losses from investments, the participant wants, expects, and is entitled to his retirement benefits." [30]

The court below dismissed this argument out of hand: "That this profit element is fixed because pension payments are set at specific levels from time to time is wholly immaterial to gain being profit in the *Forman* sense. A number of instruments which all would concede to be securities (bonds, debentures, etc.) are fixed return." (A. 227, n. 23). But in bonds and similar securities the amount of the return is fixed in the instrument, and therefore is known at the time of purchase, and depends on how much money the purchaser pays, for that determines the number of bonds he receives. In contrast, the amount of the monthly payment to beneficiaries is not fixed until the time of their retirement (that is, until the employee has completed the years of labor which the court below held to be his "purchase").[31] It depends on the employee's length of service with the employer, and the employer's judgment (made with the union in a collective bargaining context) of what level of payments is fair and necessary to provide some measure of financial security to the retiree. See *Alabama Power Co.*, 431 U.S. at 594. The actual return which any individual receives depends not only on the rate of payments but also on how long he lives in retirement. Further, bonds and debentures are ordinarily negotiable, and of course are expressly included within the statutory definitions of "security." Here again the court's analogy is without merit.

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[30] Alef and Short, *Problems created by CA-7 decision that pension plan participation is a security*, 47 J. Tax. 282, 283 (1977). See also Note, *The Application of the Antifraud Provisions of the Securities Laws To Compulsory Noncontributory Pension Plans After Daniel* v. *International Brotherhood of Teamsters*, 64 Va. L. Rev. 305, 315 (1978).

[31] The rate of benefits may even be increased after retirement.

The court also rejected our contention that there is no *Howey-Forman* profit "because, on an amortized basis, some of the gain may be attributable to 'pooled' contributions of all participating employers, forfeitures of employees whose pension rights do not vest or to increased contributions negotiated by the union" (A. 226). But there is no "may be" about it. By far the greatest proportion of the difference between the contributions made with respect to an individual's employment (the hypothetical investment) and the ultimate benefit is due to the foregoing factors rather than investments. On this point the court below mistakenly attributes to us a concession which we did not make, and as to which the underlying facts are entirely different from what the Court of Appeals stated them to be. The Court of Appeals declared:

> "A substantial part of the gain (which even defendants concede to be at least 25%) will derive from traditional return on the pension fund participant's investment, a dollar-profit element in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustees' management of the pension fund." (A. 227, citing IBT Br. 10-11.)

What was actually said in that brief, however (based on an affidavit of the Local 705 Pension Fund's actuary), was that:

> "[A]n employee retiring in 1975 under the Local 705 Pension Plan had retirement benefits with a then current actuarial value of $57,591, of which only $14,542 was attributable to contributions to the fund resulting from his own employment and interest on those contributions (App. 184-8).[32] In other words, only one-fourth of the current value of his expected pension benefits was in any way traceable to his own employment, and the remaining three-fourths resulted from contributions made with respect to other employees covered by the plan". (IBT Br. 10-11).

[32] The citation is to the record in the court below, which is reproduced at A. 177 in this Court.

Thus the 25% figure represents not what the Court of Appeals calls the "traditional return on the pension fund participant's investment," but the *total* of that "return" and the "investment". The underlying figures to which the International Union's brief referred show further that of the $14,542 (or 25%), $9,510 was the accumulated contributions paid on behalf of the employee and only the remainder, $5,032, constituted the interest thereon. In reality, therefore, less than 9% of the entire benefit's actuarial value of $57,951 constitutes the fund's investment gain on the employer contributions which the court characterized as plaintiff's "investment." It is on the basis of this 9% that the Court of Appeals determined that the Local 705 Pension Fund is an enterprise in which a covered employee realizes "profits from the efforts of others" (A. 226-228).

It is additionally significant, and probably differentiates defined benefit plans from anything which has ever been held to be a security, that in such a plan the level of benefits depends on the judgment of the employer (or trustees in a multi-employer plan) as to the long-run interests and requirements of the participants and the contributing employer(s) at any time. That judgment is in turn significantly influenced by the economic prospects of the employer (or the industry in a multi-employer fund). And since the relationship of contributions to benefits depends on actuarial considerations of which the assumed investment return is but one (see p. 11 *supra*), a better or worse investment performance may be offset by variances in the other factors which have also been assumed for actuarial purposes, such as mortality and turnover. Moreover, because most plans have

substantial unfunded but accrued liabilities, the net difference between assumptions and actuality in these plans will directly determine only the amount of the difference between assets and accrued liabilities. It will only indirectly affect the employer's contribution necessary to achieve a particular level of funding (as opposed to liability), and even less directly the level of pension benefits. This is not to say that investment performance cannot result in advantage to pension beneficiaries, but only that the relationship is far too attenuated to constitute a *Howey-Forman* profit. Cf. 421 U.S. at 855-857, rejecting the Second Circuit's view that the possibility that net income derived by the leasing by Co-op City for commercial activities, etc. would be used to reduce tenant rental costs was a "profit" to the tenant-stockholders.

b. For the foregoing reasons the investment appreciation of the employer's contributions to the fund bears too remote a relationship to the ultimate benefit to the employee to give rise to the kind of profit which has been a requisite of "investment contracts" under this Court's decisions. It is therefore perhaps superfluous to add that the court erred also in concluding that that which it held to be a profit was "from the efforts of others" in the *Howey-Forman* sense. But we shall discuss the point briefly because it again illustrates how the court's tendency to analogize led it astray.

The court observed "that gain relative to a security can derive from sources other than the direct efforts of the managers of the common enterprise" (A. 226). Neither the two pyramid scheme cases,[33] nor the variable

[33] *SEC* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473 (C.A. 5); *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (C.A. 9), *cert. denied*, 414 U.S. 821.

annuity case,[34] nor the stock option case,[35] which the court cited (A. 226-227) support that proposition, let alone resemble this case sufficiently to warrant the court's reliance.

We are unable to determine from what, if anything, in the *VALIC* opinion the court below drew its assertion that "the payout to a maturing annuitant [in *VALIC*] was more likely to derive from investments of new annuitants than from a return on his original investment and the compounded income earned on it" (A. 226-227). In any event, that is not how the matter was viewed by this Court, which held the annuity contract to be "outside the concept of insurance" because the annuities "guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities." (359 U.S. at 72). The fact that other individuals also bought the variable annuities may have been necessary for the continued profitability of the respondent company, but those other investments redounded solely to the profit of the respondent, and not to that of any annuitant. The very point of the pyramid cases was that the participation of the investors was relatively insignificant because, as the Fifth Circuit put it: "the critical determinant of the success of the Koscot Enterprise lies with the luring effect of the opportunity meetings", in which the promoters of the enterprise played by far the dominant role.[36]

[34] *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (*VALIC*).

[35] *Collins* v. *Rukin*, 342 F.Supp. 1282 (D. Mass.).

[36] 497 F.2d at 485. See also *Glenn W. Turner*, 474 F.2d 479-480, 482-483. These decisions declined to apply literally the third element of the *Howey* test that the profits of the enterprise be "*solely* from the efforts of others." 497 F.2d at 479-485; 474 F.2d at 480-483. We readily assume that these cases were rightly decided because we do not believe that the coverage of involuntary noncontributory pension plans under the securities laws turns on whether pyramid swindles are subject thereto. It is hardly surprising that the Courts

And, of course, the profit, if any, from possession of a stock option is due to the appreciation in the value of the underlying stock of a corporation, which in turn depends on the fortunes of that enterprise and thus on the efforts of its managers. That, presumably, is why "stock option" is expressly included in the statutory definitions of "security" so that the *Collins* case, which declined to exclude a particular transaction from that definition, says and decides nothing about the scope of the term "investment contract."

When these entirely different situations are put aside, and attention is paid to the realities of noncontributory defined benefit pension plans it is clear that the *entrepreneurial* efforts of those who are responsible for investing fund assets play a relatively minor role, if any, in determining the amount of the employee's pension benefits and that unless the "efforts of others" test is discarded completely, it must be concluded that there is no "investment contract" here. *Alabama Power* recognized that the efforts of the pension beneficiary himself play a major role in the amount of his benefit (see 431 U.S. at 594). To this must be added the efforts of the employer or trustees who determine the amounts of contributions and the employers who provide them, as well as the efforts of those employees who will never obtain a benefit.

B. There Is No "Purchase" or "Sale"

1. The determinations of the court below that a "purchase" and "sale" for purposes of the securities laws occur when an individual accepts employment covered by

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of Appeals were unwilling to apply the *Howey* test restrictively at the behest of the promoters there, given the teaching of *Howey* itself that the definition of security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." 328 U.S. at 299. See also, *Joiner*, 320 U.S. at 351.

an involuntary noncontributory pension plan and occur also when he continues in such employment are likewise contrary to the recent decisions of this Court, as well as the universal prior understanding of the securities laws.

In *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, this Court admonished against imposing liability under § 10 (b) and Rule 10b-5 by "add[ing] a gloss to the operative language of the statute quite different from its commonly accepted meaning." *Id.* at 199.[37] This holding was expressly reaffirmed in *Santa Fe Industries* v. *Green*, 430 U.S. 462, 472, in reversing another expansive construction of these provisions. So here, it tortures the "commonly accepted meaning of the operative language of the statute" to say that an employee "purchases" his wages by performing labor; yet the Court of Appeals held that by performing labor an employee "purchases" an interest in a pension plan to which his employer contributes as partial compensation for that labor. The terms "purchase" and "sale" in § 10(b) of the 1934 Act and § 17(a) of the 1933 Act simply do not encompass every economic transaction in which an individual provides some kind of consideration for a return or for expectation of a possible return.

The Court of Appeals relied on these definitions of "purchase" and "sale" in the 1933 and 1934 Acts. Section 2(3) of the 1933 Act provides that: "[t]he term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value." Sections

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[37] The court quoted with approval from *Addison* v. *Holly Hill Products*, 322 U.S. 607: "To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . . After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Id.* at 617-618, quoted, 425 U.S. at 199, n.19.

3(a)(13) and 3(a)(14) of the 1933 Act provide respectively that "[t]he terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" and "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

An employee's acceptance of or continuation in covered employment can be said to come within these statutory definitions only by once again misconceiving the economic reality of the transaction. The Court of Appeals said: "Here plaintiff acquired an interest in the Local 705 Pension Fund, and as shown, that interest is a security. Therefore, there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts." (A. 242). See also A. 245 quoted at p. 55, *infra*. But as we have stressed, an employee acquires *no* "interest", let alone "interests" (*id.*) when he performs covered employment. See A. 64, p. 7, quoted at p. 12 *supra*. He merely builds up credits, which are nontransferable and are lost entirely if he voluntarily or involuntarily leaves covered employment or if the plan terminates before he achieves "vesting" under the plan's terms. *See, Alabama Power Co.* v. *Davis*, 431 U.S. 581, 594; *Malone* v. *White Motor Corp.*, No. 76-1184 (April 3, 1978), Slip Op. 4, 12. It is only at vesting that an employee obtains a right to receive a pension (immediately or in the future, if he has not then reached retirement age), or some lesser benefit as provided by the plan. If the employee quits his employment before vesting, and thereby loses the opportunity for a pension, is he "selling" an interest? Is the plan then "purchasing" that interest?

Thus, the court's view that there is a "purchase" and "sale" within the statutory definitions is based on a mistaken perception of the transaction. More fundamentally, even if the definitions somehow fit, it would still be

an incorrect interpretation of these laws to conclude that there is a "purchase" and "sale" when an employee accepts or continues in employment covered by an involuntary, noncontributory plan. For such decisions involve so many factors which are unrelated to the pension plan, let alone the investment characteristics which the court attributed to them, that such employment decisions cannot be assimilated to "investment decisions" which the terms "purchase" and "sale" connote and which the securities laws were designed to protect.

2. The court's finding of a purchase and sale here is inconsistent also with *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, where the Court relied heavily on "what may be described as policy considerations" (*id.* at 737, see also *id.* at 749) in holding that a cause of action did not lie. These policy considerations apply with at least equal force in the present case, especially when it is remembered that because the Local 705 pension plan was established after Daniel commenced the employment on which he bases his eligibility (see pp. 5, 11, *supra*), it is insufficient for Daniel's complaint to hold that acceptance of covered employment is a "purchase"; it is necessary to hold also that an employee "purchases" a "security" by continuing in covered employment. Yet, by thus continuing he no more changes his position than does a stockholder allegedly lulled into keeping his monetary investment, who is denied standing to sue under the *Blue Chip* rule.

The decision below thus equates the acceptance of employment with the purchase of stock, but then treats continuation in employment *more favorably* for the purposes of standing under the securities laws than a decision to hold the stock. This is truly a paradoxical result, given that the securities laws were "designed to safeguard the integrity of *investment decisions*." (*Robinson* v. *UMW*, *supra*, 435 F.Supp. at 247, emphasis added).

Moreover, it is true here, as it was in *Blue Chip*, that recognizing the cause of action would create the very "social cost[s]" identified in *Blue Chip*. (421 U.S. at 741). The holding that continuation in employment is a "purchase" "throw[s] open to the trier of fact many rather hazy issues of historical fact the proof of which depend[s] almost entirely on oral testimony." (*Id.* at 743)

This point is further developed, *id.* at 746, in reasoning which is also directly in point:

> "[P]laintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." [38]

Although acknowledging defendants' reliance on *Blue Chip* (A. 247, n.43) the court below did not address our showing that the reasoning of *Blue Chip* discredits the contention that there is a sale when an employee decides to keep a job which is covered by an involuntary noncontributory pension plan. But the parallel with *Blue Chip* is confirmed by the heavy weight which the Court of Appeals gave to Daniel's affidavit:

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[38] If the phrase "plan booklets and other communications," were substituted for "prospectus of the issuer" in the foregoing passage, it would fit this case word for word.

> "Also, plaintiff's affidavit shows that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension. When an employee decides to retain his job, his *decision* results in his continuing to give value in the future and in his further acquisition of interests in the pension fund." (A. 245) (emphasis added)

See also A. 246, n.41 and the section of the Court's statement of the case entitled "Plaintiff's Affidavit." (A. 213-217)

We have already pointed out the errors in the court's view that an employee acquires "interests in a pension fund" by working in covered employment, but its formulation is unsound in an additional respect which is of immediate significance. Whereas the Court posits a single "decision" by the employee that results in his continuing on a job for an indefinite future, in reality an employee "give[s] value" by working day after day and week after week in consequence of not one but innumerable decisions made for various reasons with various degrees of deliberation.[39] An employee's decision to remain at work one more day is at least as amorphous a predicate for a right of action under the federal securities laws as an investor's decision to hold his investment one more day rather than sell it and buy something else. Indeed, such decisions are more complex than that of an investor because isolating the pension benefit in the employment decision is wholly artificial. In determining whether to keep or quit his job, an employee considers a whole array of factors: these include, *inter alia*, his enjoyment of the job, the wages and fringe benefits of which the prospect

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[39] One consequence of this oversimplification is that it avoids the difficult question of determining when the statute of limitations would begin to run with respect to any omission or misstatement which is alleged to violate the securities laws.

of a pension is but one, his perceived opportunities for advancement, and of course the job alternatives open to him. Thus, even if the employee believes that the pension plan is undesirable for him because he is uncertain whether he will qualify, or for any other reason, he is likely to remain on the job if his compensation (discounting the possibility of a pension entirely) and other satisfactions are greater than those which he believes he would receive at any other job open to him. See, *Los Angeles Dept. of Water & Power* v. *Manhart*, No. 76-1810 (April 25, 1978), slip. op. p. 13, n.30:

> "* * * the Department points to no 'adverse selection' by the affected employees, presumably because an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market. . . ."

In sum, whatever reasons an employee has for taking or continuing on a job do not explain why he continues to work there at some later date, and each such decision is as subjective as the decision not to purchase or sell in *Blue Chip*. It is as true here as in *Blue Chip* that such "an action under Rule 10b-5 will turn largely on which oral version of a series of occurrences the jury may decide to credit." (421 U.S. at 742). And "therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement." (*Id.*).

It is also true here that "the mere existence of an unresolved lawsuit has settlement value to the plaintiff [and] not only because of the possibility that he may prevail on the merits * * *" (*id.*) The reason, which differs from that in *Blue Chip*, but nonetheless represents a significant "social cost rather than a benefit" (*id.* at 741), is that the expense of defending against a 10b-5

or 17(a) claim would invariably be greater than paying a pension to a claimant even if he is ineligible under the pension plan's rules. Plan trustees will thus be put to the truly unenviable choice of spending the fund's assets to defend a lawsuit, or disregarding the plan's eligibility requirements. Under either choice, the individuals who do qualify under the plan's rules would be the ultimate losers, because less money would be available to pay their benefits. That these concerns are not chimerical is evidenced by the present suit, and particularly its ambitious class action allegations. (see p. 2, *supra*).[40]

3. Prior to the decision below no court or agency had ever held that there is a "purchase and sale" under the securities laws when an individual accepts or remains in employment covered by an involuntary, noncontributory pension plan. Even the District Court found the "purchase and sale" in plaintiff's participation in union contract ratification rather than in his taking and keeping his job.[41] (A. 127-128). That court correctly stated:

> "[E]xcept in those cases where recognized securities were offered by an employer for voluntary purchase

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[40] A further policy consideration mitigating against allowing this new cause of action, and which we urge in point III as independently decisive, is that the Congress has already determined which judicial and administrative remedies are to be available to pension plan participants.

[41] It is unclear whether the court below accepted the District Court's view as an alternative ground for decision. Compare, A. 229, 242-247 with A. 254-255. In any event, that theory is without merit, for the reasons discussed in the brief of Local 705, which we shall not reiterate. Two points bear emphasis, however: (1) Ratification does not come within either the natural meaning of the statutory definition of the terms "purchase" and "sale." (2) The relationship between union members and their union, when it is acting as collective bargaining representative, is utterly remote from the scope of the securities laws; it would be incongruous to seize upon ratification, which is generally regarded as a democratic and desirable practice, as the predicate for imposing securities laws liability.

by employees, the SEC acted on the assumption, consistent with existing legal thought, that employee pension plans were generally 'non-contributory' and 'involuntary', and therefore resulted in no sale and no nexus to the securities laws." (A. 115)

Judge Tone, stated in his concurring opinion:

> "In reaching this conclusion, [that the securities laws apply] I have found little comfort in the opinion expressed by the SEC, as *amicus curiae*. Apparently for the first time ever, it now takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws." (A. 260)

He pointed to the SEC's 1971 Institutional Investor Study [42] wherein "the Commission's view was that although a noncontributory pension plan might well be an investment contract, the element of sale was lacking." (A. 260-261, citing 3 SEC Study 996). The majority below, however, accepted the assertion in the SEC's brief that the agency's prior "no-sale" rationale was limited to the registration provisions of the securities laws and did not apply to its anti-fraud provisions. (A. 245-246). An examination of the SEC Study shows that Judge Tone was clearly right.

In a portion of the Study entitled "Legal, Regulatory and Tax Environment of Pension-Benefit Plans and Public Retirement Systems",[43] subpart 7, "The Securities Laws", "discuss[es] the manner in which the federal securities laws applied to pension-benefit plans in the years leading up to and during the period covered by

[42] Institutional Investor Study Report of the Securities And Exchange Commission, House Document No. 92-64, 92nd Cong., 1st Sess. (1971) (the "SEC Study").

[43] SEC Institutional Investor Study, 980. This portion is part of Chapter VIII, "Pension-Benefit Plans, Foundations and Education Endowments."

this Study." [44] Under the heading "a. The Securities Act of 1933", the following appears:

> "*(1) Corporate pension and profit-sharing plans—(a) Plans not providing for voluntary contributions.*—In the case of plans which are unfunded (pay-as-you-go basis plans) and in the case of plans where contributions to the funding medium consist of either employer money only or employee contributions which are required as a condition of employment, the Commission staff has taken the position *that the Securities Act does not apply* because there is no 'sale' or 'offer for sale' of a security. Although the employees' interests in the plan (whether the plan's assets are invested through a funding medium or consist solely of an obligation of the employer recoverable from the general assets of the employer) may be recognized to be 'securities' within the Act, the absence of a volitional element on the part of the employees in acquiring these interests is the basis for the position. While this result may not be compelled by the statutory definition of 'sale,' the result is consistent with the basic scheme of the Act to provide would-be purchasers with information adequate to make an informed opinion as to whether to purchase—assuming that there is a real difference between employer and employee contributions.
>
> "(b) *Plans providing for voluntary employee contributions.*—In the situation where the employee may make voluntary contributions to the plan (or in the case of certain savings plans) the absence-of-volition rationale cannot come into play. However, the Commission staff has in the past taken a no-action position 'that no question will be raised with respect to

[44] *Id.* at 995 omitting a footnote which states that "[t]he Securities Act of 1933 [citation] and the Investment Company Act of 1940 [citation] are the acts of principal concern in the context of this chapter." There is some discussion of the Investment Company Amendments Act of 1970, but none of the 1934 Act.

> the registration of participations in a voluntary contributory pension, profit-sharing, or similar plan that does not invest in the securities of the employer company in an amount exceeding the company's contribution.' If the plan exceeds this amount in investments in company securities, both the company stock and the interests in the plan must be registered under the Securities Act." [45]

Thus, the Commission's "no-sale" *interpretation of the statute* applied to all noncontributory plans and all involuntary pension plans and excluded them from its registration and anti-fraud provisions.[46] The Commission also had an *administrative practice* with respect to voluntary contributory plans, whereby it would take "no action" if certain types of voluntary contributory plans (that is those wherein employee payments were not used to purchase the employer's stock) were not registered. The view of the majority below that the Commission's historic no-sale position had been limited to registration is untenable. In fact, the commission *never* exercised the authority which it first asserted on brief in the court below; it *never* regulated noncontributory involuntary pension plans under the anti-fraud provisions of the 1933 and 1934 Acts, either by rules, or interpretive guidelines, or enforcement proceedings. (See 1933 Act §§ 19 (a), 20, 24; 1934 Act §§ 21, 23(a)(1)) "Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed." *Federal Power Commission* v. *Panhandle E. P. L. Co.*, 337 U.S. 498, 513. See also *United States* v. *Enmons*, 410 U.S. 396, 408-410. Of this the court below said nothing.

Because the court below erroneously believed that the SEC's "no sale" interpretation was limited to registration it failed to appreciate that the present case represents a drastic change in the SEC's position and gave

[45] *Id.* at 996-997 (emphasis added, footnotes omitted.)

[46] See also A. 261 (concurring opinion).

the Commission's present views far greater weight than they deserve under the circumstances (See *e.g.*, *Forman*, 421 U.S. 837, 858, n.25, followed in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143; *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41, n.27) and no weight whatever to the position which the SEC took in the first forty years. See also *Hochfelder*, 425 U.S. at 212-214. Moreover, the SEC's prior position that there is no sale "gave a sounder construction to [the securities laws] than the [Commission's] construction in the present case." Cf. *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 291.

As the court below observed, the SEC had first "reasoned that there was no sale involved for a noncontributory plan because there was no direct investment of money by the employee, consistent with the then current legal view that the employer's contributions were gifts." (A. 245)

In the court's view this reasoning was unsound because noncontributory pensions are now regarded as compensation for an employee's labor. But the fact that it is now generally recognized that a participation in a pension plan is not a gratuity granted by the employer does not undermine the Commission's original interpretation of the securities laws which were enacted when pensions were generally regarded to be gifts.

"In interpreting the statute it is not our task to consider whether Congress was mistaken" in 1933 and 1934 in its view of the nature of a noncontributory involuntary pension plan; "rather, we must construe the statute in light of the impressions under which Congress did in fact act. . . ." *Moor* v. *County of Alameda*, 411 U.S. 693, 709; see also *Brown* v. *GSA*, 425 U.S. 820, 828; *Califano* v. *Sanders*, 430 U.S. 99, 107, n.7. It is especially unfitting for the courts to attribute the present, more sophisticated appreciation of the nature of these pension plans to the 73rd Congress because when later Congresses also rejected the "gift" theory, they concluded not that the se-

curities laws should govern, but that special pension legislation was necessary. *See* point III A, *infra.*

The point was well made by Sen. Javits in commenting on ERISA:

> "* * * I believe that the law [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that private pensions are a form of deferred wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short, the 'gold watch' theory of pensions is dead once and for all, and we have entered into an era where pension rights and duties are defined under the law and subject to systematic interpretation and enforcement under the law." [47]

But in 1934 Congress' "policy ha[d] not yet moved to this point." [48] Therefore, the "gift" theory is an entirely sound interpretation of the securities laws as enacted by the Congress and should not have been abandoned by the SEC.

Moreover, the view expressed by the SEC in the Study, that there is no sale when an employee is covered by a compulsory noncontributory plan because he makes no "choice", is also correct. The court below, however, rejected this analysis. It stated that "the definitions of 'sale' in the 1933 and 1934 Acts do not require volition." (A. 244). Because this statement was not further explained, it is not clear whether the court was thereby accepting the argument (made by the plaintiff but not the SEC) that volition is never an element of a purchase or sale. Plainly, its omission in the definitions

[47] Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits, September 19, 1974, p. 1.

[48] Cf. *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 500.

of "purchase" and "sale" cannot be controlling. *Forman* makes quite clear that even if a transaction is literally within the statutory definition of the operating terms, the securities laws do not apply if the result is outside the statutory purpose. (See 421 U.S. at 848-851).[49] The purpose of the prohibitions against material misstatements or omissions is to provide the investor with information to make an *investment decision*, and where there is no choice and therefore no *decision* to be made these prohibitions simply do not come into play. (See 3 *SEC Study* 996-997).

In determining that there is no "volition" requirement for a "purchase" and "sale", the court below analogized an employee's voting to ratify a collective agreement which provides for employer contributions to a pension plan to a stockholder's vote to approve a corporate merger. (A. 244-245). But the authoritative rulings involving such stockholder votes do not dispense with the requirement of volition, and the proffered analogy is entirely without merit.

This Court held in *SEC* v. *National Securities*, 393 U.S. 453, that a purchase and sale are present for purposes of § 10(b) and Rule 10b-5 in certain types of corporate merger situations. The Court's description of the facts demonstrated that the shareholder's vote in that legal context *did* involve an investment choice by the individual voting shareholder:

> "According to the amended complaint, Producers' shareholders were misled in various material respects

[49] *See also Lino* v. *City Investing Co.*, 487 F.2d 689, 694 (C.A. 3):

> "[I]t is our view that the legislation was not intended to cover the transaction which occurred here. All of the definitional sections involved in this case are introduced by the phrase *'unless the context otherwise requires.'* The commercial context of this case requires a holding that the transaction did not involve a 'purchase' of securities." (Emphasis in original.)

prior to their approval of a merger. The deception furthered a scheme which resulted in their losing their status as shareholders in Producers and becoming shareholders in a new company. Moreover, by voting in favor of the merger, each approving shareholder individually lost any right under Arizona law to obtain an appraisal of his stock and payment for it in cash. Ariz.Rev.Stat.Ann. § 10-347 (1956). Whatever the terms 'purchase' and 'sale' may mean in other contexts, here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange. The broad antifraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation. Therefore we conclude that Producers' shareholders 'purchased' shares in the new company by exchanging them for their old stock." (393 U.S. at 467).

The court below relied on the SEC's rescission, by Rule 145, 17 C.F.R. § 230.145, of its prior Rule 133 (that in certain situations involving statutory merger and other types of corporate reorganizations no "sale" or "offer" should be deemed to be involved for purposes of the registration requirements of the 1933 Act.) (See 393 U.S. at 465). But the SEC's change was not premised on an interpretation of the statutory term which eliminates the volitional element. On the contrary, the SEC explained that it was making the change because, contrary to the assumption underlying Rule 133, volition is present:

> "Transactions of the character described in Rule 133 do not in the Commission's opinion occur solely by operation of law and without the element of individual stockholder volition. A stockholder faced with a Rule 133 proposal must decide on his own volition whether or not the proposal is one in his own best interest." [50]

[50] Securities Act Release No. 5246, CCH Federal Securities Law Rep., 1971-1972 Dec. ¶ 78,753, p. 81,567.

The SEC's explanation of Rule 145 also shows why the analogy proffered by the court below between a shareholder's vote on a corporate merger and the ratification of a contract proposal which contains provisions for contributions to a pension plan is legally unsound. The Commission said:

> "In voting, each consenting stockholder is expressing his voluntary and individual acceptance of the new security, and generally the disapproving stockholder is deferring his decision as to whether to accept the new security or, if he exercises his dissenter's rights, a cash payment. The corporate action *in these circumstances*, therefore, is not some type of independent fiat but is only the aggregate effect of the voluntary decisions made by the individual stockholders *to accept or reject the exchange.*" [51]

This, of course, is the same point made in *National Securities* concerning the shareholder's loss of his appraisal rights under Arizona law if he voted for the merger. But there is no equivalent of this critical factor in the member ratification vote. Although a dissenting stockholder can opt out of a merger by asserting his appraisal rights, under the law which governs the relationship between employees, employers and a union bargaining representative, the employee cannot, by his individual vote (or otherwise), opt out of a particular provision in a collective bargaining agreement. On the contrary, § 9(a) of the National Labor Relations Act gives the representative the exclusive authority to bargain about terms and conditions of employment, and to bind consenting and nonconsenting members of the unit. This authority gives rise to, and is limited only by, the duty of fair representation, which plaintiff has indeed invoked in Count III of his complaint. (A. 38-42). See, *e.g.*, *Hines*

[51] *Id.*, (emphasis added to show the court's elisions in the sentence from which it quoted at A. 245.)

v. *Anchor Motor Freight Lines*, 424 U.S. 554, 564; *Emporium Capwell Co.* v. *Western Addition Comm. Org.*, 420 U.S. 50, 65; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180. The member's right to vote on ratification, which he enjoys—if at all—only by virtue of his union's constitution or bylaws rather than state or federal law, is the mechanism by which the union determines whether to accept a proposed collective bargaining agreement. That vote is on the contract proposal in its entirety.[52] If a majority votes to accept, that becomes the decision of the representative, and the contract by which all employees in the unit are bound.

The foregoing examination of the court's attempt to equate a union member's vote on a collective bargaining agreement with a shareholder's vote on corporate mergers not only undermines its conclusion that a "purchase" and "sale" are present herein; it again illustrates that even where certain resemblances can be found it is a hazardous undertaking to import securities law concepts into a labor relations context.

The court determined that volition was present aside from the ratification vote because plaintiff Daniel testified that he would not have continued in his job for a covered employer if he had known about the eligibility requirement by which he was ultimately disqualified. (A. 245, quoted at p. 55 *supra*). But this ground for

[52] Here, too, the elements of the individual member's decision are complex. He may vote to ratify a proposed contract even if he disapproves of its provisions with regard to pensions if he believes that no improvement would result from further negotiations, or because the contract as a whole is more desirable than any which could result if this contract were rejected, or because he does not want to go on strike where that is the alternative to acceptance of the employer's offer. On the other hand, an employee may vote against ratification even if he is satisfied with its pension provisions if he believes that some other term, for example the basic wage, or provisions for overtime are insufficient and he believes that a strike or the threat thereof will achieve a better contract.

decision reads "purchase" and "sale" too loosely (see pp. 51-53, *supra*), and gives rise to the same "social costs" (421 U.S. at 741) which this Court has held should be avoided in delineating the contours of the judicially created cause of action under Rule 10b-5 (see pp. 54-57 *supra*).

Moreover, this Court has repeatedly "recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes in adopting the Act." *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477, quoting *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41; See also *Forman*, 421 U.S. at 859-860; *Blue Chip*, 421 U.S. at 736-737, 749. Allowing this case to be brought under the securities laws would be entirely foreign to their purpose.

III. THE DECISION BELOW IS CONTRARY TO THE PRIOR UNDERSTANDING OF THE SECURITIES LAWS, WHICH CONGRESS SHARED IN ENACTING SPECIFIC LEGISLATION CONCERNING DISCLOSURE BY PENSION PLANS TO EMPLOYEES.

A. The Decision Below Subverts the Judgments Made by Congress in Enacting the WPPDA and ERISA in Reliance on the SEC's Representations.

Congress has twice enacted legislation designed to protect the interests of participants and beneficiaries in noncontributory involuntary plans, and dealt therein with the precise problem of the nature and timing of disclosure to which plan participants and beneficiaries are entitled. Congress did so in 1958 in the Welfare and Pension Plan Disclosure Act (WPPDA), and in 1974 more comprehensively through the Employment Retirement Income Security Act (ERISA). On both occasions the SEC disclaimed either authority or expertise concerning collectively bargained pension plans, and it reinforced the Congressional understandings—first (prior to

WPPDA), that employees were not at all protected by federal law with respect to information concerning pension benefits, and thereafter (prior to ERISA), that existing law was inadequate, in part because no law provided employees with sufficient information. At no time were the Congressional committees studying pension plans advised that the securities laws (specifically § 17(a) of the 1933 Act and § 10(b) of the 1934 Act) already obligated plan administrators or others to provide employees who obtain or choose to retain employment covered by a collectively bargained pension plan with information concerning that plan, or that those laws dealt in any manner with the relationship between such pension plans and their participants. The committees were told just the opposite. And in both instances they legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to that relationship.

1. *The Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).*

The purpose and scope of the WPPDA have so recently been canvassed by this Court in *Malone* v. *White Motor Corp.*, —— U.S. ——, No. 76-1184 (April 3, 1978), that elaboration here is unnecessary. Briefly, it was, as its very name reveals a "Disclosure Act". The aim of the bill was "to make available to the employee-beneficiaries information which will permit them to determine, first, whether the program is being administered efficiently and equitably; and, second, more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them." (*Malone*, slip op. p. 14, quoting Senator Smith). (See also *id.* at 8, 10-11, 13.) Our particular concern here is with the role of the SEC in the process which resulted in the enactment of the WPPDA and with the Congressional understanding—to which the

SEC significantly contributed—that in creating these disclosure obligations it was filling a legislative vacuum in "the nearly unregulated pension field" (*id.* at 8).

As noted in *Malone*, Congressional consideration of the problems in the pension field began in 1954 after a message by President Eisenhower. (Slip op. p. 8.) In 1955 testimony was given on behalf of the SEC to a Subcommittee of the Senate Committee on Labor and Public Welfare conducting a welfare and pension plans investigation. Among those testifying on behalf of the SEC were a member of the Commission and the Director and Counsel of the Division of Corporate Finance. They testified that the statutes administered by the SEC did not include disclosure provisions relating to pension plans as such and that the very few pension plans which had registered under the Securities Act involved the sale of securities by a company to its employees. SEC Commissioner Goodwin agreed with Senator Allott that "the Securities and Exchange Commission would come into this particular field only by accident, so to speak, by virtue of the fact that, for example, in some of these plans stock is offered." [53]

The SEC representatives were among several witnesses from various federal agencies who testified "as to the extent of any supervision these agencies exercised over employee welfare and pension plans under existing Federal laws". Welfare and Pension Plans Investigation, S. Rep. 1734, 84th Cong., 2d Sess., p. 4 (1956) (The "1956 Report").

Chapter 3 of the Subcommittee's report was devoted to a discussion of the inadequacies of existing federal and

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[53] Welfare and Pension Plans Investigation, Hearings Before the Subcommittee on Welfare and Pension Funds of the Committee on Labor and Public Welfare, U.S. Senate, 84th Cong., 1st Sess. (1955) pp. 943-946.

state laws. Surveying existing federal control of welfare and pension funds, the 1956 Report stated:

> "In brief, there are two Federal statutes which have some application to welfare and pension plans. They are the Labor Management Relations Act of 1947 (29 U.S.C. § 186 (sec. 302)) and the Internal Revenue Code of 1954." (*Id.* at p. 57.)

After reviewing the shortcomings of the two statutes cited, the 1956 Report concluded:

> "Thus, with the exception of the ineffective sections of the Labor Management Relations Act, 1947, and the Internal Revenue Code, as discussed above, there presently exists no Federal statute, regulation, or authority which attempts to protect the rights of the beneficiaries of welfare and pension plans." (*Id.* at p. 60.)

The SEC made an even more significant contribution to the legislative process in the 84th Congress, which enacted the WPPDA. First, the Commission filed a written report and memorandum on the proposed pension and welfare plan legislation in which, *inter alia*, it compared the two major bills (that of Sen. Douglas, S. 1122, and that of Sen. Ives, S. 1145).[54] The report also made detailed comments on the Douglas bill under which administrative responsibility was vested in the SEC; it made no recommendations with respect to the Ives bill because it was to be administered by the Secretary of Labor."[55] Although it observed that "[b]oth bills provide for disclosure to beneficiaries and to the public,"[56] the SEC's

[54] The report is reprinted in its entirety at pp. 62 *et seq.* of the Hearings Before the Subcommittee on Welfare and Pension Plans Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess. ("1957 Hearings"). S. 1122 appears *id.* at 2-8; S. 1145 appears *id.* at 8-11.

[55] *Id.* at 64.

[56] *Id.* at 63.

Report gave no hint that the SEC believed that any such disclosure was already required by the securities laws.

Thereafter, the SEC's Acting Chairman, Mr. Orrick, appeared at a hearing of the Senate Subcommittee and testified that "[t]he functions of the Securities and Exchange Commission are devoted to the regulation of the capital securities markets . . . But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital-securities markets." (*Id.* at 107). It is as though Congressman Wolverton were speaking! (See p. 111, *infra*.) Mr. Orrick's view was reaffirmed in a subsequent memorandum submitted by the Commission:

> "Many of the plans involved in this legislation are the fruits of collective bargaining. Accordingly, these plans are inseparably intertwined with labor-management relations. Abuses in this area then have their main effect upon an economic area in which the Commission does not possess expertise.
>
> "It is true that the Commission and its staff have developed an expertness in financial analysis of corporate securities and full disclosure of financial information. Inasmuch as welfare and pension plan beneficiaries generally have no individual choice as to the securities to be purchased by a welfare or pension fund, the type of meaningful information to be furnished to them as to the management, investments and transactions of their funds may involve quite different criteria from those presently employed by the Commission under the various Federal Securities Acts. An agency which has had close contact with the needs and problems in the labor-management field would be in a better position to determine the appropriate criteria."[57]

Against this background, Congress determined to regulate welfare and pension plans and to vest administrative

[57] *Id.* at 119.

responsibility in the Department of Labor rather than the SEC.

The 1958 Senate Report explained:

> "Serious consideration was given earlier to placing the administration of the bill with the Securities and Exchange Commission on the basis of its past experience in the administration of disclosure type legislation. However, as the official representatives of the Securities and Exchange Commission clearly indicated that they did not feel they were the proper agency to handle the administration of this type of legislation and as they felt that the taking on of this function might interfere with their presently established functions, this consideration was abandoned." [58]

2. *Employment Retirement Income Security Act of 1974 (ERISA).*

In ERISA Congress substantially expanded the disclosure requirements which had been embodied in the WPPDA, and, for the first time, subjected pension plans to broad federal substantive regulation. See *Malone*, slip op. p. 14. It did so, in light of the understanding that "there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities"—the WPPDA of 1958, the Labor-Management Relations Act of 1947, and the Internal Revenue Code.[59]

At the outset of its investigation the Senate Subcommittee had caused a detailed analysis to be made of all legislative regulation of pension plans, the results of which were set forth in the 1971 Interim Report [60] and

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[58] S.Rep. No. 1440, 85th Cong., 2d Sess. (1958), p. 21.

[59] See Interim Report cited at n. 60, *infra*, and summaries cited at p. 73, n. 61 *infra*.

[60] Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972).

were then carried forward in subsequent committee reports in both bodies, in a summary entitled "*The Existing Law*".[61] The majority opinion interpreted the Report's discussion of the role of the securities laws as stating only that the *registration* requirements of the 1933 Act were deemed to be inapplicable, and not that there is no securities laws coverage (A. 251-252). It described the failure to make this distinction as "defendants' quintessential error" (A. 252), but it is plainly the majority below which erred. For, the Interim Report stated that "pension and profit-sharing plans are exempt from *coverage* under the Securities Act of 1933 * * * unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer." [62]

The foregoing appears in a portion of the report which describes the peripheral role of the SEC in a chapter which details the administrative responsibilities of all federal agencies (nine in number) which had any relationship to private pension plans; the discussion of the SEC is set out in full in the margin.[63] At the outset of that

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[61] S. Rep. No. 93-127, 93rd Cong., 1st Sess., 4-5 (1973), I ERISA Leg. Hist. 587, 590-591; H.R. Rep. No. 93-533, 93rd Cong., 1st Sess., 3-5 (1973), II ERISA Leg. Hist. 2348, 2350-2352.

[62] Interim Report at 96 (our emphasis). The fact that the Report also observed that those plans which are covered must be "*registered*" (court's emphasis) cannot narrow the word "coverage" to encompass only the registration requirements.

[63] "Although the Securities and Exchange Commission (SEC) does not have direct regulatory authority over private pension plans, certain provisions of the federal securities laws which it administers do apply to such plans. These provisions relate primarily to registration of securities and to annual and other periodic reports required to be filed with SEC.

"Pension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*), unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the

chapter the report stated that only the Labor Department and the Treasury Department (through the Internal Revenue Service) were considered to have "any degree of control" over the administration and operation of private pensions.[64] The Court of Appeals' reading of the Interim Report also cannot be squared with the section "Legislative Regulation," which does not even mention the securities laws.[65]

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plan by the employer. A voluntary contributory plan is one to which both the employee and employer contribute and in which employees voluntarily participate. If the plan's investment in the employer's securities exceeds the employers contribution, both the employer's securities and the interests in the plan must be registered under the Securities Act with SEC.

"Where interests in a private pension plan are registered under the Securities Act, as indicated above, the administrator of the plan must file annual and other periodic reports with SEC pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), unless the plan covers fewer than 300 persons.

"Although private pension plans generally fall under the definition of investment companies under the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) which subjects such companies to SEC regulation, sections 3(c)(3) and 3(c)(11) of the act generally exempt pension plans from the act's provisions.

"Since 1955 SEC has been collecting statistical data with respect to pension funds. Since most pension plans are exempt from coverage under the securities laws, these data are gathered voluntarily under the general statistical program of the Government.

"These data are published as follows:

1. Assets of private pension funds not administered by insurance companies are published quarterly in SEC's Statistical Bulletin.

2. Stock activity of pension funds is summarized quarterly in SEC's releases entitled "Stock Transactions of Financial Institutions."

3. A survey of pension funds' mortgage-lending activities and commitments is conducted by SEC and the results are published monthly by the Department of Housing and Urban Development." (Interim Report at 96-97)

[64] *Id.* at 91.

[65] *Id.* at 23-29.

As when the 1958 Act was being considered, the representatives of the SEC urged the enactment of pension legislation and again gave no hint that the relationship between pension plans and their participants was already subject to the securities laws.

In 1965, the President's Committee on Corporate Pension Funds had filed a unanimous report, joined by the Chairman of the SEC, Mr. Manuel F. Cohen, which recommended legislation for increased disclosure to, and remedies for, pension plan beneficiaries. The President's Committee recommended "a requirement for the disclosure of additional information related to the investment activities of retirement plans, by amendment of the Welfare and Pension Plans Disclosure Act. Disclosure of investment holdings and activities in much more detail than is now required, *perhaps in the same manner as is required of investment companies under S.E.C. regulation*, would seem useful and entirely feasible without impairment of retirement plan operations." [66]

And in 1972, when the lengthy legislative process was underway, the then SEC Chairman, Mr. William J. Casey stated in a letter to the Subcommittee which was responsible for what became ERISA:

> "[W]e believe that employee benefit plans *should be* subject to the requirement of adequate disclosure of investment returns based upon appropriate adjustment for volatility. In this way, the participants, as well as the Secretary of Labor, would be advised of the extent to which the plan's investment assets were being subjected to varying degrees of investment risk." [67]

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[66] President's Committee on Corporate Pension Funds, *etc.*, *Public Policy and Private Pension Programs—A Report To The President on Private Employee Retirement Plans* (1965), p. 78.

[67] S. Rep. No. 92-1150, 92d Cong., 2d Sess. 68 (Emphasis added.)

The majority below relied on the testimony of Mr. Cohen in the 1972 Senate Hearings. But Mr. Cohen's testimony confirmed the conclusion of the Interim Report regarding the limited role of the SEC, which he read and endorsed:

> "Let me address myself to the more urgent problems. The first is fragmentary regulation. As the studies so diligently undertaken by this subcommittee have so convincingly demonstrated, the Federal authority and responsibility now dispersed among *nine different Federal agencies*, under at least as many different statutes, must be pulled together and coordinated. The obvious place for most of the Federal authority and responsibility is in the Labor Department under the auspices of the Secretary of Labor." [68]

And he strongly reiterated the view that Congress should enact pension reform legislation. His recommendations and those of his successor would have been pointless if Messrs. Cohen and Casey had believed that the 1933 and 1934 securities laws already required disclosures from involuntary noncontributory pension plans to their participants.

The majority below notes also that "the Congress that enacted ERISA" was not "unaware that the SEC considered interests in pension funds to be securities under the 1933 Act unless excepted" (A. 253, n.53), referring to the 1971 Institutional Investor Study. But, as Judge Tone recognized (A. 260-261), Congress' awareness of the SEC Study cuts *against* the conclusion that Congress

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[68] Hearings on S. 3598 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 232 (1972). (Emphasis added.) Compare pp. 73-74, *supra*. It is somewhat ironic that that testimony should be cited in support of an interpretation of the securities laws which would further fragment regulatory authority and impose an additional statutory scheme on private pension plans.

believed the antifraud provisions to be applicable and only the registration provisions to be inapplicable. For the SEC Study also declared that "the Commission Staff has taken the position that the Securities Act *does not apply* because there is no 'sale' or 'offer for sale' of a security." SEC Study, p. 996, emphasis added. See p. 59, *supra*.

In sum, Judge Tone was clearly right when he stated: "Members of Congress considering legislative proposals after the adoption of the securities acts who relied on the SEC's interpretation of those acts must have understood that they did not apply to transactions of the kind before us." (A. 261, concurring opinion). He declined to give controlling weight to that fact, however, because he attributed to Congress the understanding that the question was open in "the Supreme Court [which] has been known to disagree with" the SEC, and that it "appears likely that Congress has chosen to leave the matter in that posture." (*Id.*) But we submit that however plausible such a hypothesis may be in other legislative contexts, there is abundant evidence that it does not accurately describe the intentions of the Congress that enacted ERISA. The legislative record presents no basis whatsoever which would justify the surmise that Congress even contemplated the possibility that the securities laws might apply to the relationship between involuntary noncontributory pension plans and their participants. On the contrary, its description of "the existing law" in the final reports issued by the respective committees of the House and Senate (see p. 73, n.61, *supra*) evidences that Congress was confident that it was entering an area in which there were no existing federal laws, except for the Internal Revenue Code and WPPDA, which were substantially superseded by ERISA, and the LMRA which simply prescribes the structure of certain types of collectively bargained plans. Moreover, if Congress had been given any reason to entertain a doubt on this score, it most probably would have taken steps to prevent the securities

laws from expanding into this area, for the avoidance of bureaucratic duplication and conflict was one of Congress' principal objectives.[69]

3. *The Upshot.*

The court below said "that the SEC has historically *advocated* a hands-off approach to the regulation of pension plans with respect to disclosure requirements holds no brief for exempting pension plans from the anti-fraud provisions of the securities acts." (A. 252-253, emphasis added). But the statements of the SEC cannot accurately be so described. The SEC did not favor a general "hands-off" policy; on the contrary, as we have seen, in 1972 its Chairman affirmatively recommended that legislation governing disclosure by pension plans to their participants be enacted; and in 1957 what it advocated was that jurisdiction over such regulation be vested in an agency with greater competence over the subject than the Commission, not that no such legislation should be enacted. More significantly, the Commission's observations were not mere "advocacy" but rather were disclaimers of authority under the then-existing state of the law, which in the context of the proposals before Congress on those occasions could only have been understood as assertions that no legislation for which it was then responsible

[69] See, *e.g.*, *ERISA* § 3004 set forth at 10a-11a, *infra*. See also, *e.g.*, Senator Williams' explanation of the bill which was enacted:

> "One of the thornier problems confronted by the conferees was the question of arranging a workable administrative and enforcement structure that would incorporate the historic role of the Internal Revenue Service with respect to qualified plans as well as the broader role visualized for the Labor Department in terms of safeguarding the interests of participants and beneficiaries and applying its expertise in connection with collectively bargained plans and matters impinging on the field of labor relations. By carefully assigning specific functions to each agency, the Senate bill tended to create a dominant role for each agency and minimize the degree of overlapping." III ERISA Leg. Hist. 4770.

involved the protection of the rights of participants and beneficiaries under collectively bargained pension plans.

On both occasions Congress was sufficiently concerned about the existing state of the law to make an exhaustive study thereof. In the WPPDA it made a conscious allocation between the responsibilities of the states and the federal government (see *Malone*, *supra*, slip op. p. 14), asserting for the latter only the task of administering the new and modest disclosure requirements which it took to be Congress' first significant entry into the pension field. And in enacting ERISA, one of Congress' principal objectives was "to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators [and] employers . . ." ERISA, § 3004(a).

The SEC's testimony and written submissions prior to the enactment of the WPPDA were of critical importance for the additional reason that, as we have seen, Congress had specifically solicited the SEC's comments and actively considered placing administrative responsibility in that agency. If Congress had been told that the Commission was already vested with authority to prevent fraud involving failure to disclose material facts with respect to pension plans, the case for the Douglas proposal would have been considerably strengthened. Indeed, if Congress had been told that as the law then stood pension plan sponsors and administrators were under an obligation to comply with the antifraud provisions of the 1933 and 1934 securities laws in dealing with covered employees, and that, but for an administrative interpretation by the Commission they were already subject to the registration requirements of the 1933 Act, Congress might have decided that no new legislation was necessary, and that the existing statutory mechanism should be utilized. Alternatively, it might have retained those laws with modifications geared to the special characteristics of pension plans.

Or Congress *might* have determined that the regulations which were actually enacted were the most desirable, that they should be subject to the jurisdiction of the Department of Labor, and abrogated the securities laws insofar as Congress was informed that they might be applicable, and thereby incorporate an express repeal. But Congress was not given reason to believe this was necessary.

The majority's erroneous perception of the SEC's representations and the Congress' general understanding when it enacted pension disclosure legislation, is of a piece with its misunderstanding of the legislative history of the securities laws and the administrative practice thereunder (see pp. 88-134 *infra*). These errors seriously undermine its interpretation of the 1933 and 1934 Acts.

But the paramount importance of this history stems from the fact that Congress has twice enacted pension legislation in reliance on the SEC's existing interpretation. Even as the SEC "is not now free" [70] to assert that the securities laws regulate this subject, so, too, is the courts' freedom circumscribed, for the principled basis of this rule of construction is not that the agency should be estopped, but that the manifested Congressional will should be enforced. Thus even if, as Judge Tone apparently believed, the securities laws are so elastic that the courts could permissibly have applied them to reach involuntary noncontributory pension plans absent intervening Congressional action, the enactment of WPPDA and ERISA under the circumstances detailed herein forecloses this choice. These laws embody Congressional policies concerning the regulation of pension plan disclo-

[70] *Bell Aerospace Co. Div. of Textron, Inc.* v. *NLRB*, 475 F.2d 485, 494 (C.A. 2) (Friendly, J.), quoted with approval and affirmed on this point, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289. Judge Friendly concluded, based on a careful examination of this Court's precedents, that "when an administrative construction has been long in effect, the agency cannot make a big change, especially after a reenactment or substantial amendment, but can make smaller ones."

sure which the courts may not override and frustrate by rejecting the assumptions on which Congress justifiably proceeded.

A recent decision of the Court illustrates our point. In *Califano* v. *Sanders*, 430 U.S. 99, the question was whether § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), is an independent grant to the United States District Courts of subject matter jurisdiction for judicial review of the actions of federal officials, a question which had sharply divided the lower courts and commentators. The Court then observed that three Court decisions had arguably assumed "that the APA is an independent grant of subject-matter jurisdiction" (*id.* at 105); nevertheless, the Court ruled to the contrary in light of subsequent legislation:

> "* * * However, an Act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.
>
> "On October 21, 1976, Congress enacted Pub. L. 94-574, 90 Stat. 2721, which amends 28 U.S.C. § 1331 (a) to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of 'any [1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.' The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.
>
> "As noted previously, the actual text of § 10 of the APA nowhere contains an explicit grant of jurisdic-

tion to challenge agency action in the federal courts. Furthermore, even the advocates of jurisdiction under the APA acknowledge that there is no basis for concluding that Congress, in enacting § 10 of the APA, actually conceived of the Act in jurisdictional terms. * * * Thus, the argument in favor of APA jurisdiction rests exclusively on the broad policy consideration that, given the shortcomings of federal mandamus jurisdiction, such a construction is warranted by the rational policy of affording federal judicial review of actions by federal officials acting pursuant to federal law, notwithstanding the absence of the requisite jurisdictional amount * * *. We do not find this argument to be compelling in light of Congress' apparent intention by the 1976 amendment to restructure afresh the scope of federal-question jurisdiction.

"In amending § 1331, Congress obviously has expressly acted to fill the jurisdictional void created by the pre-existing amount-in-controversy requirement. This new jurisdictional grant was qualified, however, by the retention of § 205(h) as preclusive of actions such as this that arise under the Social Security Act. Read together, the expansion of § 1331, coupled with the retention of § 205(h), apparently expresses Congress' view of the desired contours of federal-question jurisdiction over agency action. A broad reading of the APA in this instance would serve no purpose other than to modify Congress' new jurisdictional enactment by overriding its decision to limit § 1331 through the preservation of § 205(h)." (430 U.S. at 105-106, footnotes omitted.)

The parallel to the present case is precise except that we dare say that as an original proposition the argument for the jurisdictional grant in § 10 of the APA was far stronger than that for securities law jurisdiction over these private pension plans. Here, as in *Sanders*, even the advocates of coverage do not contend that Congress

"actually conceived of" the securities laws as governing those transactions. Rather, they argue that the basic policy of the securities laws would be furthered if it were held that noncontributory and involuntary pension plans are securities and that a purchase and sale is involved, and that the language is sufficiently broad to permit this result. *Sanders* teaches that the authority of the courts to construe legislation in the light of policy considerations where the Congressional will is unclear (cf. *Blue Chip*, 421 U.S. at 737) is sharply curtailed when Congress has enacted subsequent legislation on the subject in light of its own understanding of the prior law. Congress having dealt with the problem of disclosure to pension plan beneficiaries in the WPPDA on the basis that the securities laws were inapplicable, and again in ERISA on the same premise, the courts would defeat the will of the legislature by now approving a contrary interpretation of the securities laws.[11] It is for this reason that the true history of the SEC's position and the Congressional response provide an independent ground for rejecting the novel construction of the securities laws which the court below reached herein.

According to the Court of Appeals:

"Reading the anti-fraud provisions of the securities laws to be complementary to the requirements of ERISA makes good sense. The requirements of ERISA do not substitute for the protections afforded

[11] It bears emphasis that the *Sanders* decision did not independently determine that Congress' belief that the APA does not confer jurisdiction over administrative action was correct, but rather treated the fact that it so believed to be controlling. See particularly, 430 U.S. at 107, n. 7. As the Supreme Court said in another recent case, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828. See also *Moor* v. *County of Alameda*, 411 U.S. 693, 709; *Bell Aerospace Co. Div. of Textron, Inc.* v. *NLRB*, 475 F.2d 485, 494, n. 13 (C.A. 2), *aff'd in part, rev'd in part*, 416 U.S. 267.

> by the anti-fraud provisions because the securities laws require that all material facts, including, of course, risk of loss, be disclosed prior to the investment decision * * * while ERISA disclosure limits itself to the plan provisions without a particularizing of how or how likely benefits may be lost (ERISA Section 102 (29 U.S.C. § 1022)) and may be made 90 days subsequent to the investment commitment. ERISA Section 104(b)(1)(A) (29 U.S.C. § 1024(b)(1)(A)). Defendants have not shown that ERISA would provide relief to persons who have acquired an interest in a pension fund where false or misleading representations have been made at inception or during subsequent ratifications or upon a job offer. Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information at such times, including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." (A. 254-255, footnotes omitted).

The court correctly identified the differences between ERISA and the antifraud provisions of the securities laws, but it gravely erred in holding that it makes "good sense" to interpret the securities laws to fill what it considers to be undesirable gaps and omissions in ERISA. The court thereby substituted its own views of public policy for those of Congress, which has the constitutional authority to make such judgments and exercised that authority only after an intensive study of the needs of private pension plans and their participants as well as of existing law.

The timing and substance of required pension plan disclosures is addressed in precise terms in ERISA, and the decision below would defeat the clear Congressional intent. The decision to allow disclosure to be made at any time within 90 days after an employee becomes a participant was a conscious Congressional decision. A requirement that an individual be given information immediately, which would be applicable under the Court of

Appeals' theory, was proposed in some early versions of ERISA but was ultimately dropped.[72] Moreover, it is simply not correct to say that the greater the amount of information which is provided, the better will be the employee's understanding of the pension plan. Intelligibility, rather than bombardment with detail, was the standard of disclosure deliberately chosen in ERISA.[73]

With a single exception, the court did not spell out what matters must be disclosed to pension plan participants under its ruling; this is presumably left "to be translated into concreteness by the process of litigating elucidation." (*Machinists* v. *Gonzales*, 356 U.S. 617, 619). In ERISA, by contrast, Congress specified what is required to be disclosed, and when and how, thereby creating a "safe harbor" for those who comply with the express provisions of the statute and the implementing regulations promulgated by the Department of Labor.

The one disclosure which the Court of Appeals does expressly require, calls for comment because creation of that requirement is an independent error even if the securities laws apply, and because it illustrates once again the hazards of trying to superimpose securities laws concepts onto the pension plan aspects of the employer-employee relationship.

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[72] 503(c)(3) of H.R. 2 as it passed the Senate required the summary plan to be furnished "to every participant upon his enrollment in the plan * * *" III Legislative History of the Employee Retirement Income Security Act of 1974, 3763.

[73] The key disclosure document under ERISA is the "summary plan description" which must "be written in a manner calculated to be understood by the average plan participant" and must cover precisely described categories of information. ERISA, § 102.

For example, the Conference Report on ERISA states: "Each administrator of an employee benefit plan is to furnish to each participant and to each beneficiary a summary plan description written in a manner calculated to be understood by the average plan participant or beneficiary." *Id.* at 4525; see also *id.* at 4665, remarks of Mr. Dent.

The court below required disclosure of what it dubs the "statistically determinable risk that many employees covered by a plan will never receive their pension benefits" (A. 255, see also A. 217, 254, 258). This ruling may reflect and its whole attitude toward the case appears to be colored by the court's perception that there is only a small "actuarial probability", which it says is "here perhaps as low as 8%," that a pension plan participant will ever obtain a vested right to a pension. But aside from the highly dubious provenance of the 8% figure,[74] it is entirely fallacious to treat all pension plan participants alike in their legitimate expectations and entitlements. At any moment, the total covered work force will include many individuals who continue in that employment for only a relatively short period of time, and who, therefore, are not the intended beneficiaries of the pension system (see *Alabama Power Co.*, 431 U.S. at 592); as a result of that turnover, it will inevitably happen that only a small proportion of all the individuals who have worked at any time over the years will satisfy

[74] The figure of 8% was injected into this case by plaintiff when he declared: "That the possibility that as many as ninety-two percent of the Local 705 Pension Trust Fund will *never* receive any retirement benefits is quite likely could not even have been imagined by such participants until the publication of various Senate Subcommittee studies beginning in 1972. See Interim Report of Activities of the Private Welfare & Pension Plan Study, S.Rep. No. 92-634, 92d Cong., 2d Sess., at 115-153 (February, 1972)." Plaintiff's Brief In Opposition To Defendants' Motion to Dismiss at 30. The cited report had nothing to do with the Local 705 plan. It analyzed a selected group of plans and, as to these, it concluded that of those employees who left their employment prior to retirement, 92 percent whose employers had plans requiring 11 or more years for vesting, left without any vested interest, and 73 percent whose employers had plans requiring 10 years or less for vesting, left without any vested interest. These percentages do not refer at all to the number of employees covered by these plans who remained employed until retirement and who then received a pension (*Id.*, pp. 125 *et seq.*)

the eligibility requirements for vesting.[75] Moreover, Congress in ERISA addressed the problem of harsh pension eligibility rules by establishing standards as to when vesting must occur, but declined to create retroactive vesting requirements. The court below circumvented that decision by retroactively declaring a disclosure duty with which, as far as we are aware, no pension plan has ever complied.

Even for the future, the Court of Appeals' requirement does not make "good sense". Actuarial assumptions are not actuarial facts, and even when they are based upon empirical data, they speak of a statistical universe. An actuarial assumption that half of the employees upon whose employment contributions are paid will move on to other jobs before vesting occurs says little or nothing to a 40-year-old who is prepared to make a career decision. Indeed, providing such data to an employee could be misleading where the assumption, or even the data upon which it is based, is heavily weighted by the mobility of the 20 to 30 year group. Similar problems arise when the statistical universe embraces categories as diverse as laborers and general foremen, as it so often does. In short, even "statistically" validated assumptions are valid only with respect to a statistically significant group; they are utterly meaningless for predicting the future with respect to any individual member of the group. That presumably is why Congress has not legislated the duty to provide such information; the court below should not have established that duty by judicial fiat.

[75] A simple mathematical example will illustrate our point. Assume an employer with two trucks. One individual works for twenty years driving the same truck. The other truck is driven successively by a series of employees who work for a few months or years, averaging two years, so that during the same twenty-year span ten individuals drive the second truck. Only the first driver obtains a pension, which is less than 10% of all the drivers who worked at all during that time.

B. The Legislative and Administrative History of the Securities Laws Shows That They Were Not Intended to Cover Compulsory Noncontributory Pension Plans.

1. *The Court Below Misunderstood the Reason Why Pension Plans Were Not Mentioned During the Enactment of the 1933 Act.*

It is common ground that no reference to employee pension plans is to be found in the language or history of the Securities Act of 1933. The reason, however, is not as the Court of Appeals suggested, that "in the early 1930's pension plans were still a rarity." (A. 241) By 1933, employee pension plans were by no means a rarity; they were a significant economic phenomenon affecting over 3,500,000 employees of 360 companies,[76] a phenomenon whose importance Congress had specifically recognized in revenue legislation as early as 1926.[77] The same

[76] Figures tabulated as of 1929 in Latimer, Industrial Pension Systems, 57 (1933). A 1939 Senate Report stated: "Between 1900 and 1933 some 800 industrial institutions adopted and installed pension plans affecting about 4,000,000 employees." *Survey of Experiences in Profit Sharing and Possibilities of Incentive Taxation*, Rep. of the Subcomm. of the Comm. on Finance, U.S. Senate, S.Rep. No. 610, 76th Cong., 1st Sess., 46 (the "1939 Senate Report").

[77] In the Revenue Act of 1926 Congress explicitly exempted from income tax trusts created by an employer as part of a pension plan for his employees. 44 Stat. 9, § 219(f). The Conference Committee on the 1926 Act observed that such pension funds were similar to stock bonus and profit sharing plans which had been exempted from income tax by Section 219(f) of the Revenue Act of 1921. 42 Stat. 22. Congress revised the tax treatment of pension plans in Section 165 of the Revenue Act of 1928, 45 Stat. 791, and made a further change in Section 165 of the 1932 Revenue Act. 47 Stat. 169. The first statutory recognition of a deduction for contributions to employee pension trusts appeared in Section 23(q) of the Revenue Act of 1928. That section was reenacted with minor changes as Section 23(q) of the Revenue Acts of 1932, 47 Stat. 169, and 1934, 48 Stat. 680. The Senate Finance Committee Report on the 1928 Act stated: "A considerable number of business concerns, however, established pension plans for the benefit of their

Congress that enacted the securities legislation of 1933 and 1934 also enacted the Railroad Retirement Act of 1934 establishing a compulsory retirement system for railroad workers.[78] The next Congress considered a proposal that companies which had private pension plans be exempted from the Social Security Act.[79]

Although in 1933 their period of greatest growth was still in the future, pension plans were already of sufficient economic importance and recognition by Congress in other federal legislation that it is more likely than not if Congress had intended them to be covered by the new securities legislation, it would have said so. The reason they were omitted was not oversight or because such

employees a good many years ago . . ." S. Rep. No. 960, 70th Cong., 1st Sess., 21-22. The history of the Federal income tax treatment of pension plans is summarized in Vol. 4A, Mertens, Law of Federal Income Taxation, Sec. 25B.02. (1972 revision)

[78] Railroad Retirement Act of 1934, 48 Stat. 1283, heard and reported in the House of Representatives by the Committee on Interstate and Foreign Commerce and in the Senate by the Committee on Banking and Currency, the same committees which heard and reported the Securities Act of 1933 and the Securities Exchange Act of 1934. Congress at that time recognized inadequacies in existing pension plans in the railroad industry:

> "The record shows that there is now some form of retirement pension plan upon 90 percent of the railroad mileage in the United States. Such plans, however, are not by any means satisfactory either to the railroads or to railroad employees. In most part the pensions provided are inadequate and the cost to the railroads is mounting year by year.
>
> "Thousands of railroad employees, retired from service because of the infirmities of age are receiving pension, if at all, in most part insufficient to provide for the comforts of life which years of honest toil should assure them." H.R. Rep. No. 1988, 73rd Cong., 2d Sess. 2 (1934). *See also* S. Rep. No. 974, 73rd Cong., 2d Sess. 2 (1934).

The Railroad Retirement Act of 1934 was held unconstitutional in *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330.

[79] See testimony of Murray W. Latimer in 1941 Hearings cited p. 105 *infra* at 879.

plans "were a rarity," but that pension plans were in a different universe of discourse and were totally foreign to the sphere of commercial activity which Congress undertook to regulate in the 1933 and 1934 Acts.

The securities legislation of 1933 and 1934 was born of the economic collapse of 1929. The overall relationship of the two Acts was sketched in President Roosevelt's message of March 29, 1933, which called for legislation to require that "every new issue of securities to be sold in interstate commerce shall be accompanied by full publicity and information." The sale of worthless securities was understood to create two evils: first, tragedy in the lives of thousands of individuals who lost their life savings, accumulated after years of effort and, second, misdirection of the capital resources of the Nation.[80]

Traffic in "securities" is what the 1933 and the 1934 Act also were all about. The pivotal definition of "security," essentially the same in both Acts, was drawn "in sufficiently broad and general terms so as to include . . . the many types of instruments that in our commercial world fall within the ordinary concept of a security." [81]

This Court's early decisions interpreting "security" recognized that the definition was intended to describe instruments that were the subject of speculation or investment. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 349, 351, 352, and *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 297, 298. But pension plans were not considered to be securities.

In *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 349, 351, this Court referred to pensions as "gra-

[80] H.R.Rep. No. 85, 73rd Cong., 1st Sess., 2-3.

[81] H.R.Rep. No. 85, 73rd Cong., 1st Sess., 11, quoted in *Forman*, 421 U.S. at 851.

tuities", "consistent with the then current legal view". (A. 245). The prevailing absence of legally enforceable rights of employee participants in pension plans contrasted sharply with the position of an investor who, as the holder of an instrument "that in our commercial world [fell] within the ordinary concept of a security", had definite and enforceable rights with respect to the issuer of that security. Thus an employee's interest under a non-contributory pension plan differed *toto caelo* from the phenomena of speculation and investment dealt with in securities laws.

It is our contention that employee pension plans have been consistently viewed by Congress as part of the employer-employee relationship and have been regulated in a separate line of legislation beginning with the Labor Management Relations Act of 1947, the Welfare and Pension Plans Disclosure Act of 1958, and culminating in the Employees' Retirement Income Security Act of 1974 ("ERISA").[82] Congress has acted in accordance with the economic reality that compulsory non-contributory pension plans, the type of pension plan involved in this case, are part of the labor market, not the enterprise capital market, and that employer contributions to those pension plans represent a form of compensation for a lengthy period of labor not an investment by the employee within the meaning of the securities laws. The history of the federal securities laws subsequent to 1933, to which we now turn, abundantly confirms these conclusions.

[82] Congress has also encouraged the establishment of employee pension plans as legislative policy expressed in tax legislation, see p. 88 n. 77, *supra*.

2. *The Inference which the Court Below Drew from the Rejection of the 1934 Hastings Amendment is Unjustified.*

The Court of Appeals sought support for its novel holding in the history of an amendment to the 1933 Act by Senator Hastings which was considered and rejected by Congress in 1934 (A. 233-234). However, an examination of that amendment and its legislative history demonstrate that it had nothing to do with mandatory, non-contributory pension plans, or indeed with the definition of "security." The amendment would have added the following provision to Section 4(1) of the 1933 Act:

> "As used in this paragraph, the term 'public offering' shall not be deemed to include an offering made solely to employees by an issuer or by its affiliates in connection with a bona fide plan for the payment of extra compensation or stock investment plan for the exclusive benefit of such employees." (78 Cong. Rec. 8708)

Although the Hastings amendment was originally agreed to in the absence of objection on the Senate floor, it was eliminated in Conference. The House Managers commenting on the Conference Committee Report stated:

> "The conferees eliminated the third proposed amendment to this subsection on the ground that the participants *in employees' stock-investment plans* may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73rd Cong., 2d Sess., 41 (emphasis added to show the critical phrase omitted in the quotation at A. 233).

When the Senate took up the Conference Report, Senator Hastings complained about the action of the Conference Committee in rejecting his amendment. He said:

> "I do not see why the Federal Government should insist upon having anything to do with the plan of a corporation which decides that, as a part of its policy, it will give certain additional compensation or bonus to its employees. I think that is a matter with which the Government ought not to have anything to do, and there is no public interest involved in the policy of a corporation in adopting such a plan.
>
> "For years and years there have been discussions all over this country as to the best method of permitting employees of corporations to share in the profits of the corporations." (78 Cong. Rec. 10181)

Senator Couzens responded that "one of the controlling factors which caused the elimination of the [Hastings] amendment was the Insull transactions" in which "millions of shares of stock of Insull corporations were sold to their employees merely upon representations of the corporations themselves." The House Conferees had stressed the evils which had occurred "where employees of a number of corporations had been induced to buy shares of the stock of the corporations." *Id.* The discussion ended after Senator Fletcher intervened to state that the Conferees also believed the Hastings amendment was unnecessary since an offering limited to employees was not a public offering, an interpretation which was ultimately rejected by this Court. *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126, n.13.

The history of the rejected Hastings amendment provides no support for the Court of Appeals' decision in this case. There is no mention of pension plans in the language or legislative history of the proposed amendment. The only explicit reference is to plans under which stock issued by a corporation is offered for sale to employees of that corporation. The language in the amendment relating to plans for the payment of extra compensation is nowhere explained or defined, but appears in con-

text to refer only to employee benefit plans such as stock bonus plans or profit sharing plans utilizing employer stock and which therefore clearly involve the issuance of a security.

In the 1941 hearings on the SEC's proposed amendments to the 1933 and 1934 Acts, SEC Commissioner Purcell relied upon Congress' rejection of the Hastings amendment to support the SEC position that the 1933 Act applied "to employees' plans *which involve the sale of a security*," a conclusion which says nothing about the question whether compulsory non-contributory employee pension plans "involve the sale of a security." [83]

There is no indication that the SEC manifested any interest in employee pension plans for several years after the 1933 and 1934 Acts. During those years employee pension plans continued to grow in size and number, stimulated by the Social Security Act of 1935.[84] A 1939 Senate Finance Committee Report on profit sharing plans noted the significant growth of industrial pension plans between 1900 and 1933, included a list of U.S. companies having such plans and recommended that employers who operate pension plans providing greater benefits than the federal Social Security System be exempted from that system.[85] Legislative attention to employee pension plans during the 1930's was also reflected

[83] 1941 Hearings cited p. 105, *infra*, at 895-6 (emphasis added). Mr. Purcell also referred to the Congress' 1934 action as having "made it quite apparent to the Commission that Congress intended investments in employees' plans to be included within the term 'security'." (*Id.* at 895). This statement must be read in the context of his entire testimony which related only to contributory employee plans and not to the types of pension plans involved in this case. See pp. 105-110, *infra*.

[84] 1941 Hearings, at 866 (Testimony of Murray W. Latimer).

[85] 1939 Senate Rep., op. cit. p. 58, n. 76, *supra*, at 46, 192-197, 252-256.

in the Railroad Retirement Act of 1937, 50 Stat. 307, and in a series of revenue acts.[86]

3. *The Investment Company Act of 1940 Cuts Against the Conclusion That There Is a "Security" Here.*

a. Referring to Congressional testimony given in 1941 by SEC Commissioner Purcell (see pp. 105-112, *infra*) the Court of Appeals said:

> "Commissioner Purcell also noted that the 1940 Congress was aware of the economic congruence between employee pension plans and ordinary mutual funds because it defined an 'employees' security company' as one type of 'investment company' in Section 2(a)(13) of the Investment Company Act of 1940. 1941 Hearings at 895. Consequently, an employee pension plan is regulated by the 1940 Act unless it falls within an exemption from registration. See, e.g., 15 U.S.C. §§ 80a-3(c)(11) and -6b." (A. 234).

Our examination of the Investment Company Act of 1940 (hereafter "1940 Act") shows that the Court of Appeals erred in its view that pension plans are "congruent with" employees' securities companies and therefore are investment companies regulated under the 1940 Act unless

[86] The deduction provisions of Section 23(q) of the Revenue Act of 1928 relating to contributions to employee pension trusts were reenacted as Section 23(p) under the Revenue Acts of 1936, 1938 and 1939 and the employee trust exemption was reenacted as Section 165 of those Acts. A regulation promulgated under Section 165 of the Revenue Act of 1938 provided for disclosure of the pension plan to employee participants. The regulation stated:

> "A 'stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of some or all of his employees' is a definite written program signed by such employer and *communicated to such employees*. . . ." (emphasis added) Regs. 101, Art. 165-1 (1938).

This regulation was repromulgated under Section 165 of the Internal Revenue Code of 1939, Regs. 111, § 29.165-1 (1939).

exempted. Pension trusts and employees' securities companies are given totally different treatment under that Act. Congress did then decide to regulate employee investment plans, but at the same time it said that qualified employee pension trusts are not investment companies under the Act. The specific *exclusion* of these employee pension trusts from the 1940 Act supports our contention that Congress has never regarded employee pension plan participants as investors intended to be protected by the federal securities laws. Moreover, even on the court's reading of § 2(a)(13), it is fallacious to conclude that Congress believed that all types of employee pension plans, let alone involuntary noncontributory plans would have been subject to the Act but for its exemption provisions.

a. As this Court observed in *United States* v. *National Assn. Securities Dealers*, 422 U.S. 694, 704-706, the basis of the 1940 Act was the Investment Trust Study which had been ordered by Section 30 of the Public Utility Holding Company Act of 1935, 49 Stat. 837, 15 U.S.C. § 79z-4. The overall purposes of the 1940 Act have been described by a Chairman of the SEC as follows:

> "The Investment Company Act of 1940 goes beyond disclosure and introduces various substantive regulatory provisions which are deemed necessary where a security involves a participation in a pool of liquid assets. . . . [I]t seeks to protect investors in three primary ways. First, by providing continuing disclosure, which supplements disclosures obtained under the Securities Act. Second, by giving investors a voice in the determination of questions vital to their interests, such as changes in basic investment policy, the adoption, renewal, assignment or termination of investment management contracts and other important matters. . . . Third, the Investment Company Act prohibits or conditions certain transactions or relationships which may give rise to a conflict of

> interest between the investors and those who are managing their money."[87]

See also the Findings and Declaration of Policy in § 1(a) of the 1940 Act.

Coverage under the 1940 Act turns on § 3(a), which defines an "investment company" as any "issuer" that falls within any of the three subdivisions of that section. "Issuer" is defined in § 2(a)(22)[88] as "every person who issues or proposes to issue any security, or has outstanding any security which it has issued." "Security" is defined in § 2(a)(36) in the same terms as in § 2(1) of the 1933 Act. As originally enacted, § 3(c)(13) (revised as § 3(c)(11)), said with unmistakable clarity that employee pension trusts are *not* investment companies:

> "(c) Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this title:
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> * * *
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> (13) Any employees' stock bonus, pension or profit-sharing trust which meets the conditions of section 165 of the Internal Revenue Code." 54 Stat. 798, 799.[89]

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[87] Testimony of SEC Chairman Manuel F. Cohen. Collective Investment Funds, Hearings before a Subcommittee of the Committee on Banking and Currency, U.S. Senate, 89th Cong., 2d Sess. on S. 2704, at 134 (1966).

[88] For convenience we shall, except where noted otherwise, refer to the present, rather than the original, section number.

[89] The fact that § 3(c)(13) refers to employee pension *trusts* and not to pension *plans* has made no difference in the view of the SEC. The SEC's Institutional Investor Study of 1971 stated, with reference to § 3(c)(13):

> "Since these trusts are exempt only if they are part of qualified plans, the Commission staff has interpreted the exemption as applying also to the related plan or plans." *Id.* at 998.

Although § 3(c)(13) also refers to two other types of employee benefit plans, for convenience we will refer to it only as it relates to pension plans.

By contrast, an "employees' securities company" is defined in § 2(a)(13) of the 1940 Act as

> "any investment company or similar issuer all of the outstanding securities of which (other than short-term paper) are beneficially owned (A) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other, (B) by former employees of such employer or employers, (C) by members of the immediate family of such employees, persons on retainer, or former employees, (D) by any two or more of the foregoing classes of persons, or (E) by such employer or employers together with any one or more of the foregoing classes of persons." 15 U.S.C. § 80a-2(13).

An employees' securities company is essentially a special type of investment company whose securities are owned by an employer and his employees and was so understood in the investment trust study.[90] On the other hand, there was no discussion whatsoever of employee pension trusts in that study, an omission which is particularly instructive because the Report was unusually comprehensive. Appendix A to Part I of the Report lists by name "all the investment companies known to the Commission." While a few employees' securities companies can be identified (Electrical Securities Corporation, Elfun Trusts, G.E. Employees Securities Corporation), the list contains nothing described as an employee pension plan.

Unlike employee pension trusts which are excluded by § 3(c)(13), employees securities companies are specifically covered by the Act, subject to administrative exemption by the SEC under § 6(b) "if and to the extent that such exemption is consistent with the protection of investors." The Court of Appeals also confused the *exclusion* provisions of § 3(c)(13) and the *exemption* provisions of § 6(b).[91] (A. 234-235).[92]

[90] This type of investment company was described in the first part of the SEC Report, *The Nature, Classification, and Origins of Investment Companies*, H.R.Doc. No. 707, 75th Cong., 3d Sess., 95-97 (1938). Under the heading "Use As An Investment Medium For A Particular Class Of Persons", the Report identified the G.E. Employees' Securities Corporation as "a company set up by an industrial concern for the investment of savings by employees."

That the SEC understood the fundamental difference between pension trusts and employees' securities companies under the 1940 Act is shown by *Electrical Securities Corporation*, 10 SEC Jud.Dec. 648, a ruling issued on December 1, 1941. Electrical Securities Corporation had applied for an exemption order pursuant to Section 6(b) of the 1940 Act. The applicant was a corporation whose principal function was to provide a medium for investment of the funds of the General Electric Pension Trust, a non-contributory retirement plan established for the benefit of approximately 50,000 employees and former employees of the General Electric Company and affiliated companies. The Commission distinguished between the applicant, which it found to be an employees' securities

[91] Section 6(b) provides in full:

> "Upon application by any employees' security [sic] company, the Commission shall by order exempt such company from the provisions of this title and of the rules and regulations hereunder, if and to the extent that such exemption is consistent with the protection of investors. In determining the provisions to which such an order of exemption shall apply, the Commission shall give due weight, among other things, to the form of organization and the capital structure of such company, the persons by whom its voting securities, evidences of indebtedness, and other securities are owned and controlled, the prices at which securities issued by such company are sold and the sales load thereon, the disposition of the proceeds of such sales, the character of the securities in which such proceeds are invested, and any relationship between such company and the issuer of any such security." 15 U.S.C. § 80a-6(b).

[92] The same confusion is reflected in the Purcell testimony and the 1972 Congressional testimony of former SEC Chairman Cohen referred to at A. 234 and A. 235, n. 31.

company entitled to request exemption under § 6(b), *id.* at 650 and the General Electric Pension Trust, which "falls within the provisions of Section 3(c)(13) and, therefore, is *not* an investment company within the meaning of the Act" (*Id.* at 649). It said also "that the pension trust is an employee's [sic] plan that is *not in the purview of the Act.*" (*Id.* at 650) (emphasis added).

The *Electrical Securities* decision is significant also because the Commission concluded that the applicant should be exempted from all of the provisions of the Act in part on the ground that the pension trust was noncontributory. The SEC twice stressed that the employee participants had made no contributions to the pension trust,

> "It is important to note that these assets [of the Pension Trust] were contributed by General Electric and its affiliated companies, and *do not represent funds advanced by the employees who may be eligible for retirement benefits* . . .
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> • • • •
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> "Thus, we find that the notes held by the Pension Trust are purchased *only* with funds advanced by General Electric and certain of its affiliates to the Pension Trust . . ." (*Id.* 649, 651) (emphasis added).

The Commission concluded that the "protection of investors" standard of § 6(b) had been met, listing as the first of its reasons that the investment company was used as the medium for the investment of funds all of which were contributed by the employer; it then granted an exemption from all of the provisions of the 1940 Act on the condition that certain periodic reports be filed with the Commission. (*Id.* at 650-651). This decision contrasts sharply with that issued the same day in *G.E. Employees' Securities Corporation*, 10 SEC Jud. Dec. 652, wherein the Commission denied a broad exemption to a corporation whose stock was owned by the General Electric Company and which sold its debenture bonds to

employees and pensioners of that company and affiliated companies and promissory notes to the General Electric *Additional* Pension Trust, which was a *contributory* pension plan. (*Id.* at 654).

Thus, the Commission's ruling recognized that a pension trust and an employees' securities company were different entities under the 1940 Act and that pension trusts were outside the purview of the Act. And in emphasizing the fact that all contributions to the General Electric Pension Trust were made by the employer, the Commission acknowledged the distinction between contributory and non-contributory plans which the SEC and the Court of Appeals have attempted to obliterate in this case.

In sum, the language of the statute and its history, confirmed by a contemporaneous SEC ruling, show that the Court of Appeals was mistaken in assuming that pension trusts are employees' securities companies and investment companies regulated by the 1940 Act unless covered by an exemption.

But this is not all. Although it theorized that employee participants in a compulsory non-contributory pension plan are investors whose "interest" in that plan is a security, the Court of Appeals offered no explanation as to why Congress entirely excluded them from the protections of the 1940 Act. Similarly the court offered no explanation for the absence of any discussion of employee pension plans in the SEC Report which was the principal basis for that Act. On the other hand, §§ 2(a)(13), 3(c)(13) and 6(b) of the 1940 Act show that Congress then considered the subject of employer-employee relationships and decided which of those relationships were appropriate subjects for the type of regulation provided in the 1940 Act. The exclusion of employee pension trusts in Section 3(c)(13) and the failure to mention them in the SEC Report may both be explained on the basis of Congress'

and the SEC's recognition that employee participants in such pension plans are not investors within the meaning of the federal securities laws. Thus the 1940 Act is evidence which cuts against the holding of the court below.

b. The Court of Appeals inferred from what it thought was the Congressional decision that employee pension plans are regulated by the 1940 Act unless they are exempted, that Congress must have believed such plans to be employees' securities companies. But even if one were to follow the Court to that point, the most that could be inferred is that Congress believed *some* employee pension plans might be employees' securities companies, which would say nothing about whether Congress believed any particular type of pension plan, such as involuntary, noncontributory plans, to be securities. Employee pension plans can be treated as identical for the purposes of their treatment under the 1940 Act and the securities laws generally, only by ignoring the distinctions between involuntary and voluntary plans and between noncontributory and contributory plans (and, within the latter category, between those which are and those which are not utilized for the purchase of the employers' own stock). There is no evidence that Congress was similarly undiscriminating, and as we have seen, the SEC distinguished between contributory and noncontributory plans in its decisions involving trusts established by the General Electric Company. As we next show, the 1941 testimony of SEC Commissioner Purcell and the 1941 opinion of an SEC Assistant General Counsel, on which the Court of Appeals relied (A. 234-235) also carefully distinguished between these two types of employee pension plans in determining whether they involve a "security." That evidence, like that of the 1940 Act itself, will thus be seen to further undermine the court's description of the prior understanding of the securities laws.

4. *The 1941 SEC Opinions and Testimony Establish that the SEC Did Not Then Consider Compulsory, Noncontributory Pension Plans to Be Securities.*

a. *The Opinions.*

In September 1941 the SEC published two opinions of Assistant General Counsel John F. Davis which set forth the position which the SEC was to follow for the ensuing three decades (with a modification in 1953 to be noted later) on the status of employee pension and profit sharing plans under the Securities Act of 1933. CCH Fed. Sec.L.Rep., 1941-1944 Dec. ¶ 75,195, p. 75,386. This position was:

1. Certain types of voluntary contributory plans involve the sale of a security and are subject to the Act.
2. Compulsory plans and non-contributory plans are not subject to the Act because they do not involve an offer or sale within the meaning of the Act.

As to "certain types of voluntary contributory plans," a security may be present, either an investment contract or a certificate of interest or participation in a profit sharing agreement.[93] Also, voluntary contributory plans involve a "sale" under Section 2(3) of the 1933 Act since

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[93] "The Commission has always taken the position that the offer or sale of interests in *certain types of voluntary, contributory plans* is subject to the registration and prospectus requirements of the Securities Act of 1933, unless one of the general exemptions in Sections 3 and 4 of the Act is available." (emphasis added) (*Id.* at 75,386).

"You are correct in surmising it to be our position that the security which is involved within the meaning of Section 2(1) of that Act in connection with the offer or sale of interests in *certain types of plans* is normally an 'investment contract.' Frequently the interests may come also within the phrase 'certificate of interest or participation in a profit-sharing agreement.'" (*Id.* at 75,387) (emphasis added)

> ". . . it is our position that, wherever a plan involves an investment contract or certificate of interest or participation in a profit-sharing agreement and *the employees have a choice whether or not to make contributions*, there is obviously an 'attempt or offer to dispose of * * * a security * * * for value.'" (emphasis added, ellipses in original) (*id.* at 75,387)

Compulsory and non-contributory plans are not subject to the Act because no sale is involved:

> "On the other hand, it is because of the language of Section 2(3) that we have taken the position in the past that no 'offer' or 'sale' is involved in the case of a non-contributory plan, where the employees are not requested to make any contributions, or in the case of a compulsory plan, where there is no element of volition on the part of employees whether or not to participate and make contributions." (*Id.*)

Contrary to the Court of Appeals, the 1941 opinions did not say "that 'security' within the definition of the 1933 Act included employee pension plans." (A. 234). The first opinion stated only that "*certain types* of voluntary contributory plans" (emphasis added) were subject to the registration and prospectus requirements of the 1933 Act. And the second opinion stated that "interests in *certain types* of plans" (emphasis added) were normally an investment contract or in other cases a certificate of interest or participation in a profit sharing agreement. Nowhere is there a suggestion that interests in compulsory and non-contributory pension plans are securities under the 1933 Act.

The Court of Appeals also erred in suggesting that the "no sale" interpretation set forth in the 1941 opinions with regard to compulsory and non-contributory plans was limited to the registration as opposed to the antifraud provisions of the 1933 Act. (A. 246). The opinions themselves negate this suggestion. Their statement of "the question of finding a 'sale' within the meaning of Sec. 2(3) of the Act" and their conclusion that such plans do not involve an "offer or sale" necessarily meant that the entire Act was inapplicable since the sale of a security is required to bring either the registration or the antifraud provisions of that Act into play.

b. *Commissioner Purcell's Testimony.*

Three months after publication of the 1941 opinions the SEC presented certain proposals dealing with pension and other employee benefit plans to the Committee on Interstate and Foreign Commerce of the House of Representatives.[34] Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., 895 ("1941 Hearings").

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[34] On August 7, 1941 the SEC had issued its Report on Proposals for Amendments to the Securities Act of 1933 and Securities Exchange Act of 1934. H.R. Comm. Print, 77th Cong., 1st Sess. Two of the proposed amendments to the 1933 Act related to pension plans and other employee benefit plans. The first provided for an exemption from registration for those "types of plans [that] contain provisions sufficiently safeguarding the interests of employees to warrant their being automatically exempted from the registration requirements of the Act." (*Id.* 15.) The second proposal would have given the Commission rulemaking authority to exempt from registration plans which did not meet the requirements for automatic exemption.

The reach of the proposals described in the August 1941 Report was then unclear. If both proposals had been adopted, application of the 1933 Act would still have required the presence of a "security" and a "sale." The proposals on their face did not disclose what types of employee plans were believed to be subject to the 1933 Act as it then stood and therefore required statutory exemption to be relieved from the registration requirement; but the references to employee contributions in the Report (*Id.* 15-16) show that the SEC's proposals were developed to distinguish the treatment of different types of voluntary contributory plans. The two opinions of the SEC Assistant General Counsel published one month later clarified that what was at issue was an effort by the SEC to apply the Securities Act to certain voluntary contributory employee pension and other benefit plans but not to compulsory noncontributory plans.

The few reported instances in which the SEC had begun to seek registration of employee benefit plans under the Securities Act

The SEC was represented by Commissioner Ganson Purcell. He did not argue, as the Court of Appeals implies at A. 234-235, that interests in *all* pension plans were securities nor did he suggest that the "no sale" interpretation of the Commission with respect to compulsory and noncontributory plans was limited to the registration provisions of the Act. (*Cf.* A. 245-246). No suggestion is to be found anywhere in his testimony that such plans are securities or that they are subject to the antifraud provisions of the Act. Rather, he reiterated the interpretation which had been set out in Assistant General Counsel Davis' opinions: (1) that certain voluntary contributory plans involve the sale of a security, are therefore subject to the Act and required to be registered unless a specific exemption is available, and (2) that compulsory and noncontributory plans are not subject to the Act because they do not involve a sale.

In defending his position that the Securities Act applies to *some* pension plans, Commissioner Purcell was speaking only of voluntary, contributory plans. This is clear from his reference to "* * * any plan under which employees are given the *opportunity* to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date." (1941 Hearings 895, emphasis supplied). The kind of plan to which Mr. Purcell was addressing himself is further shown by his statement that "many [not, "all"] employee plans are

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confirm this view. In 1938 the Commission demanded registration of the Sears, Roebuck Profit Sharing Plan, a voluntary contributory plan which invested principally in Sears stock. Harbrecht, *Pension Funds and Economic Power*, 85-90 (1959). The Sears Plan filed a registration statement in 1940, said to be the first such statement to be filed. (1941 hearings, 974, 1021). In February 1940 the SEC demanded registration of a voluntary, contributory profit sharing plan maintained by Jewel Tea Company, a demand which was refused by the company. The SEC told that company that if the plan were made compulsory the registration demand would be dropped. (1941 Hearings, 962, 963).

in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large", *id.*, and by his reliance on Congress' rejection in 1934 of the Hastings amendment relating to employee stock investment plans. (See pp. 92-94, *supra*)

That Mr. Purcell believed the Securities Act to apply only to voluntary contributory plans is revealed by other portions of his testimony.

> "Mr. Chairman, I should like to make as clear as possible at the outset of my remarks the nature of the proposals that are now being considered by the committee. I would like to call your attention to the fact that we are not proposing that pension plans be made subject to the Securities Act. *Certain plans are now subject to the Securities Act and the registration requirements*, as Mr. Latimer stated yesterday and as I will explain in detail in a few minutes. (*Id.* 887-888) (emphasis added).[95]
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> * * * *
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> "Well, our view of it is that there is substantially the same situation in either case. In one, *the employees are being offered the securities of a company directly and being encouraged, as you say, to invest in them and take an ownership interest in the company.* If they are supplied with the information that is required under the Securities Act, the company has met the requirements of disclosure of the Securities

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[95] Mr. Murray W. Latimer, the Chairman of the Railroad Retirement Board and a leading expert on pensions (see *id.* at 865) testified in support of the Commission's proposals. It is clear from his testimony that the plans which he believed to be subject to the Securities Act, and as to which he was asserting the Commission's position (see particularly *id.* at 873, 878, where representatives of the Commission were nodding approval) were *contributory, voluntary* plans—that is, plans to which the employees contributed money and had a choice as to whether to contribute. See *id.* at 871-873, 874, 876, 877-878, 880-883.

Act. Now, if the pension or other type of investment plan is going to take the employees' money and invest it directly in the stock of the company, then it is the view of the Commission that under disclosure principles the employee ought to know that that is going to be done when he is asked to participate in the plan. *That is all that is suggested.*" (*Id.* 903) (emphasis added).

Mr. Purcell also made clear that compulsory and noncontributory plans were *not* subject to the 1933 Act.

"Now, in anything that I have said, I do not mean to imply that every employees' plan requires registration. *It is only those plans which involve the sale of an investment contract or some other type of security.* Obviously I am not talking about plans which provide simply for sick benefits or hospitalization or social and cultural activities. *The Securities Act does not apply* unless the *employees' payments* are made with a view to their being invested and earning a return for them.

"Moreover, *even where the plan involves securities,* registration is not required in the many cases where the employees pay nothing for the securities, but receive an interest in an investment fund by way of bonus from their employer; for, of course, *a gift is not a sale, and the Securities Act is concerned only with sales of securities.*

"Similarly, compulsory plans do not require registration. *If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved.* The purpose of the registration provisions of the Securities Act is to disclose to prospective investors the essential facts about *securities which they are asked to buy, and if the employees are given no choice* as to whether to buy or refuse to buy there

hardly seems any point in the registration process. As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan.

"Finally, even where there is a sale—that is, *where the employees are given a choice whether or not to contribute*—an exemption may be available if all the funds must be invested in insurance policies and annuities, as Mr. Latimer indicated this morning . . ." (*Id.* at 896-897) (emphasis added).

Mr. Purcell's understanding that compulsory and nontributory plans were not subject to the 1933 Act was further shown by his repeated references to voluntary plans and employee contributions (*id.* 902, 904, 910), and his repeated insistence that his concern was limited to plans which involve the sale of a security (*id.* 900, 901, 913).[96]

[96] Industry witnesses who followed Mr. Purcell also indicated that this was their understanding of his position, *id.* 983, 987, 988. They testified that for several years after the 1933 Act the SEC had made no such claim although many registration statements had been filed by corporations offering securities which mentioned the existence of such plans. (*Id.* 951, 997). One witness pointed out that although hundreds of plans were in existence at the time of the 1933 Act and many more had been adopted since then, there had been no example of voluntary registration of such a plan and it was unreasonable to suppose that the trustees of all such plans had violated the law for all those years (*id.* 968). Industry witnesses testified that the Commission's claim of jurisdiction over voluntary contributory plans announced in the 1941 opinions and in the SEC's amendment proposals had come as a surprise. (*Id.* 923, 932, 974, 994, 997). They uniformly urged that, except for employee stock investment plans, voluntary contributory pension plans were not subject to the Securities Act. (*Id.* 926, 933, 950, 965, 996-7, 985). They echoed Congressman Wolverton's position that pension plans had not been considered in connection with the Act and that the SEC's recent claim in this regard was a distortion of the purposes of that Act. (*Id.* 927, 951, 965, 997). Several witnesses warned that approval of the Commission's proposals would discourage the establishment of retirement plans by employers. (*Id.* 945, 953, 957, 971, 985, 992-4).

The Court of Appeals accepted the SEC's argument below that the Commission's "no sale" interpretation with respect to compulsory and non-contributory pension plans, as expressed in the 1941 opinions and in Commissioner Purcell's 1941 testimony, was reached only for purposes of the registration provisions and was never applied for purposes of the antifraud provisions of the Securities Act. (A. 245-246). The 1941 opinions, as we have seen, cannot be read in this way; nor can Mr. Purcell's testimony. Nowhere in its 1941 presentation to Congress did the SEC say that it believed the antifraud provisions were applicable to compulsory non-contributory plans. Although Mr. Purcell's testimony focused on the registration requirements of the Act, he did not say that the "no sale" interpretation which he espoused with respect to compulsory and non-contributory pension plans applied to the registration but not the antifraud provisions of the Act.[97]

Even Mr. Purcell's limited assertion of authority was challenged in the course of the Commissioner's testimony

[97] Such a distinction would have been inconsistent with the plain language of the 1933 Act, which contains only one definition of the term "sale" and no language indicating that the term means one thing for purposes of the registration provisions and another thing for purposes of the other provisions of the Act which depend on the presence of a sale.

This distinction also would have been inconsistent with the position which the SEC took in a brief *amicus curiae* filed in March, 1941 in *National Supply Co.* v. *Leland Stanford Junior University*, 46 F.Supp. 389 (N.D. Cal.), *aff'd.*, 134 F.2d 689 (C.A. 9), *cert. denied*, 320 U.S. 773. In that case the SEC argued that where no "sale" was involved within the meaning of the 1933 Act a purchaser was barred from suing both under § 12(1) which creates civil liability for violation of the registration requirements of the Act and § 12(2) which creates civil liability for the use of untrue statements or omissions of material facts in the sale of securities. Brief of the Securities and Exchange Commission as *amicus curiae* in No. 20462 (U.S.D.C.N. Cal.) pp. 2-3, 17. The SEC reiterated that position on plaintiff's appeal in that case. Brief of the SEC in No. 10272 (C.A. 9), pp. 6, 8, 15-16.

and that of other witnesses by Congressman Wolverton, who had been a member of the House committee which initially considered the 1933 Act (1941 Hearings at 877), and who insisted that the entire subject of pension plans was "far afield" from the Securities Act. (*Id.* at 870-872). Congressman Wolverton said:

> "I was a member of this committee when the Securities Act was enacted. The matters that you are now bringing to our attention, to the best of my knowledge and recollection, were never even mentioned in connection with the Securities Act. This is something totally foreign to what we had under consideration at that time.
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> "We were seeking to protect the public against the issuing of improper securities; to give it all of the information that would enable it to know whether it was getting something good or something bad; but the question of pensions and their funds, or the investment of the funds, was never even a subject of discussion before the committee . . ." (*Id.* at 878)
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> "Well, the more you talk, and the longer I listened to Mr. Latimer, the more I am impressed with the thought that the subject is so big, of such a character, and covers a field so wide that it should be a matter of special legislation, if it is necessary, and not to be tacked on to the Securities Act like a wart to something that was never intended to apply to it. It just seems to me that you are driving something in that never was in contemplation when we passed this Securities Act." (*Id.* at 913)
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> "I do not think I can emphasize too strongly the lack of congressional intent in the passage of the Securities Act to include jurisdiction in these matters that have been assumed by the Securities and Exchange Commission.

"Speaking for myself, as I have stated on several occasions, I have no recollection of any request for that power having been presented to the Commission when we were considering the bill on the floor of the House, nor in the Senate. I cannot conceive that a matter that is as important as this seems to me, if we are to judge by the interest that has been taken in these hearings, that a matter of that kind could be made a part of this bill without some discussion or some reference to it in some way, and yet there is an absolute lack of any reference of that kind, which leads me to the conclusion that others as well as myself did not have in mind that it was in any way intended to be included, nor that the bill as enacted, had any bearing on this particular subject." (*Id.* at 980-981)

The Court of Appeals was plainly mistaken in suggesting that Congressman Wolverton's statements dealt only "with supervision" or "regulation", by which it meant registration under the 1933 Act (A. 235, n.32). He could not have expressed more emphatically his view that the subject matter of employee pension plans was "totally foreign" to the 1933 Act in its entirety. And, as we have seen, he not only reflected the views of the 1933 Congress, but anticipated the course of future Congressional action: For when Congress determined to regulate private pension plans, it did so in 1958 and again in 1974, as "a matter of special legislation" rather than "tack[ing] it on to the Securities Act like a wart. . . ." (1941 Hearings at 913).

5. *The SEC's Administrative Practice after 1941 Was, As Before, to Treat Compulsory Noncontributory Pension Plans As Beyond the Purview of the Securities Laws.*

After the SEC failed in its 1941 effort to gain express statutory authority over voluntary contributory plans, it evidently abandoned further efforts to apply the Securities Act to most plans of that type. During his 1941

testimony Commissioner Purcell told the House Committee that the SEC had decided to withhold further action under the Securities Act relating to the employee benefit plans which it believed to be subject to registration, pending Congressional action on its proposals (1941 Hearings at 914). It appears that prior to 1951 companies were advised by the SEC "that plans under which any contributions were invested in employer stock had to be registered." [98] In 1948 a commentator reported that the Commission, upon direct inquiry, had advised that suitable forms for the registration of pension plans were not then available.[99]

In 1951 Louis Loss, then Associate General Counsel of the Commission (and a signatory of the Ninth Circuit brief in *Leland Stanford*) after referring to the Commission's unsuccessful 1941 amendment proposals, and its stated intention to withhold further action until Congress had acted, said, "Nothing further has been done as of this writing." Loss, *Securities Regulation* 329 (1st ed. 1951).

In 1953 the SEC belatedly acknowledged the abandonment of its earlier efforts to compel registration of all voluntary, contributory pension plans under the Securities Act. Letters from the Assistant Director of the Commission's Division of Corporation Finance formally announced the much narrower policy that registration was required only for contributory plans which used employee contributions to purchase employer securities. These 1953 letters stated:

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[98] Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans, 29 Law and Contemporary Problems, 795, 809, n. 45 (1964) (hereinafter Mundheim and Henderson).

[99] Comment, *Pension Plans As Securities*, 96 U.Pa. L. Rev. 549, 550 (1948).

> "pending the adoption of a suitable form, no question will be raised with respect to the registration of participants in a voluntary, contributory pension, profit-sharing, or similar plan that does not invest in the securities of the employer company in an amount exceeding the company's contributions."

Letters dated May 12, 1953 from the Assistant Director, Division of Corporation Finance of the Commission to Commerce Clearing House, CCH Fed.Sec.L.Rep. ¶ 2105.51 and to Prentice-Hall, P-H Pension and Profit Sharing Rep. ¶ 11941 (1971).[100]

Nothing was said in the 1953 letters about compulsory non-contributory pension plans. The conclusion in the 1941 opinions that such plans did not involve a sale and were therefore not subject to the Securities Act was generally understood to be unchanged[101] and was expressly reaffirmed as current staff policy in letters dated August 1, and November 16, 1962 from the Chief Counsel of the SEC Division of Corporation Finance to Commerce Clearing House, CCH Fed.Sec.L.Rep. ¶ 2105.52 and to Prentice-Hall, P-H Pension and Profit Sharing Rep. ¶ 11941 (1971). And as we have seen, the SEC Institutional Investor Study of 1971 reaffirmed the Commission's long-standing interpretation that the Securities Act does not apply to compulsory, non-contributory pension plans. *Supra*, pp. 58-60.

After the enactment of WPPDA, the SEC recognized the 1958 law as Congress' chosen instrument for protect-

[100] One month later the SEC adopted Form S-8, a simplified registration form for employee stock purchase plans of companies which already filed reports under the 1934 Act. Securities Act Release 3480, June 16, 1953. Loss, *Securities Regulation* 319, n.9 (2d ed. 1961).

[101] For references to this understanding see Loss, *Securities Regulation*, 326-329 (1st ed. 1951); *Id.* 327-328 (Supp. 1955); *Id.* 506-511 (2d ed. 1961); *Id.* 2551-2556 (Supp. 1969).

ing the rights of employee pension plan participants. The 1963 SEC Special Study of Securities Markets said:

> "While pension funds are one of the most important institutional groups in the securities markets, and are growing at the fastest rate, they are notable for the dearth of information publicly available on their holdings. Investment companies are required by the provisions of the Investment Company Act to disclose their holdings of individual stocks in their periodic reports. Insurance companies are required by various State statutes or regulations to make similar disclosures. *Pension funds, however, have not been subject to any corresponding disclosure requirement.* Although the Federal Welfare and Pension Plans Disclosure Act applies a disclosure concept to pension funds, the act does not require that the holdings of individual security issues be revealed unless they are securities of an employer or other 'party in interest', and are not securities listed on a national securities exchange or securities of a registered investment company or public utility holding company.
>
> "Recommendations have been made in the past by others that the Federal Welfare and Pension Plans Disclosure Act should require greater disclosure of individual security holdings of pension funds, *with the purpose of informing, and protecting the interests of, the beneficiaries of such plans.* In view of the general importance of the pension funds in the securities markets, however, there appears an independent reason of public policy favoring such disclosure." [102]

At no time did the Commission proceed against any involuntary noncontributory pension plan under the anti-fraud provisions for making material misstatements to

[102] Report of Special Study of Securities Markets of the Securities and Exchange Commission, Part II, House Document No. 95, 88th Cong., 1st Sess., 869 (1963) (emphasis supplied).

pension plan participants or for failing to disclose material facts to them. In fact, its practice was in full accord with its statement of the law in the 1971 Institutional Investor Study and in its presentations to Congress when the WPPDA and ERISA were enacted. The Court of Appeals unaccountably failed even to mention this long and uninterrupted history of inaction. Instead, it placed its heaviest reliance on a 1970 amendment to the 1933 Act which, as we now show, the court completely misinterpreted.

6. *The 1970 Amendment to the 1933 Act Has No Bearing on The Question Before the Court.*

a. *Introduction.*

The Court of Appeals placed heavy reliance on an amendment made to § 3(a)(2) of the 1933 Act by § 27 (b) of the Investment Companies Amendments Act of 1970 (the "1970 Act"). The change in § 3(a)(2) is set forth at pp. 3a-5a, *infra*. The court said: "Recognizing that interests in employee pension funds are 'securities,' in 1970 Congress decided to exempt them from the registration requirements of Section 5 of the 1933 Act (15 U.S.C. § 77e) if the employee pension fund was maintained by a bank or in a separate account maintained by an insurance company." The court drew from that interpretation two propositions which were critical to its ultimate judgment. *First*, that Congress thereby "evidenced agreement with the SEC's position that interests in pension funds are securities;" and *second*, that by virtue of those amendments nearly all pension funds are exempt from registration. (A. 236-238, 252, 258.)

The first proposition is wrong because, as we shall show, the 1970 amendment did not address the relationship between employee participants and pension plans or trusts at all, but rather only the relationship between banks or

insurance companies which offer bank trust funds or separate insurance accounts as investment vehicles for pension fund assets and those who are responsible for determining the manner in which such assets will be invested.

The second proposition is wrong because contrary to the assumption of the court below that 96% of all pension funds are bank maintained and hence exempt from registration by reason of the 1970 amendment (A. 258, n.61), the SEC's own statistics show otherwise. While we do not have information which would show the number of pension funds that have their assets managed otherwise than by banks or insurance companies, a study issued by the SEC itself shows that at the end of 1975, of the aggregate $145.6 billion asset value of all private noninsured pension funds, only $93.5 billion were managed by banks and trust companies. Thus, funds with assets of at least $50 billion would be nonexempt from registration, even if § 3(a)(2) were construed as exempting from registration all pension funds "maintained by a bank or in a separate account maintained by an insurance company." See SEC 35 Statistical Bulletin 552 (November, 1976).

The court's error is at least partially understandable since it got the idea from the SEC which argued in its brief that there is only one "affirmative condition" to exemption from registration under § 3(a)(2), that is, that a pension plan be qualified under Section 401 of the Internal Revenue Code and that 96% of all pension plans are so qualified. (SEC Br. 59, n.81, quoted at A. 258, n.61). The SEC was able to say this only by reading the additional condition "maintained by a bank" out of the statute, a rewriting of § 3(a)(2) which the court below was not prepared to swallow. Instead, the court inserted an unstated and absurd premise to the SEC's statistical conclusion: that pension fund qualification under the

Internal Revenue Code is the same as or co-extensive with bank maintenance of pension assets. (A. 258, n.61)[103]

Since the court below also erred in its description and interpretation of many details of the legislative history of the 1970 amendment and omitted others of significance, our exposition with respect to the amendment is unavoidably lengthy. Notwithstanding the length of the discourse, the 1970 amendment has nothing to do with the question presented.

b. *The Language of the 1970 Amendment.*

The 1970 amendment deals only with single and collective trust funds maintained by a bank or in separate accounts maintained by an insurance company; these it exempts from registration but not from the antifraud provisions of the federal securities laws. The amendment was drafted to deal only with the question of whether banks and insurance companies are required to register their sales of interests in trust funds or investment accounts which they maintain in connection with employee pension plans.[104] It does not address and therefore says nothing at all about the status of interests in the pension plan itself; that issue was not then considered. That this

[103] The court there says also: "Because of the longtime and consistent administrative practice, these pension funds might be deemed beyond the scope of the registration requirements even if they are not already exempted" (§ 302(a)). Passing the question of just what the SEC's practice was, the court's supposition invites the question as to what would be the statutory source of the SEC's authority to provide such an exemption. We know of none.

[104] While § 3(a)(2) also deals with separate accounts maintained by insurance companies and other types of qualified employee plans, for convenience and brevity we will hereafter refer to the exemption only as it relates to interests in trust funds maintained by banks and issued in connection with qualified pension plans.

interpretation and only this interpretation is correct appears from the language of the amendment to § 3(a)(2) which, in pertinent part, as amended, provides an exemption from registration for

> "any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954." [105]

The statute carefully distinguishes between a trust fund maintained by a bank and a pension plan. Interests in trust funds which are "maintained by a bank . . . in connection with" pension plans are exempted; but interests in the underlying pension plans are not dealt with. When a bank maintains a trust fund in connection with a pension plan, the interest in that fund is a security which

[105] We here set forth the entire text of the pertinent language added by the amendment:

> "any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code. * * *"

the bank sells to its customer. The customer is the person or group who determines how the assets which fund the pension plan are to be invested. That may be the sponsor (the employer or other organization establishing the plan) or, in the case of an underlying pension trust, the trustee of that trust. In that situation there are two relationships: (1) that between the bank and its customers and (2) that between the sponsors or trustees of an underlying pension trust and the employees who are the plan participants; it is only the former which involves the "purchase and sale" of a "security." However under a long-standing SEC interpretation registration was not required for the sale of interests in the bank's trust fund on the rationale that the transaction did not involve any public offering and was therefore exempt under what is now Section 4(2) of the 1933 Act, a proposition which was not free from doubt. See Loss, IV *Securities Regulation*, 2538 (Supp. 1969).[106] The principal purpose of the 1970 amendment to § 3(a)(2) was to codify that administrative practice, and eliminate any questions with respect to whether or not such interests were required to be registered. That amendment, however, did not deal with what is at issue here, the status under the securities laws of employee interests in the underlying pension plans.

In its brief in the court below the SEC agreed that as the amendment to § 3(a)(2) of the 1933 Act passed the Senate in the 91st Congress its purpose "was to clarify the status of certain commingled investment accounts maintained by banks and insurance companies." (SEC

[106] "The Commission has consistently taken the position that the commingling of corporate pension plans and the operation of common trust funds involves the issuance of a security—although often in a transaction not involving a public offering." Memorandum re Securities Act Release No. 4552, Nov. 6, 1962. Reprinted in Common Trust Funds—Overlapping Responsibilities and Conflict in Regulation, Hearing Before a Subcommittee of House Committee on Government Operations, 88th Cong., 1st Sess., 167-168 (1963). See also Mundheim and Henderson p. 113, n. 98, *supra*, at pp. 820-821.

Br. 32). The Court of Appeals accepted the SEC's contention that the subsequent action of a House Subcommittee, which added the two words, "single or", "altered the focus of the exemption to encompass interests in the underlying pension funds." (A. 239) Our examination of what this change did to the text, and of the explanations in the Committee Reports and floor debate after these words were added will demonstrate that the focus never changed; it always remained exclusively on the interests in bank trust funds maintained for pension plans and never reached interests in the underlying pension plans. Before doing so, however, we shall briefly summarize the earlier history of the amendment. Against that background, the shift in focus which the Court of Appeals posits is seen to be an even more radical transformation of the original conception of the bill.

c. *The History of § 27(b) prior to the House Amendment.*

The dominant concerns of the 1970 Act were two major and controversial proposals to regulate mutual fund management fees and "front end load" commission charges.[107] These proposals had been the principal features of S. 1659 of the 90th Congress which, as originally introduced, in May 1967, contained only proposed amendments to the Investment Company Act of 1940 and the Investment Advisors Act of 1940. In November 1967 Senator McIntyre introduced Amendment 438 which added a new Title II to S. 1659. Title II included proposed amendments to the federal banking and securities laws relating to three types of bank collective investment funds: (1) collective investment funds for managing agency accounts (so-called "bank mutual funds"); (2) assets held by a bank in a fiduciary capacity, such as trustee, executor, administra-

[107] Mutual Fund Legislation of 1967, Hearings before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., on S. 1659, 23 (hereafter "1967 Hearings").

tor or guardian; and (3) bank collective trust funds consisting of assets of qualified employee pension trusts, including H.R. 10 retirement plans for self-employed individuals.[108]

Sen. McIntyre's proposals with respect to two types of bank collective funds, those held in a fiduciary capacity and those held for employee pension plans were noncontroversial and characterized as consistent with existing SEC interpretations.[109] As to bank trust funds maintained for pension plans, an SEC Analysis stated:

> "The amendments expressly exempt from the registration provisions of the Securities Act and Section 12(g) of the Exchange Act "any collective fund maintained by a bank consisting solely of assets of retirement, pension, profit-sharing, stock bonus or other trusts which are exempt from federal income taxation under the Internal Revenue Code" except any fund consisting of assets from H.R. 10 plans.

[108] See the analysis of the amendment prepared by the SEC. 1967 Hearings, Part 3, 1209, 1221-1222.

Earlier versions of these proposals were contained in the proposed Bank Collective Investment Fund Acts of 1963 and 1965. *See* Collective Investment Funds, Hearings Before a Subcommittee of House Committee on Interstate and Foreign Commerce, H.R. 8499, H.R. 9410, 88th Cong., 2d Sess. (1964); Collective Investment Funds, Hearings Before a Subcommittee of Senate Committee on Banking and Currency on S.2704, 89th Cong., 2d Sess. (1966). *See also* Common Trust Funds—Overlapping Responsibilities and Conflict in Regulation, Hearing Before a Subcommittee of House Committee on Government Operations, 88th Cong., 1st Sess. (1963). The history which gave rise to these proposals is summarized in Loss, IV *Securities Regulation*, 2536-2549 (1969 Supp.) and Mundheim and Henderson, op. cit. p. 113, n. 98, *supra*, at 795, 819-833.

[109] The third proposal in Amendment 438, to expressly permit banks to operate commingled investment funds for individual agency accounts in direct competition with mutual funds, was highly controversial and was ultimately left by the 1970 Act to then existing law. Investment Company Amendments Act of 1970, H. Conf. Rep. No. 91-1631, 28-29. The issue was ultimately resolved against the banks in *Investment Company Institute* v. *Camp*, 401 U.S. 617.

> The amendment is consistent with SEC practice under existing law except insofar as the exemption may extend to funds which invest in the employer's stock and include employee contributions." 1967 Senate Hearings, 1222.

The SEC shortly thereafter decided that the scope of the proposed exemption presented no problem with respect to contributory plans which invest in the employer's stock. In a Memorandum to the Senate Committee the SEC said:

> "In testimony before the Senate Committee, the Chairman expressed reservations about the proposed amendment insofar as it would provide an exemption for corporate pension plans which invest in the employer's stock. Such an exemption would be contrary to the established position of the Commission which requires registration of those plans which invest substantially in the employer's stock.
>
> • • • •
>
> "The Commission, however, does not believe it is necessary to recommend changes in the proposed amendments to deal with employee plans which invest in the employer's stock, since *the language of the amendment clearly indicates that it would exempt from registration only interests in the collective funds for corporate pension plans and not interests in the plans themselves.* Thus, the legislation will not affect the Commission's existing authority to require Securities Act registration for interests in corporate pension plans which are funded by bank collective funds, even though interests in the funds are exempt from registration . . ." (*Id.* at 1341-1342) (emphasis added)

Thus the SEC recognized the distinction between interests in bank trust funds holding pension fund assets and interests in the underlying plans. The SEC also recognized that the proposed amendment to Section 3(a)(2) of the 1933 Act dealt with the former but not the latter.

The McIntyre Amendment was included in S. 3724 which was favorably reported by the Senate Committee in July 1968, and passed the Senate in 1968. However, the House failed to act. In January 1969 Senator Sparkman introduced S. 34 which was drawn from S. 3724 and the substance of which was reported favorably as S. 2224 by the Senate Committee on Banking and Currency after hearings held in April 1969.[110]

Section 27(b) of S. 2224 which contained the amendment to Section 3(a)(2) of the 1933 Act was included in Part B of the bill, a group of provisions relating to "Banks and Savings and Loan Associations and Insurance Companies," 1969 Senate Report, 22. The Report explained the pertinent part of Section 27(b) as follows:

> "The amendment would also exempt from the registration provisions of the act interests or participations in collective trust funds maintained by banks for funding certain stock bonus, pension, or profit-sharing plans which meet the requirements for qualification under section 401(a) of the Internal Revenue Code. In effect, the amendment would exempt interests or participations in connection with corporate pension or profit-sharing plans which meet the requirements for qualification under section 401(a) of the code, but not interests or participations in connection with such plans (known as "H.R. 10 plans") which cover employees, some or all of whom are employees within the meaning of section 401(c)(1) of the code. *The exemption is limited to interests or participations in those bank collective trust funds maintained for the funding of employees' stock bonus, pension, or profit sharing plans and not as vehicles*

[110] S. Rep. No. 91-184, 91st Cong., 1st Sess., Investment Company Amendments Act of 1969 (the "1969 Senate Report").

> *for direct investment by individual members of the public.*" [111]

The distinction between interests in bank trust funds holding assets used to fund pension plans and interests in the underlying pension plans was thus still clear.

d. *The Addition of "single or" by the House, the Resulting Language, the House Committee Report and the Explanatory Colloquy.*

The text of the amendment as the bill passed the Senate was that quoted at A. 239 and, as the court acknowledges, the amendment was solely addressed to interests in bank trust funds. But the language which so demontrated was not the word "collective" (emphasized *id.*), but the phrase "maintained by a bank".

It is at this point, according to the Court of Appeals, that the House Subcommittee's addition of the words "single or" to precede the phrase "collective trust funds maintained by a bank" "altered the focus of the exemption to encompass interests in the underlying pension funds" A. 239. The words of the amendment as thus changed, the explanation therefor given in Congress, and subsequent developments before passage, all refute the Court of Appeals' interpretation.

We begin, of course, with the language of the amendment. (*Ernst & Ernst* v. *Hochfelder*, *supra* 425 U.S. at 200). With the addition of the words "single or", the phrase in question read "any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with . . . a . . . pension . . . plan." The distinction between a bank trust fund and an underlying pension

[111] 1969 Senate Report at 27 (emphasis supplied). This was the identical explanation given in the Senate Report in the prior Congress reporting favorably on the McIntyre Amendment, S. Rep. No. 90-1351, 90th Cong., 1st Sess., 25-26.

plan remained clear as it had since the McIntyre amendment was introduced in 1967. With the addition of the words "single or" the amendment still exempted only interests in a bank trust fund and not interests in the underlying pension plan.

The Court of Appeals confuses the words "funds" and "plans." It refers to "pension funds" and "pension plans" interchangeably, A. 236-242, although Congress was more precise. The amendment consistently differentiates between "pension plans" and "trust funds", be they single or collective; the phrase "pension fund" nowhere appears. And the Commission itself had been equally precise when it described an earlier version of the amendment in its 1967 memorandum, quoted at p. 123, *supra*.

With the words so clear, resort to legislative history should be unnecessary. But that history abundantly demonstrates that the change in focus found by the court never took place.

It is reasonable to suppose that if the subcommittee thought it had made a significant change in the bill by adding "single or", its Report to the full House would have so stated. Yet, that Report did not even mention the addition of the two words, to which the court attributes such far-reaching effect. Its explanation of the bill was word for word the same as that of the Senate Committee prior to the change.[112]

But we need not rely on inference. For the meaning of the change from the Senate bill was the subject of a colloquy in the House debate between Congressman Springer, the ranking minority member and Congressman Moss, the chairman of the subcommittee:

> Mr. SPRINGER. The second question: Section 27(b) of the bill provides an exemption from registration

[112] H.R. Rep. No. 91-1382, 91st Cong., 2d Sess., 43. Compare the 1969 Senate Report, quoted at pp. 124-125, *supra*.

under the Securities Act of 1933 for interests or participations in trust funds maintained by banks for funding certain stock bonus, pension or profit-sharing plans which meet the requirements for qualification under section 401 of the Internal Revenue Code. I understand that this bill differs slightly from the bill passed by the Senate in that it would make it clear that interests in a single trust maintained by a bank where the trust assets were not commingled with those of other qualified trusts would also be exempted from the registration requirements of the Securities Act. I understand that the SEC has required registration of interests and participations in such trust funds where employee money is used to buy securities of the employer or companies affiliated with the employer. I understand that this bill would not prevent the SEC from requiring registration of interests or participations in such trusts if that also were the case. Am I correct?

> Mr. MOSS. The gentleman is correct. It is my understanding that that is what was intended.

> Mr. SPRINGER. I thank the distinguished gentleman for his explanation.[113]

This deliberate and authoritative colloquy, far from stating that there had been a significant change in "focus", declared that the House bill differed from the Senate bill "slightly", in that "a single trust maintained by a bank where the trust assets were *not* commingled with those of other qualified trusts would *also* be exempted from registration" under the securities laws; that is, they would be treated like "collective trusts maintained by a bank" under the Senate bill.[114]

[113] 116 Cong. Rec. 33287 (Sept. 23, 1970).

[114] The court states that the House subcommittee added the words "single or" in response to the letter of Stannard Dunn, General Counsel for Sperry Rand Corporation (A. 239). The Court of Appeals quoted the language which Mr. Dunn suggested be added to

This colloquy, which is not discussed by the court below, is independently conclusive against the court's interpretation of the 1970 amendment. Only by ignoring or misreading this colloquy could the court assert that "Thus" the "focus" of the exemption provision was altered

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§ 27(b), *id.* but overlooked the significance of the subcommittee's refusal to accept his suggestion. The second paragraph of Mr. Dunn's letter pointed out that § 27(b) as it then stood would exempt only interests in "common" or "collective" trust funds maintained by banks in connection with employee benefit plans, but failed

> "to exempt interests or participations in a similar, and commonly used, type of employee benefit plan—that is, a plan under which funds are paid to a bank trustee that invests them in its discretion (without comingling [*sic*] with other trust funds in a 'common' or 'collective' trust fund) . . ."

Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., on H.R. 11995, at 929. Mr. Dunn's letter went on to point out that the SEC had long taken the position in "no action" letters that registration would not be required for contributory employee plans so long as employee contributions were not invested in employer securities. He stated that this had not been a "satisfactory treatment of the problem" because such Commission advice "does not purport to exempt the interests or participations from any registration requirement nor to afford legal protection against civil suits under the Securities Act or actions under state 'blue sky' laws." The letter concluded by suggesting the addition of a separate clause in § 3(a)(2) which would exempt any interest or participation "in any employees' stock bonus, pension or profit-sharing trust . . . which meets the requirements . . . of Section 401 of the Internal Revenue Code." *Id.* 930, 931.

The adoption of this portion of Mr. Dunn's proposal would indeed have vastly broadened the focus of the amendment since it would have dealt separately with interests in employee benefit plans themselves. But the House Committee did not adopt it, as the language it chose and the Springer-Moss colloquy make clear. In refusing to adopt the additional exemption proposed by Mr. Dunn and modifying § 27(b) only to exempt single as well as collective trust funds maintained by banks in connection with employee pension plans, the House subcommittee showed its intention not to broaden the scope of the amendment beyond that which it had since it was first introduced in 1967.

"to encompass interests in the underlying pension funds." A. 239.

The Conference Committee accepted the House version of § 27(b).[115] The entire statement by the Conference Committee on § 27(b), as modified by the House, was as follows:

> "Exemptions from Registration Under the Securities Act of 1933 for Certain Trust Accounts
>
> "The Senate bill exempted from the registration requirements of the 1933 Act certain collective trust funds maintained by a bank or in a separate account maintained by an insurance company.
>
> "The House amendment would have codified a long established administrative practice of the Commission by making it clear that this exemption applied not only to collective trust funds, but also to single trust funds.
>
> "The conference agreement follows the House version." [116]

e. *Which Administrative Practice Was Codified?*

The Court of Appeals opined that the administrative view which was codified by the 1970 amendment was that "although interests in pension funds did not need to be registered in most cases, they are nonetheless securities." (A. 241). Its citation of the Springer-Moss colloquy (pp. 126-127, *supra*) for that proposition is inexplicable.[117] The

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[115] It adopted a further change described at pp. 130-131, *infra*.

[116] H. Conf. Rep. 91-1631, 91st Cong., 2d Sess., 31 (1970).

[117] The SEC for its part did not rely on the colloquy; indeed it failed even to call it to the court's attention, although it was obviously the most direct and authoritative explanation of the amendment on which the SEC based its argument.

only administrative practice which Mr. Springer mentioned is one with respect to bank-maintained trust funds "where employee money is used to buy securities of the employer . . ." which, of course, is not relevant here. And the administrative practice which the Conference Report said was codified *by the House Amendment* was that the registration exemption of bank-maintained trust funds, "applied not only to collective trust funds, but also to single trust funds."

It is clear from its language and history that the principal administrative practice which was codified by the 1970 amendment was not one relating to pension plans but rather the SEC practice of exempting sales of interests in bank trust funds operated for pension plans on the ground that no public offering was involved. *Supra*, p. 120. It is the same administrative practice to which the SEC memorandum had referred in 1967, before "single or" was added. That addition thus merely perfected the original intention to codify the Commission's practice with respect to sales of interests in such bank trust funds, whether commingled or not.

f. *The Subsequent Changes.*

Two changes were made in § 27(b) subsequent to the House amendment but neither of those changes showed any "shift to include interests in the underlying plans." (A. 240). The first change was made by the Conference Committee. It added a new clause (i) which contained an exception to the basic exemption from registration accomplished by the amendment.[118] This is the change referred to at A. 240-241 relating to certain types of contributory plans. But the court's explanation is erroneous. The true meaning of clause (i) can best be understood in

[118] Another exception, which was preserved as clause (ii), deals with H.R. 10 plans.

conjunction with the further changes which were made a few days later.

After the House Committee added and the Conference Committee approved the addition of the words "single or", concern was expressed (notwithstanding Congressman Springer's assurance) that this change might have created a loophole through which contributory plans which invested employee money in the employer's securities and which had always been required to register might have been able to escape registration. The possibility existed because such a plan might designate a bank as trustee, provide for separate administration of its fund (hence a "single fund") and argue that since a bank was the issuer of interests in the fund, the exemption applied and registration was not required. The Conference Committee decided to deal with the problem by adding an express exception as clause (i). However, that first effort at drafting clause (i) went too far since it would also have required a bank trustee to register any interests in a *collective* fund which were sold to a contributory plan of the type traditionally required to register and this would have defeated one of the major objectives of § 27(b). Senator Sparkman cured this difficulty by a further amendment (tacked on to another pending bill) which narrowed the exception in clause (i).[119]

[119] Pub. L. 91-567, § 6, 84 Stat. 1497. The Sparkman amendment added the words italicized in the following text and eliminated the words in brackets:

> "(i) *the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and* under which an amount in excess of the employer's contribution [for any period] is allocated to the purchase of securities (*other than interests or participations in the trust or separate account itself*) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer . . ."

Clause (i) only describes those cases in which a bank is required to register interests in trust funds which it maintains. The Court of Appeals appears to read clause (i) as if it was intended to describe all instances in which contributory plans are required to register (A. 240-241). This is clearly incorrect since it would allow a contributory plan which invests employee contributions in employer securities and the balance of its assets in a bank collective trust fund to escape registration on the ground that it is not described in clause (i). Similarly, such a contributory plan is still required to register even though it does not invest in any bank trust fund and is not described in clause (i) or § 3(a)(2) itself.

The Court of Appeals ignored the first change made by the Sparkman amendment, the language added at the beginning of clause (i). We have explained the reason for that change, *supra*, at p. 131. The Court of Appeals mentioned only the second change in the Sparkman amendment, the addition of the parenthetical exclusion, but described it incorrectly as an amendment "to make it clear that the term 'security issued by the employer' did not include the securities consisting of the interests in the pension fund." (A. 241). The parenthetical exclusion however does not refer to interests in "the pension fund" but to "interests . . . in the trust" and the only trusts mentioned in clause (i) are those maintained by a bank. The parenthetical exclusion was apparently intended to deal with those situations in which assets funding a pension plan maintained by a bank or insurance company for its own employees are invested in the bank's own trust fund or a separate account of that insurance company. In such cases interests in the trust fund or separate account could have been regarded as securities issued by the employer, but they were not the type whose purchase with employee contributions was intended to require registration.

In the court below, the SEC argued that under its interpretation of the 1970 amendment all pension plans which are qualified under § 401 of the Internal Revenue Code would be exempt from registration, a figure which it estimated at 96% of all plans. This interpretation of the 1970 amendment ignores its language which restricts the exemption to funds "maintained by a bank or in a separate account maintained by an insurance company . . ." The Court of Appeals did not repeat this error. Without expressly noting its disagreement with the SEC, it placed a narrower interpretation on the amendment, namely that its effect was to exempt pension funds which are "being maintained by a bank." (A. 236). While this version at least addresses the language of the amendment, it raises very serious difficulties of its own. It attributes to Congress an intention, nowhere mentioned in the legislative history, to radically narrow the existing administrative practice under which most pension plans were not required to register, so that the statutory exemption said to codify that practice would apply only to pension plans maintained by banks and insurance companies. The practical consequences of such a step would be very large. The percentage of plans whose assets are not maintained either by a bank or a separate account maintained by an insurance company is very substantial. (See the SEC statistics discussed at p. 117 *supra*.) Under the Court of Appeals' view, these plans would be subject to the registration as well as the anti-fraud provisions of the securities laws.

The Court of Appeals nowhere attempts to explain why Congress should have chosen to create two classes of pension plans—those maintained by banks and insurance companies and those which are not—and exempted the former but not the latter from registration. Moreover, since the Court of Appeals' theory was that Congress was codifying an SEC administrative practice, it is significant that the SEC did not even argue, let alone establish, that

it ever administratively differentiated between pension funds which are "maintained by a bank . . ." and other pension funds, with respect to registration or otherwise. Thus, the SEC's interpretation is irreconcilable with the statutory language, and the Court of Appeals' version attributes to Congress the intent to codify an administrative practice whose existence no one has ever suggested.

Only petitioners' interpretation of the 1970 amendment avoids both horns of this dilemma. It explains the reference to administrative practice in the Conference Report and, more conclusively, it explains why Congress used the phrase "maintained by a bank."[120] On the other hand, since as of 1970, neither the SEC nor anyone else had held that there is a sale of a security when an individual accepts or continues employment where there is a mandatory, non-contributory pension plan, there was no perceived reason to codify the general understanding that such plans are not covered by the securities laws at all, including the registration provisions of the 1933 Act.

At least as late as 1971, in the Institutional Investor Study, the SEC was taking the position that the entire 1933 Act, rather than just its registration requirement, was inapplicable to mandatory non-contributory pension plans, *supra*, pp. 59-60. The argument that in 1970 Congress had codified an administrative view that the antifraud provisions were applicable to such plans cannot be squared with this evidence.

The Court of Appeals' interpretation of the 1970 amendment is on its face a grave indictment of the legislative process. It is not a light thing to suggest that

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[120] As we have seen, this was done at the behest of the banks in order to codify the administrative interpretation that they were not required to register their sale of interests in trust funds which they maintained for pension plans.

Congress casually shifted the "focus" of a proposal "to clarify the status of certain commingled investment accounts maintained by banks and insurance companies" (SEC Br. 32) into a sweeping determination that interests in all pension plans should be deemed securities and subject to the antifraud provisions of the securities laws and, in the case of plans not maintained by banks or insurance companies, subject also to the registration provisions of those laws. It is likewise a startling suggestion that Congress did so, as the Court of Appeals asserts, on the basis of a single letter from the counsel for one corporation, without hearing from other companies, or from labor organizations, pension plan administrators and others which would be affected thereby and without any other study of the consequences of such a profound expansion. And it stretches credulity to maintain that Congress would take such a giant step without at the very least stating in a committee or conference report or authoritative floor debate that that is what it has done. Of course, as we have seen, the evidence establishes conclusively that Congress did not perpetrate the travesty of the legislative process which the Court of Appeals tacitly found.

IV. ANY APPLICATION OF THE DISCLOSURE REQUIREMENTS OF THE SECURITIES LAWS SHOULD BE PROSPECTIVE ONLY, BECAUSE "RETROACTIVE LIABILITY COULD BE DEVASTATING FOR A PENSION FUND."

If it were held that Mr. Daniel and other participants in involuntary non-contributory pension plans are "purchasers" of a "security," the financial impact upon such plans and their beneficiaries would be enormous. While the opinion below is unenlightening as to the standards that would govern pension plans' antifraud liability and specifically avoids consideration of the relief to be granted

in the event of liability,[121] it is evident that there would be innumerable potential plaintiffs with colorable complaints about their plans' failure to make various disclosures previously deemed unnecessary. If even a tiny fraction of these potential plaintiffs were awarded previously denied pensions as plaintiff maintains they should (or received the amount of past contributions with respect to their employment), the solvency of such plans and their ability to pay prescribed benefits would be drastically jeopardized.

The situation would then be essentially that dealt with in *Los Angeles Dept. of Water & Power* v. *Manhart*, No. 76-1810 (April 25, 1978), which affirmed an alteration of previously accepted principles of pension management in another respect—by holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), prohibits pension contribution requirements for women higher than those for men notwithstanding different mortality rates. The Court held that the courts below should not have awarded retroactive monetary relief because:

> "Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that [such] a program * * * was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views." (Slip op. pp. 16-17)

[121] The only guidance offered to plan administrators is that "all material facts are [to be] disclosed in a manner comprehensible to the average worker" (A. 259). While acknowledging the "not uncomplicated question of the form of relief," the Court of Appeals simply stated that: "It is for the district court to construct a remedy which properly balances the needs of plaintiff against those of other fund participants" (A. 257).

The Court then went on to consider:

> "* * * the potential impact which changes in rules affecting insurance and pension plans may have on the economy * * *. These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." (Slip op. p. 18.)

Here, as in *Manhart*, "this is apparently the first litigation" asserting the rule of pension management adopted below, and that rule would "represent[] a marked departure from past practice." Slip op. p. 19; see Point III, *supra*. "Retroactive liability could be devastating for a pension fund" and "[t]he harm would fall in large part on innocent third parties" (slip op. p. 19), pensioners and current employees who (on the theory followed below) indirectly finance the pension funds. Thus, precisely the same policy and practical considerations militate here also in favor of treating any such rule as only a standard for behavior henceforth and not as a basis for monetary recovery.[122] Treatment of the securities laws is-

[122] Moreover in this case, unlike *Manhart*, non-retroactivity of newly announced legal rules would not necessarily deny plaintiff all opportunity for monetary relief. The complaint includes alternate claims, including a claim under § 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), which has been held to provide relief from pension eligibility requirements such as those about which

sue under review must, moreover, accord with the principle, followed in *Manhart*, that the Court "cannot base a ruling on the facts of this case alone" but must consider the effect of retroactivity *vel non* upon the generality of pension plans to which it would apply. Slip op. p. 19, n.42.[123]

Manhart denied retroactive recovery although this Court had held that in suits under Title VII there is a "presumption in favor of retroactive liability [which] can seldom be overcome." (Slip op. p. 16 citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405; See also slip op. p. 20). Thus the Court necessarily found prevention of such pension plan dislocations a matter of unusual public policy significance, as indeed its language itself indicates. Such "considerations of policy" have even more force where the granting of *any* private remedy is due only to a "judicially implied cause of action" (*Blue Chip*, 421 U.S. at 736). As the Court there said:

> "It is therefore proper that we consider * * * what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." (*Id.* at 737)

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plaintiff principally complains insofar as they are "arbitrary and capricious." *Johnson* v. *Botica*, 537 F.2d 930, 933-934 (C.A. 7); *Burroughs* v. *Board of Trustees*, 542 F.2d 1128 (C.A. 9), *cert. denied*, 429 U.S. 1096. (See A. 212, n.3).

[123] In *Manhart* the Court was properly unmoved by arguments, similar to those advanced in the opinion below (A. 257-258), seeking to minimize the impact of changes in pension rules. See slip op. pp. 19-20, nn. 42 & 43. Similarly, the court of appeals' general comments about the factual showing that plaintiffs would have to make (A. 259) offer little comfort in view of the plain fact that pension managers have never deemed it necessary to make actuarial or other securities-type disclosures to employees covered by involuntary noncontributory plans. In any event, these factual issues would ordinarily require full litigation, with all of the expenses that would entail even if the outcome were not adverse to the pension plan.

> "We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or the other unless and until Congress addresses the question." (*Id.* at 749)

The "delimitation" made in *Blue Chip* precluded suits by persons other than literal "purchasers" and "sellers" of securities. The "policy considerations" upon which the Court relied included "the danger of vexatious litigation" (*id.* at 740), unduly disrupting normal business activities, involving "many rather hazy issues of historical fact the proof of which [would depend] almost entirely on oral testimony" (*id.* at 743), and risking "a liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*id.* at 748, quoting from *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179-180, 174 N.E. 441, 444 (1931)). These same policy considerations are present in this case and they argue against the creation of any securities law remedy at all. When the more specific pension policies that were decisive in *Manhart* are added, the case for non-retroactive liability is conclusive. Indeed, it would be enough that this is an unusually compelling situation for application of the general doctrine that a decision on "an issue of first impression whose resolution was not clearly foreshadowed" is appropriately non-retroactive where it "could produce substantial inequitable results if applied retroactively." (*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107.)

The inequity of imposing financial liability under the securities laws for noncompliance with disclosure standards that were generally understood to be non-existent is well articulated in Judge Friendly's opinion for the court in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1291-1294 (C.A. 2):

> "[W]e would be loath to impose a huge liability * * * on the basis of what we regard as a substantial

> modification, if not reversal of the SEC's position on disclosure * * *, by way of its *amicus* brief in this case." (*Id.* at 1294)

Mutatis mutandis, that is exactly what the SEC successfully did in its *amicus* brief in the court below.

In *Manhart* the Court noted that in enacting ERISA Congress "underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." Slip op. p. 18, n.40. Such reference to related legislation as a major source of the "policy considerations" to be applied by the courts is even more appropriate in the present context, where the applicable law is itself a judicial creation. "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles * * *" *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 392. Even if the general substantive policies embodied in ERISA were not deemed inconsistent with judicial creation of additional pension requirements based upon the securities laws, this specific Congressional policy against dislocation of existing pension systems would at the least command that any such additional remedy be prospective only.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with direction to the District Court to dismiss Counts I and II of the complaint.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES AND RULE INVOLVED

This case involves §§ 2(1), 2(3), 3(a)(2), and 17(a) of the Securities Act of 1933, 48 Stat. 74 as amended (15 U.S.C. §§ 77a *et seq.*); §§ 3(a)(10) and 10(b) of the Securities Exchange Act of 1934, 48 Stat. 881 as amended (15 U.S.C. §§ 78a *et seq.*) and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; §§ 9(a) and 302(c)(5) of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, etc., 49 Stat. 449, 61 Stat. 136, 73 Stat. 519 (29 U.S.C. §§ 141 *et seq.*) and §§ 102 and 3004 of the Employment Retirement Income Security Act of 1974, 88 Stat. 832 (29 U.S.C. §§ 1001 *et seq.*).

Section 2(1) of the Securities Act of 1933 (15 U.S.C. § 77b(1) provides:

> When used in this subchapter, unless the context otherwise requires—
>
> > (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(3) of the Securities Act of 1933 (15 U.S.C. § 77b(3)) provides as pertinent:

> The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. * * *

Section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77c(a)(2)) as originally enacted provided:

> (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:
>
> * * * *
>
> *(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank.*

Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 3(a)(2) of the Securities Act of 1933 (as amended in 1970), (15 U.S.C. 77c(a)(2)), reads as follows:

> "(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of

a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; * * * or any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code. The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom

are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. For the purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term 'bank' means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term 'bank' has the same meaning as in the Investment Company Act of 1940."

Section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(10)) provides:

> When used in this chapter, unless the context otherwise requires—
>
> > (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, tempo-

rary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 (17 C.F.R. § 240.10b-5) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 9(a) of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1934 (29 U.S.C. § 159(a)) provides:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 302(c)(5) of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1934 (29 U.S.C. § 186(c)(5)) provides:

(c) The provisions of this section shall not be applicable

* * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provi-

sions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; * * *

Section 102 of the Employment Retirement Income Security Act of 1974 (29 U.S.C. § 1022) provides:

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described

in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

Section 3004 of the Employment Retirement Income Security Act of 1974 (29 U.S.C. § 1204) provides:

> (a) Whenever in this Act or in any provision of law amended by this Act the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which, to the extent appropriate for

> the efficient administration of such provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.
>
> (b) In order to avoid unnecessary expense and duplication of functions among Government agencies the Secretary of the Treasury and the Secretary of Labor may make such arrangements or agreements for cooperation or mutual assistance in the performance of their functions under this Act, and the functions of any such agency as they find to be practicable and consistent with law. The Secretary of the Treasury and the Secretary of Labor may utilize, on a reimbursable or other basis, the facilities or services, of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services, of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary of the Treasury and the Secretary of Labor and, to the extent permitted by law, to provide such information and facilities as they may request for their assistance in the performance of their functions under this Act. The Attorney General or his representative shall receive from the Secretary of the Treasury and the Secretary of Labor for appropriate action such evidence developed in the performance of their functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this subchapter or other Federal law.

Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753 and 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT JOHN DANIEL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753 and 77-754.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK

Petitioners,

vs.

JOHN DANIEL,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT JOHN DANIEL.

OPINIONS BELOW.

The opinion of the district court (Pet. App. pp. 106-134) is reported at 410 F. Supp. 541. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. pp. 209a-262a) is reported at 561 F. 2d 1223.[1]

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1. Petitioners Local 705 International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, and Louis F. Peick will hereinafter be referred to as "Local 705" and their brief as "Local 705 Br." Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America will hereinafter be referred as as "IBT" and its brief as "IBT Br." The joint appendix filed by Petitioners in this Court will hereinafter be referred

(Footnote continued on next page.)

STATEMENT OF THE QUESTION PRESENTED.

We do not accept petitioners' statement of the question presented on this appeal and thus restate the question we believe is lodged here for review: Whether plaintiff's interest in the Local 705 Pension Trust Fund constitutes a "security" acquired by way of a "sale", as those terms are defined in the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"), for the sole purpose of applying the antifraud provisions of the federal securities laws?

STATEMENT OF THE CASE.

A. Plaintiff's Claim.

The plaintiff, John Daniel has brought this lawsuit to seek relief for certain fraudulent and illegal activities undertaken by defendants in connection with the sale of interests in the Local 705 International Brotherhood of Teamsters Pension Trust Fund (the "Local 705 Pension Fund"). The defendants include the IBT, Local 705, the Local 705 Pension Fund, and the officers of Local 705 and trustees of the Local 705 Pension Fund. The only claims in issue on this interlocutory appeal involve Counts I and II of the Complaint relating to violations of the antifraud provisions of the federal securities laws.

Counts I and II seek relief for defendants' fraudulent and intentional misrepresentations and omissions of material fact relating to the sale to plaintiff of interests in the Local 705 Pension Fund, all in violation of Section 17(a) of the Securities Act of 1933, 15 U. S. C. § 77a-77aa, and Section 10(b), and Rule 10b-5 thereunder, of the Securities Exchange Act of 1934, 15 U. S. C. § 78a-78jj, and 17 C. F. R. § 240.10(b)-5. Such misrepresentations and omissions include among others:

(Footnote continued from preceding page.)
to as "Pet. App." Other references to "Br." preceded by a name will similarly refer to a brief filed in the court below or in this Court by that party or amicus.

(i) misleading statements as to the length and continuity requirements for the payment of a pension benefit from the Local 705 Pension Fund to plaintiff;

(ii) omitting to state the requirements for a payment of a pension benefit from the Local 705 Pension Fund to plaintiff;

(iii) omitting to state that all investments made by the plaintiff in the Local 705 Pension Fund, and all accumulated earnings thereon, will be forfeited if the length and continuity requirements are not met;

(iv) omitting to state that the likelihood the Local 705 Pension Fund will ever pay a pension benefit to plaintiff is substantially less than half;

(v) omitting to state the success or failure of the Local 705 Pension Fund in managing the monies in the Fund and the investments of the Fund; and

(vi) omitting to state that funds held in trust by the Local 705 Pension Fund have been diverted from their lawful purposes.

B. The Plaintiff.[2]

The plaintiff, John Daniel, invested in the Local 705 Pension Fund over the period from 1955 through November, 1973, and his investment is now *worthless*. Local 705 established the multi-employer Local 705 Pension Fund as of January 1, 1955.[3] Pursuant to the terms of the labor contracts negotiated by Local 705, part of the consideration received by Daniel and all other Local 705 members for labor services provided to Local 705 covered employers has been invested into the Local 705 Pension Fund.[4] These investments were made, pursuant to such con-

2. See generally the affidavit of Respondent, John Daniel, which is reproduced in Respondent's Br. In Opposition to the Petitions for Writs of Certiorari, pp. App. 1-App. 7 (hereinafter referred to as "Daniel Aff.").

3. The Local 705 Pension Trust Fund was created by a Trust Agreement between Local 705 and certain employer groups, pursuant to Section 302(c)(5) of the National Labor Relations Act ("NLRA"), 29 U. S. C. § 186(c)(5). Local 705 Br. at 6.

4. The investments by Local 705 union members into the Local 705 Pension Fund are substantial. Thus, a member of Local 705

(Footnote continued on next page.)

tracts, directly into[5] the Local 705 Pension Fund on behalf of such Local 705 union members by their employers as part consideration for labor services provided. The monies so invested into the Local 705 Pension Fund have been held in trust and invested and managed by Local 705 Pension Fund trustees for the benefit of all such Local 705 members who have invested in the Fund.

Daniel worked for Local 705 covered employers for a period of 22½ *consecutive years* and was denied a pension from the Local 705 Pension Fund. He first became a member of Local 705 in April, 1950, and at the same time entered into employ-

(Footnote continued from preceding page.)
now invests $30.00 per week, or $1,560 per year, through employer contributions into the Local 705 Pension Fund. A. S. Hansen, Inc., Affidavit, Local 705 Br. at p. A10. The aggregate value of all such monies invested by a Local 705 member over his trucking career are likely to be very large. Indeed, this investment is probably the largest investment a union member will ever make in his lifetime, "exceeding in value the owner-occupied single-family home, as well as the automobile." Drucker, *The Unseen Revolution,* p. 43 (1976). The aggregate value of all monies invested by Local 705 members in the Local 705 Pension Fund since its inception totals some $153 million. A. S. Hansen, Inc., Affidavit, Local 705 Br. at p. A7. If these securities are being sold by means of a fraud, it is a problem crying out for a remedy.

5. The primary reason for the payment of such part of an employee's compensation package *direct* into the Local 705 Pension Fund by the employer, rather than first to the employee and subsequently by the employee into the Local 705 Pension Fund, is tax related. For plans qualified under Section 401 of the Internal Revenue Code of 1954, employers are (within certain limits) permitted to deduct contributions made to such plans on behalf of covered employees, and the covered employees may defer the payment of tax on such employer contributions made on their behalf until actually received on retirement. See generally, M. Bernstein, *The Future of Private Pensions,* (New York, The Free Press of Glencoe, 1964) at pp. 198-200. Because of this tax incentive, it has been estimated that 96 percent of all pension plans have qualified under Section 401. See S. Rep. No. 1150, 92nd Cong., 2d Sess. 110 (1972). Clearly, the fact that (because of tax reasons) this part of an employee's compensation is paid (as above described) by the employer on behalf of the employee direct into a pension plan does not detract from the conclusions that (1) value is given by the employee in exchange for his interest in the Local 705 Pension Fund, and (2) the employee is an investor in the Local 705 Pension Fund.

ment as a truck driver with an employer who had a labor contract with Local 705. Until his retirement at age 63 on account of poor vision, he only worked as a truck driver for employers who were under collective bargaining agreements with Local 705. Daniel has not worked at all since his retirement on December 1, 1973.[6]

Over the whole 22½ year period of his employment career with Local 705 covered employers, Daniel's *sole* absence was a forced four month absence due to an economic lay off from his job.[7] Although this brief absence was strictly involuntary, Local 705 has seized upon it to deny Daniel a pension for not complying with its 20 year *continuous* service vesting rule,[8] notwith-

6. Daniel Aff. Para. 2-3.

7. Daniel was laid off by his employer on December 5, 1960, and he returned to work in April, 1961. During this four month lay off period, he tried unsuccessfully to find alternative trucking employment. Daniel Aff. Para. 4. Subsequent to his return to work and for an approximate three month period, April to July 5, 1961, his employer's bookkeeper embezzled certain funds, including those monies which should have been invested on Daniel's behalf into the Local 705 Pension Fund. On learning what happened, Daniel reported the facts to Local 705 and was assured by Local 705 that "they would take care of whatever had to be done on account of the embezzlement." *Id.* Para. 5. Notwithstanding such promise, Local 705 has consistently treated Daniel's break-in-service as a seven- rather than a four-month interruption. Local 705 Br. at 10. *Indeed, on this interpretation, even if Daniel had not been involuntarily laid off for four months, he would have been denied a pension from the Local 705 Pension Fund because of the alleged break in service arising from the three month embezzlement.*

8. In order to receive a retirement benefit from the Local 705 Pension Fund over the period of time at issue in this lawsuit, a Local 705 union member must have met certain eligibility requirements established by the Board of Trustees of the Local 705 Pension Fund. One major hurdle which had to be cleared was the "length requirement": a union member had to have 20 years of service with an employer or employers who had a collective bargaining agreement with Local 705 for the payment of a normal retirement pension. Local 705 Pension Plan Section 2.01(b); Pet. App. 72a p. 8. A second major hurdle which had to be cleared by a union member seeking his pension was the continuity of service requirement: the 20 years of covered service which a union member had had to be *continuous and uninterrupted* with absolutely no break-in-service (prior to 1970), or with less than a two year break-in-service (under

(Footnote continued on next page.)

standing his admitted 22½ years of service.[9]

The establishment of the Local 705 Pension Fund was an important element in Daniel's decision to continue working with Local 705 covered employers.[10] Daniel understood the Local 705 Pension Fund to insure the financial security of his old age. He recognized that he would be investing in the Local 705 Pension Fund through contributions made on his behalf into the Fund by his covered employers as part of his compensation for labor services performed; and that these contributions (together with the profits earned thereon) would, in part, finance the pension benefits he counted on receiving after retirement.[11]

The economic inducements to Daniel to invest in the Local 705 Pension Fund were substantial.[12] In fact, the economic pay off promised from a Teamster pension fund has been a key selling point used both by employers to convince employees to enter into employment and by the various Teamster unions to convince employees to certify the Teamster union as their exclusive representative in labor negotiations.[13] Daniel and the other members of Local 705 have, as a result, consistently voted in favor of collective bargaining agreements which provide for employer contributions on their behalf into the Local 705

(Footnote continued from preceding page.)
certain conditions) subsequent to 1969. Local 705 Pension Plan Section 2.01(b) and 2.05; Pet. App. 72a pp. 8 and 11. Presumably, under the Trustee's interpretation of this continuity requirement, a Local 705 union member whose 20 years of covered service from 1955 to 1975 was interrupted by a 1 month, or even a 1 day break in service in 1965, would be denied a retirement benefit from the Local 705 Pension Fund. This Draconian result befell plaintiff here: John Daniel was denied a pension benefit, notwithstanding his total 22½ years of covered service, because of a 4 month involuntary break-in-service in 1960.

9. Daniel Aff. Para. 14-15.

10. *Id.* Para. 7.

11. *Id.* Para. 6.

12. *Id.* Para. 9-10.

13. For example, articles in the first eight issues of the 1976 edition of *International Teamsters* (the union's magazine) were devoted to the Teamster pension plans.

Pension Fund in lieu of additional direct cash wage increases.[14] The economic importance of employee pension plans to employee decision making is not, however, unusual. A Federal Mediation and Conciliation Service Study has, for example, concluded that pensions are second only to cash wages as a determinate of employee decisions. Simkin, Union Membership Rejection of Contract Settlements, *Labor Relations Yearbook*, pp. 334, 342 (1967).[15]

14. This Court has thus noted that: "[F]uture [pension] benefits may be traded off against current compensation." *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593 (1977). A recent study prepared for the Department of Labor by the University of Maryland concludes, for example, that workers who receive pension benefits "pay for them" by accepting correspondingly lower wages. U. S. Dept. of Comm., *The Value of Defined Benefit Pension Plans: A Test of the Equalizing Differences Hypothesis* (Nat'l Tech. Info. Service, 1978). And, a Senate pension study has indicated:

> "Since labor negotiations resulting in wage increases through collective bargaining invariably include some consideration of pension benefits, employees believe that had pensions not been included in the settlement package, they would have received higher wage commitments." S. Rep. No. 634, Interim Report of Activities of the Pension Welfare, Pension Plan Study, 92d Cong., 2d Sess. 75 (1972).

See further the Amer. Acad. of Actuaries Br. at 19:

> "The parties may bargain for an increase in wages and then decide how much should be in the form of increased wages and how much contributed for funding retirement benefits."

Cf. S. Slichter, J. Healy, E. Livernash, *The Impact of Collective Bargaining on Management* 373 (1960) (pension plans encouraged during World War II by difficulty of obtaining general wage increases); Note, Pensions: Security In The Future or Securities Under The Law, 27 *Cath. U. L. Rev.* 364, 368 (1978).

15. This conclusion has been confirmed by a recent University of Maryland Study prepared for the Department of Labor. U. S. Dept. of Comm., *Internal and External Labor Markets: An Analysis of Manpower Utilization* (Nat'l Tech. Info. Service, 1978).

Daniel learned of the Local 705 Pension Fund only through mailings from and other communications with the Fund itself, the trustees of the Fund, Local 705, and the officers of Local 705. However, these communications intentionally misrepresented and failed to disclose certain material facts pertaining to the value of an interest in the Local 705 Pension Fund. For example, such materials did not disclose the minimum length of time considered to constitute a break-in-service in the Local 705 Pension Fund 20 years continuous service vesting rule; such materials did not disclose that all contributions made on behalf of a Local 705 member into the Local 705 Pension Fund (and all accumulated profits on the aggregate of such contributions) would be forfeited following any proscribed break in service; such materials did not disclose that service credit in one Teamster pension fund would not count toward service credit in most of the other 229 teamster pension funds; and such materials did not disclose the fact that very few Local 705 members would ever receive a pension benefit.[16]

The importance of such information is revealed by a recent statistical survey of employee pension plans which concludes that *fewer* than 10 percent of all participants in those plans which require 11 or more years of service for vesting will ever receive any pension benefits.[17] Interim Report on the Activities of the Private Welfare and Pension Plan Study, Senate Committee on Labor and Public Welfare, S. Rep. No. 634, 92d Cong., 2d Sess. 15, 115-153 (1972) (hereinafter referred to as *Senate Pension Study*). A more material fact relating to the

16. Daniel Aff. Para. 11 and 12.

17. If only 10 percent of the Local 705 members participating in the Local 705 Pension Fund ever receive any pension benefits, the question arises as to who benefits from the forfeitures resulting from the unlucky 90 percent. A clue to the answer of this question may be found in a recent study of the Teamster unions. PROD, *Teamster Democracy and Financial Responsibility*, pp. 81-89 (1976). However, any real effort to uncover the basic facts relating to the operation of Teamster pension funds has been thwarted by the chilling effect of Teamster violence. See A. A. Raskin, "Can Anybody Clean Up The Teamsters," *N. Y. Times Mag.*, Nov. 7, 1976.

value of an interest in an employee pension plan could not be imagined.[18]

18. The full Senate Committee on Labor and Public Welfare has thus concluded, on review of its Subcommittee's study, that this study

> "established that forfeiture of pension benefits by plan participants was extremely high in that 92 percent of all participants who left plans which required 11 or more years of service for vesting and 73 percent of all participants in the plans with 10 years or less for vesting did not qualify for benefits upon termination of employment." *Senate Pension Study* at 15.

Petitioners' efforts to discredit this study must fail. See IBT Br. at 86 n. 74. First, similar studies, reported in the legislative history of ERISA and cited by petitioners' own *amicus*, have reached the similar conclusion that far less than 50 percent of all participants in union negotiated pension plans would ever receive a retirement benefit. See ERISA Regulations Industry Committee (ERIC) Br. before the Seventh Circuit below, at p. 28 and n. 20:

> "Other estimates have progressed from 10 percent [Legislative History of the Employee Retirement Income Security Act of 1974, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, April, 1976 ("ERISA Leg. Hist."), Vol. I at 1218] . . ., to 22 percent (*Id.*, Volume I at 1267), to 28 percent (*Id.*, Volume I at 1089) to 33½ percent (*Id.*, Volume II at 1599)."

Second, because the *Senate Pension Study* is limited to plans with a vesting requirement of *11 years or more*, and because the Local 705 Pension Fund has a stringent *20 years* of continuous, uninterrupted service vesting requirement, the *Senate Pension Study* conclusion that only 8 percent will ever receive pension benefits is probably the best guideline to actual Local 705 Pension Fund experience. Indeed, the *Senate Pension Study* reports further that in 1969 only 3 percent of all pension plans with vesting requirements had a vesting schedule more onerous than that of the Local 705 Plan. *Senate Pension Study* at 19. It also reported that the probability of receiving a pension benefit is appalling *even for those participants with an extended service record:*

> "The study has also disclosed that substantial numbers of workers who did not qualify for any pension benefits *were long-service employees.* [In those plans with a vesting requirement of 11 years or more,] . . . for every two participants who received a normal, early, or deferred retirement benefit since 1950, one participant forfeited despite more than 15 years service; for every one participant who received a benefit, one participant with more than 10 years service forfeited, 3 participants with more than 5 years service forfeited, and 16 participants with 5 years service or less forfeited." *Id.* at 65 (Emphasis added.)

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Finally, such materials do not disclose the success or failure of the Local 705 Pension Fund trustees in managing the monies in the Fund and the type of investments in which such monies are placed.[19] This information is vital because the performance of the Fund affects the economic return to a participant on his investment. Higher performance will ultimately lead to larger retirement benefits, and poor performance underscores the risk of loss of a participant's investment. It has thus been estimated that for every 1 percent increase of investment earnings, pension benefits can be raised 20 percent. M. Bernstein, *The Future of Private Pensions* (New York, The Free Press of Glencoe, 1969) at 41. See also *Employee Benefit Plan Review* (No. 4) 50 (1954).[20] This relationship of investment performance to bene-

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Third, even Local 705 has now *conceded* that Daniel's chances of ever receiving a pension were no more than 50 percent at the time of his entry into employment with Local 705 covered employers. Local 705 Seventh Circuit Br. at p. 32. Of course, Plaintiff denies the accuracy of Local 705's estimate because it is *not* a likelihood based on actual experience, but a theoretical number based on actuarial assumptions, the accuracy and appropriateness of which have never been demonstrated and, indeed, are challenged in this lawsuit. However, in any event, whether the percentage of participants ever receiving a pension benefit is 8 percent or 33⅓ percent or even 50 percent is irrelevant because all such numbers are of the utmost materiality to an investor in the Local 705 Pension Fund.

19. Daniel Aff. Para. 12. The recently authorized Department of Justice criminal investigation into the management of various Teamster pension funds suggests that these monies have been unlawfully diverted from their proper purposes. See generally PROD, *Teamster Democracy and Financial Responsibility* (1976). Indeed, the investment profile of at least one Teamster pension fund, the Central States, Southeast and Southwest Area Pension Fund, reveals a shocking 89 percent commitment to real estate loans. See p. 60, *infra*. This is in sharp contrast to the average investment of all private noninsured pension funds of from 1 to 2 percent of their total funds in real estate loans. SEC, *Statistical Bulletin* at 5-7 (May, 1978).

20. The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") has itself noted in its *amicus* brief: ". . . where the level of defined benefits is collectively bargained, employers generally will be more willing to promise higher benefits to the extent that the contributions required are less because of the plan's investment income." AFL-CIO Br. at 13 n. 16.

fit growth has, in fact, been stressed by Local 705 in one of its own informational booklets:

> "Another advantage [of the Local 705 Pension Fund] is that the contributions earn income by being invested. Consequently, the money originally contributed grows. Without this income growth the Fund could not accumulate enough money to pay the $250.00 monthly pensions provided by the Plan." Pet. App. 70a at p. 14.

Daniel and the other Local 705 members have invested in the Local 705 Pension Fund in reliance on such misleading communications. In addition, because Daniel had been employed every year for 23 consecutive years with Local 705 covered employers, he believed that upon retirement he would qualify for a Local 705 Pension Fund pension.[21] Having only completed elementary school,[22] Daniel also relied to a large extent on the " 'fraternal'—if not paternal—proclamations of Local 705 that the Local 705 Pension Fund will 'afford protection to you and your wife . . . [and will] take care of you and your family in case of retirement.' "[23] *Daniel* v. *International Brotherhood of Teamsters*, 410 F. Supp. at 545. However, Daniel's request for a pension was denied by the Local 705 Pension Fund trustees because of their interpretation of the 20 year service rule—that such service be continuous without any break or interruption. In his attempt to receive his pension, Daniel exhausted all intra-union and intra-Local 705 Pension Fund procedures by applying and appearing twice before the Fund trustees in his effort to overturn their denial of his pension application.[24]

21. Daniel Aff. Para. 13-14.

22. *Id.*, at Para. 2.

23. *Id.*, at Para. 9-10. The Local 705 Pension Fund communications provided Daniel have been aptly characterized by the District Court below as "obfuscated by many pages of small print and couched in ambiguous or technical language." *Daniel* v. *International Brotherhood of Teamsters*, 410 F. Supp. at 545.

24. Daniel Aff. Para. 14-15.

In brief, plaintiff John Daniel was induced to invest substantial value into the Local 705 Pension Fund by defendants' intentional misrepresentations of material facts and omissions to state other material facts relating to the value of plaintiff's investment. Daniel was induced to invest on the promise of substantial economic profits. While misrepresenting the profits to be made, the defendants also failed to set out, or even mention, the substantial risks of loss. As a result of defendants' securities fraud, Daniel's investment into the Local 705 Pension Fund is worthless.

C. The Plaintiff's Investment Vehicle.

The interest of the plaintiff in the Local 705 Pension Fund is analogous to an interest in a mutual fund acquired through a periodic investment plan. This has been recognized by the SEC for over 35 years:

> "In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large." Testimony of then SEC Commissioner Purcell in Hearings on Proposed Amendments to the 1933 and 1934 Acts before the House Comm. on Interstate and For. Commerce, 77th Cong., 1st Sess., at 895-96 (1941) (hereinafter referred to as the *1941 Hearings*).

Former SEC Chairman Manuel F. Cohen has stressed the same similarities:

> "In many respects, pension plans and mutual funds have features in common . . . First, both investor and employee are investing money which they have earned. *There is no gratuity involved. Realistically, the employee is simply putting into a fund for his future use that which he would otherwise get in his paycheck.* And the employer finds it to be in his interest to contribute to that fund and to do so under circumstances which will stimulate contributions by his employees. Both the investor and the employee—and the employer—place their confidence and trust in an administrator who is in a position to exercise expert judgment concerning the management of their funds . . . Both

> [mutual funds and employee pension plans] represent huge contributions of economic power in our society." Hearings on S. 3598 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. at 231 (1972) (hereinafter referred to as the *1972 Hearings*) (emphasis added).

Plaintiff's interest in the Local 705 Pension Fund constitutes, moreover, his sole investment vehicle in the American capital markets. This is no longer unusual. Because of tax provisions and economies of scale, pension funds are the most efficient way for most workers to invest. N. Ture, *The Future of Private Pension Plans* 3 (1976). Private employee pension plans, such as the Local 705 Pension Fund, are today the primary investment vehicle for most working Americans:

> "In 1940, an estimated four million employees were covered by private pensions; in 1950, the figure had more than doubled to 9.8 million; in 1960, over 21 million employees were covered; and in 1973, approximately *30 million workers participated*. Currently, one-half of the industrial work force in the United States are members and participants of private pension plans. It is projected that by 1984, 42.3 million workers will be covered by private pension plans. The growth of the assets owned or controlled by pension funds has closely paralleled this expansive growth. Total estimated assets of pension plans have accelerated from $2.4 billion in 1940 to *$150 billion in 1973* and are increasing at a rate projected to exceed $250 billion by 1980." S. Rep. No. 127, 93rd Cong., 2d Sess. 2-3 (1973). (Emphasis added)[25]

Further, private non-insured pension funds are now the largest investors in the American capital markets. At the end of 1972, they held 11 percent in value of *all* New York Stock Exchange listed stocks, and in 1972 they accounted for over 23 percent of the dollar value of all shares traded on the New York Stock

25. According to the latest figures in SEC, *Statistical Bulletin* 6-8 (May, 1978), as of December 31, 1977, the total asset book value of all private noninsured pension funds in the country amounted to $181.5 billion and the total asset book value of all private insured pension reserves (including separate accounts) amounted to another $98.1 billion.

Exchange. New York Stock Exchange, *1973 Fact Book* 51-52, 75 (1973).

One highly informed commentator has characterized this profound change as "The Unseen Revolution", noting that the investment by a fund participant in an employee pension plan is likely to be "the largest single asset for the middle aged American family." Drucker, *The Unseen Revolution* 43 (1976); see n. 4, *supra*. However, "Unseen" or seen, what 35 years ago was perhaps a novel way of investing is now widely spread. No reason appears, moreover, why working Americans should be excluded from the protection of the antifraud rules because of the *form* of their investment vehicle.[26] As the court of appeals has noted below (Pet. App. p. 241a-242a):

> "Because employee pension plans are now the major, if not sole, form of investment for most American workers to provide for their old age and because of the now crucial role that such plans play in today's capital markets, they are just the sort of investment vehicle that the securities acts were passed to regulate. To proclaim that the securities laws encompass securities consisting of interests in pension plans is 'quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it * * *.' *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737, . . . The type of fraud allegedly perpetrated on the plaintiff is among those the securities laws were passed to prevent and remedy."

26. The general counsel for the SEC thus stated on oral argument below:

> "The real issue . . . before this Court, is whether there can ever be any set of facts which would give rise to a cause of action under the Anti-Fraud provisions of the Federal Securities Laws for fraud and misrepresentation in the inducement of entering into a pension fund plan. This is the sole issue . . . before this Court . . . whether [under] allegations of . . . lying, stealing and cheating, [the] anti-fraud provision[s] can ever be applicable to an interest in a pension fund. We assert that they can." Transcript pp. 33-35.

D. The Teamsters Fraud and Scienter.

The securities fraud complained of here involves not merely the omission to disclose one particular fact,[27] but the whole complex scheme whereby the Teamster defendants have conspired to cause the Teamster rank and file to invest their savings in Teamster pension funds substantially more attractive in appearance than in reality. The securities fraud here engaged in is particularly egregious because it is intentional and continuing; it is particularly striking because of the unique risk of wholesale loss in a Teamster pension fund[28] and because of the Draconian nature of the vesting requirements. See generally pp. 5-6 and n. 17 and n. 19, *supra*. For example, the Teamsters union has established a scheme of approximately 230 pension funds with (until recently) few rights of portability between different Teamster funds, knowing that worker mobility will extinguish pension rights. Gilmore Affidavit Para. 4, Pet. App. 202a. Because of the health hazards of Teamster members working in the trucking industry, and because of the economic hazards relating to worker mobility, involuntary layoffs, and mergers and acquisitions of trucking employers, most Teamster members will during their career participate in a number of different Teamster Locals and Teamster pension funds. With the lack of full scale portability, such mobility can only result in the denial of pension benefits for the Teamster rank and file—even though continually assured of the unity of the Teamster organization. See, *e.g.*, State of California, Department of Indust. Relations, *Work Injuries In Trucking—California* (1977). Furthermore, of all these Teamster pension funds, the Local 705 Pension Fund has been characterized by the IBT itself as that fund with the most stringent eligibility requirements. Gilmore Aff. Para. 10, Pet. App. 205a. In sharp contrast stands the pension fund established for the officers of the IBT—with a vesting period of only 5 years. PROD, *Teamster Democrary & Financial Responsibility* 75 (1976).

27. See pp. 6-11, *supra*.

28. See pp. 59-60, *infra*.

The Teamster pension funds thus stand out because they typify the whole host of abuses that can develop when one has the use of other people's money. L. Brandeis, *Other People's Money* (1914). They stand out because the abuses engaged in are particularly glaring. They stand out because of the scienter underlying the fraud perpetrated against the rank and file. For this reason alone petitioners' recourse to a doomsday argument based on the worldwide retroactive liability of all pension funds is an empty embrace. In addition to a variety of other factors expressly limiting the decision below, Pet. App. p. 259a, there is absolutely no evidence of any sort that other non-Teamster pension funds have engaged in the type of *intentional* securities fraud complained of here. Following *Ernst and Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), the negligent or innocent misrepresentation or omission to state a material fact about a pension fund security is not grounds for a cause of action under Sections 17(a) and 10(b) of the 1933 and 1934 Acts respectively. Petitioners' efforts to associate themselves with honest plan sponsors must, therefore, fail. Indicative of defendants' efforts to deny by any means the value of a participant's investment in a Teamster pension fund has been a use of violence found nowhere else in the pension fund industry.[29]

29. The uniqueness of the Teamster intent to frustrate the pension claims of the rank and file is highlighted by the chilling effect of Teamster violence. See n. 17 *supra*. One striking example of this chilling effect is the unwillingness of a named plaintiff in *Dutchak* v. *IBT et al.*, No. 76 C 3803 (N. D. Ill.), a companion case consolidated with *Daniel* by the District Court below, to have his name listed in the caption other than by a "John Doe." See, *e.g.*, Raskin, *supra* n. 17, at 31 ("One after another [Teamster union member] described the high price of dissent . . . there were tales of beatings, car burnings, blacklistings, and of telephoned warnings to wives . . ."). This violence has even touched a plaintiff in the *Dutchak* case. See Dutchak Affidavit Para. 12 (two death threats received after applying for a pension from the Local 705 Pension Fund).

30. The controlling question of law certified to the Seventh Circuit and now on review here was succinctly stated by Judge Kirkland as follows:

> "The Court makes no finding here beyond the narrow holding that the Complaint alleges the sale of a security for purposes

(Footnote continued on next page.)

E. The Course of Proceedings Below.

After the filing of the Complaint on October 4, 1974, defendants Local 705 and Louis Peick moved to dismiss all Counts and defendant IBT moved to dismiss Counts I and II of the Complaint. On March 1, 1976, the District Court denied all such motions in their entirety. Pet. App. 106a; *Daniel* v. *International Brotherhood of Teamsters*, 410 F. Supp. 541 (N. D. Ill. 1976). However, on April 19, 1976, after denying defendants' motions for reconsideration, the District Court certified for immediate appeal under 28 U. S. C. Section 1292(b) its denial of the motions to dismiss Counts I and II of the Complaint.[30] Pet. App. 162a. And, on June 17, 1976, the Seventh Circuit Court of Appeals granted defendants' petition for permission to appeal. Pet. App. 199a.

The Court of Appeals for the Seventh Circuit heard the appeal on April 4, 1977, and on August 20, 1977, unanimously affirmed the District Court decision denying petitioners' various motions to dismiss Counts I and II of the Complaint. In holding that plaintiff's interest in the Local 705 Pension Fund was a "security" acquired by way of "sale" for the purposes of the antifraud rules of the federal securities laws, the Court of Appeals employed a "modality of analysis" approved by this Court. Pet. App. 217a. See generally *Ernst and Ernst* v. *Hochfelder*, 425 U. S. 185, 212-14 (1976). This modality of analysis stresses in order of attention the statutory language, the legislative history, Securities and Exchange Commission ("SEC") administrative interpretation, and economic reality and policy considerations.

1. Noting that the statutory definition of "security" in both the 1933 and 1934 Acts includes an "investment contract," the

(Footnote continued from preceding page.)

> of application of the anti-fraud provisions of the Securities Acts, and that the Complaint alleges violations of those provisions. The Court makes no finding with respect to applicability of any other sections of those Acts to employee pension plans such as the one here litigated." Pet. App. 128a.

court applied the definition of "investment contract" as set out in *SEC* v. *W. J. Howey Company*, 328 U. S. 293, 298-99 (1946), and reiterated in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 852 (1975), to conclude that plaintiff's interest in the Local 705 Pension Fund was a security. The first element of the *Howey* test, that there be an investment of value,

> "requires that the employer-paid contributions to the pension fund . . . be properly considered to be economic compensation to the employee. This proposition is *universally accepted by the courts and commentators.* Accordingly, the investment of money prong of the *Howey* rule has been satisfied." Pet. App. 225a. (Emphasis added).[31]

The second element of the *Howey* test, the presence of a common enterprise, is found in the Local 705 Pension Fund. And, the third element, profits from the efforts of others is also present in the form of a

> ". . . traditional return on the pension fund participant's investment, a *dollar-profit element* in the form of capital gains, interest, dividends, and other accumulated earnings realized from the trustee's management of the pension fund." Pet. App. at 227a. (emphasis added)

and by virtue of the fact that

> "It is conceded that the expected payout to a beneficiary will [otherwise] exceed the contributions made by the employer on the employee's behalf (the union member's investment). The resulting gain would commonly be termed a profit. . . . [Indeed, *it*] *is precisely this promise of retirement benefits far in excess of the pensioner's investment that forms the economic inducement to invest in a pension fund.*" *Id.* at 226a-228a[32] (emphasis added).

31. Indeed, even petitioner IBT has conceded in its brief to the Court of Appeals that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for employee's labor." IBT Court of Appeals Br. p. 12.

32. Petitioners also do "not contest that whatever is expected from the common venture will be solely derived from the efforts of persons *other than* the venture's investors." Pet. App. p. 226a n. 21 (emphasis added); and petitioners even concede that a substantial part of this profit—amounting variously from 9 percent to 25 percent—will derive from traditional forms of return. Compare Pet. App. 227a. with IBT Br. at 46-47.

2. Having determined that under the *Howey* test an interest in the Local 705 Pension Fund is a security, the court found support for its conclusion from an analysis of both the legislative history and SEC interpretation. For example, the court noted that a proposed 1934 amendment—which would exempt from the 1933 Act registration requirements "an offering made . . . in connection with a bona fide plan for the payment of extra compensation" to employees—was eliminated in conference because of the need of such employees for the protection provided by registration mandated disclosure. Pet. App. p. 233a. That Congress thus considered interests in employee pension plans as securities (not automatically exempt from registration) was confirmed some seven years later by then SEC Commissioner Purcell, who in commenting on the proposed 1934 amendment stated:

> "With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employee's plans which involve the sale of a security . . . *Any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an 'investment contract.'*" *1941 Hearings* (emphasis added).

More importantly, the court noted that Congress as recently as the Investment Companies Amendments Act of 1970 recognized that interests in pension funds are securities, and codified a long standing administrative practice of the SEC by exempting such interests from the registration requirements of Section 5 of the 1933 Act. Pet. App. p. 236a *et seq.* Finally, the court noted that:

> "Professors Mundheim and Henderson have characterized the SEC's interpretation of 'security' . . . as including an interest in employee pension plans *as that 'traditionally taken.'*" Id. at 235a. (Emphasis added).

3. In the next step of its analysis, the court found that its conclusion resulting from an analysis of the statute, the legislative history, and SEC interpretation—that an interest in the

Local 705 Pension Fund is a security—was consistent with both economic reality and the policy considerations underlying the federal securities law. Analogizing an interest in the Local 705 Pension Fund to an interest in both a mutual fund and a variable annuity contract, *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65 (1959) *("VALIC")*, *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967), the court stressed:

> "If the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized." Pet. App. p. 232a-233a.

4. Having determined that an interest in the Local 705 Pension Fund is a security,[33] the court next concluded that the plaintiff acquired such security by way of a "sale," because there was a "disposition for value" or "other disposition" of such security as the statutory definitions of sale in the 1933 and 1934 Acts, respectively, require. Certainly, because plaintiff has acquired an interest in the Local 705 Pension Fund, the court noted "there necessarily has been a disposition of a security to plaintiff within the scope of the two Acts." *Id.* at 242a. Furthermore, "plaintiff's giving of his services and the employer's contribution on behalf of the employee constitutes value, thereby meeting the 'for value' requirement." *Id.* Although the court noted that

> "the definitions of sale in the 1933 and 1934 Acts do not require volition . . . [i]n any case, volition is present to the extent that Local 705 members voted whether or not to accept the collective bargaining contract containing this

33. Petitioner IBT has itself conceded the presence of a "security" in the context of this case. Thus, petitioner IBT stated in its Reply Brief in Support of its Motion To Dismiss (filed Feb. 27, 1975):

> "Much of Plaintiff's argument is devoted to the proposition that interest in an employee pension plan may be 'securities' under the Federal securities laws. *This is not disputed by IBT.*" *Id.* at p. 1. (Emphasis added.)

See Pet. App. p. 233a. and n. 18.

> pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund or seek dismissal of union officers or the unlikely radical measure of decertification of the Union." *Id.* at 244a.

5. Finally, citing the standard for pre-emption set out in *Gordon* v. *New York Stock Exchange*, 422 U. S. 659, 682-83 (1975), the court concluded that the antifraud provisions of the federal securities laws had not been pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"). Pet. App. p. 250a. *et seq.* Indeed, Section 514(d) of ERISA specifically saves *all other federal legislation* and Section 514 (b)(2)(A) of ERISA even specifically saves *all state securities* laws. Further, defendants' confusion of the requirements of the 1933 Act's registration provisions with the antifraud provisions of the 1933 and 1934 Acts constitutes "defendants' quintessential error." *Id.* at 252a.[34]

> "The registration provisions are designed to assure that investors will be furnished with all material information concerning an informed investment decision. The mechanism to implement this objective includes filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer. In contradistinction, the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather the anti-fraud provisions are essentially a generalized self-executing prohibition against fraudulent activity." *Id.*

Noting that the requirements of ERISA differ from the requirements of the antifraud rules, the court thus concludes that "Reading the anti-fraud provisions of the securities laws to be

34. The court of appeals has thus noted that "the defendants concede that certain voluntary and contributory pension plans are subject to both the securities laws' registration requirement and ERISA (Rep. Br. 206). The securities laws have not torpedoed such plans. This seems to follow from the continuing registration of such plans. In fact, the disclosure requirements are becoming complementary as the SEC in its revisions of Form S-8 attempts to avoid duplication of, but not defer to the ERISA requirements." Pet. App. at 253a. and n. 54. See n. 59, *infra*.

complementary to the requirements of ERISA makes good sense." *Id.* at 254a.

Characterized as "scholarly" by Judge Tone, Pet. App. 260a, Judge Cummings' opinion comprehensively deals with every aspect of the question presented in this case. Every point raised by the petitioners is dealt with in great length. That the logic of its conclusion—that plaintiff's investment in the Local 705 Pension Fund is a "security" acquired by way of a "sale"—is soundly based and compelling becomes clear from Judge Tone's concurring opinion. Although finding the case "close and difficult," Judge Tone writing separately concurred, thereby making the decision unanimous, because of the "breadth of the definitions of 'investment contract' and 'sale' *in the statutes themselves* and the interpretation of those terms in [the authoritative] . . . cases." Pet. App. 260a. (Emphasis added.)

SUMMARY OF ARGUMENT.

The unanimous decision of the Seventh Circuit Court of Appeals holding plaintiff's investment in the Local 705 Pension Fund to be a "security" acquired by way of a "sale" pursuant to the antifraud provisions of the federal securities laws is clearly correct and should not be upset. It is soundly based on statutory analysis, legislative history, administrative interpretation, judicial precedent, and public policy. Because of the strong foundation of the decision, petitioners' efforts to overcome it are not directed to the statutory language or to the six prior Supreme Court opinions construing this language, all of which support the decision below. Rather, petitioners seek to shield themselves from liability for their intentional securities fraud, first, by denying the applicability entirely of the federal securities laws, and, second, by offering up a *concursus horribilum*. Petitioners' efforts must, however, fail. The decision below does not expand the scope of the federal securities laws. Neither should petitioners be allowed to camouflage their intentional securities fraud

through an attempted association with honest pension plan sponsors.

An interest in an employee pension plan meets the definition of "security" as set out in the 1933 and 1934 Acts and as construed by six Supreme Court decisions. That this is clearly so must be the reason petitioner IBT has itself conceded the presence of a "security" in the context of this case. See n. 33 *supra*. One form of "security" is an "investment contract," and the definition of "investment contract" was set out by this Court in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 298-99 (1945), and re-affirmed in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 852 (1975). The *Howey* rule requires the presence of three elements—and, after an exhaustive analysis, the Seventh Circuit has concluded that all such elements can be found here. Under the Local 705 Pension Fund (1) money is invested (2) in a common enterprise the management of which is committed to a third party and (3) from which profits and income are expected. See pp. 50-62 *infra*.

Rather than being expansive, therefore, this case is merely one of many where an accepted principle of law—the *Howey* rule—has been applied to characterize as a "security" interests in a particular scheme utilized to make use of other people's money. As "remedial" legislation, the definition of "security" is broad and has been flexibly construed. *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 195 (1963); *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967). As such, it was the clear intent of Congress to cast its net widely to remedy the abuses that develop when one has the use of other people's money. See n. 38 *infra*. Section 10(b) of the 1934 Act was thus drafted broadly to snare all other "cunning devices." See pp. 40-41, *infra*. And, the Local 705 Pension Fund is just such a (modern day) device intentionally used by the defendants to induce employees to invest with others the consideration they receive for labor services performed with the expectation of future profits. As Justice Brennan has noted:

> "Congress need not go through the travail of re-enacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage." *VALIC*, *infra*, at 93 (Brennan, J., concurring.)

Petitioners seek to obscure this conclusion by use of various "unrealistic and irrelevant formulae." *Howey*, 328 U. S. at 301. For example, petitioners call plaintiff's interest in the Local 705 Pension Fund a "contingent expectancy"—because of the risk that plaintiff will never receive any economic benefit from the Fund. However, in so doing, petitioners ignore the fact that the risk of loss is present in any investment. Thus, the holder of an employee stock option holds a security even if the exercise right is dependent upon the employee remaining on the job for a certain length of time. See pp. 44-45, *infra*. For another example, petitioners call the Local 705 Pension Fund in which the plaintiff has invested an "involuntary non-contributory" pension fund. However, in so doing, petitioners ignore the fact that the definition of "security" is not limited by the particular form an investment vehicle takes or the name appended to it. In fact, the form of the investment vehicle here utilized takes its shape from various tax incentives—none of which change the underlying economic reality. See p. 4 n. 5 and p. 46. Indeed, economic reality here tells us that the plaintiff has acquired his interest in the Local 705 Pension Fund for substantial value. See p. 4 n. 4 and p. 47. Congress, the courts, and commentators now all agree that "regardless of the form they take, the employer's share of the cost of these plans or the benefit the employers provide are a form of compensation." S. Rep. No. 1440, 85th Cong., 2d Sess. at 4 (1958).

Petitioners, finally, offer up the "unrealistic" assertions that plaintiff, as an employee, cannot be an investor and has made no investment decision. However, there is absolutely no reason why an employee cannot also be an investor. Indeed, the term "employee-investor" was used at least as early as 1941 to characterize an employee who invests in an employee pension fund.

See n. 43, *infra*. Moreover, the investment decision undertaken by such an employee is not insignificant. On an absolute basis, it amounts to $30 per week, $1,560 per year, and over $30,000 over a 20 year career. And, on a relative basis it is probably the largest investment a Teamster union member will make in his lifetime. Drucker, *The Unseen Revolution* 13 (1976). Because the profit potential on such an investment is substantial (see p. 47), the economic lure of an investment in the Local 705 Pension Fund is hard to resist.

An investment in an employee pension plan is likely to be the customary, if not the only, investment vehicle for millions of Americans. See pp. 13-14, *supra*. As such, private non-insured employee pension funds have now become the largest investors in the capital markets. There is no reason, therefore, why working Americans should be excluded from the protection of the antifraud provisions of the federal securities laws because of the *form* of their investment vehicle. The appropriate inquiry here should not be "whether" employee pension plan securities are included, but rather "why" as a vital investment vehicle should they be excluded.

Petitioners' parade of horribles is their answer to this question. However, petitioners disclose the weakness of their position by relying on such an emotional appeal to a doomsday argument. Not surprisingly, this scare tactic cannot overcome the solid judicial reasoning of the court below. Petitioners first "horrible" is an alleged irreconcilable conflict between the federal securities laws and the newly enacted ERISA. However, petitioners inexplicably fail to note that this lawsuit involves a pre-ERISA securities fraud. See p. 97, *infra*. Because the provisions of ERISA only take effect prospectively, the plaintiff has no remedy here under ERISA.

Furthermore, even were ERISA here applicable, it would not pre-empt the federal securities laws or in any other way insulate petitioners from liability for their intentional securities fraud. Not only does ERISA specifically save all other federal legislation, it also specifically saves the applicability of *state* securities

laws to employee benefit plans. ERISA Sections 514(b)(2)(A) and (d). This conclusion is confirmed by an analysis of the legislative history of ERISA and the federal securities laws. See pp. 62-78 and 99-103, *infra*. Both Congress and the SEC have since 1934 recognized that interests in employee pension plans are securities. And, this recognition has been recently confirmed by the Investment Company Amendments Act of 1970. In fact, ERISA and the federal securities laws complement one another. ERISA does not regulate the circumstances of entry into an employee pension plan. And, even were it applicable here, ERISA would provide plaintiff *no remedy* for defendants' fraudulent misrepresentations inducing plaintiff to invest into the Local 705 Pension Fund. See p. 97 and n. 85, *infra*.

Petitioners' next "horrible" is the alleged havoc the decision below will wreak upon the nation's collective bargaining system. However, without support in either law or fact such predictions of ruin cannot withstand analysis. The decision below in no way denigrates the exclusive representative status of the collective bargaining representative. The plaintiff below does not have the right to bargain individually with his employers. What he does have is the right to vote to ratify any Local 705 labor contract with covered employers. And, this right to vote arises from the Local 705 constitution and not from this lawsuit.

Petitioners, finally, raise the "horrible" of vast dollar damages which would allegedly result from a finding of liability here. In so doing, petitioners seek to camouflage their intentional securities fraud by hiding behind the backs of honest plan administrators. The fraud complained of here involves not merely the omission to disclose one particular fact, but the whole complex scheme whereby the Teamster rank and file have been fraudulently induced to invest their savings in Teamster pension funds. The petitioners thus cannot avoid the fact that the fraud engaged in by the Teamster defendants is particularly glaring. In contrast, there is absolutely no evidence of any sort that other non-Teamster pension funds have engaged in the type of

intentional securities fraud complained of here. *Ernst and Ernst* v. *Hochfelder*, 425 U. S. 185 (1976).

In any event, the whole question of damages is not now before the Court. Indeed, this Court has clearly held that the finding of liability in a securities fraud case is unrelated to a determination of the appropriate remedy. *Mills* v. *Electric Auto-Lite*, 396 U. S. 375, 386 (1970). It is for the district court at first instance to fashion an appropriate remedy where federally secured rights are invaded. *J. I. Case* v. *Borak*, 377 U. S. 426, 433 (1964).

Petitioners, thus, seek to divert this Court's attention from their intentional securities fraud by raising the effect the decision below would allegedly have on other non-Teamster pension funds. As noted above, however, petitioners prophesize doom without support in either law or fact. The decision below does not require registration of employee pension plans with the SEC. In fact, most employee pension plans will be exempted from the registration requirements by Section 3(a)(2) of the 1933 Act. And, most of the balance will be exempted by longtime and consistent SEC administrative practice. For example, it is SEC policy to require registration only for those employee pension plans in which an amount in excess of the employers' contributions are invested in employer securities. See n. 59, *infra*. Finally, what is considered to be a sale for purposes of the antifraud rules is not necessarily a sale under the registration requirements. *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969).

The decision below is in fact a narrow opinion. It merely applies long established definitions under the federal securities laws to a particular set of facts. Indeed, the facts themselves are not really novel for petitioners concede that interests in certain employee pension plans are securities subject to the antifraud rules, as well as to the registrations requirements of the 1933 Act and ERISA. Yet, notwithstanding petitioners' fears, the application of the federal securities laws has not wreaked havoc on such plans. The petitioners have not given any good reasons why

an investment in the Local 705 Pension Fund should be treated any differently or would have any different result. The correctness of the decision below must, therefore, be affirmed by this Court in order to afford plaintiff a remedy for the intentional securities fraud practiced against him.

ARGUMENT.

I.

All of the Elements for a Cause of Action Under the Antifraud Rules of the Federal Securities Laws Are Present.

The operative provisions of Section 17(a) of the 1933 Act[35] and Section 10(b), and Rule 10b-5 thereunder, of the 1934 Act are, for purposes of this lawsuit, identical. The four principal elements which must be alleged to state a valid cause of action are:

35. In denying petitioners' various motions to dismiss, the District Court below held that Section 17(a) of the 1933 Act impliedly provides for a private cause of action. Although on appeal to the Seventh Circuit only Local 705 mentioned (and then in passing) the Section 17(a) argument, the Court of Appeals subsequently took the opportunity to hold that Section 17(a) does, indeed, imply a private right of action. See Local 705 Court of Appeals Br. at 21; Respondent's Court of Appeals Br. at 10 n. 21; Pet. App. 247a-250a; *Schaefer* v. *First National Bank of Lincolnwood,* 509 F. 2d 1287, 1293 (7th Cir. 1975). Now, before this Court, only petitioner Local 705 raises the issue of whether Section 17(a) impliedly creates a private cause of action. Local 705 Br. at 58-63. Respondent believes, however, that this issue is not properly encompassed within the question presented on this appeal. See p. 2, *supra.* Of course, on the issue itself this Court has reserved its opinion. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 733 n. 6 (1975). And, the Circuit courts are split on the question. Compare, *e.g., Fischman* v. *Raytheon Mfg. Corp.,* 188 F. 2d 783, 787 (2d Cir. 1951) and *Schaefer, supra,* with *Greater Iowa Corp.* v. *McLendon,* 378 F. 2d 783, 788 (8th Cir. 1967). However, contrary to the assertions of Local 705, *Simmons* v. *Wolfson,* 428 F. 2d 455 (6th Cir. 1970), cert. den. 400 U. S. 999 (1971), only re-affirms the *Birnbaum* purchaser-seller requirement, and does not hold that Section 17(a) does not create a private right of action. *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (2d Cir. 1952). In any event, logic compels the existence of a private cause of action under Section 17(a) for defrauded buyers. As Professor Loss has noted: "There is nothing novel about the doctrine of implied tort liability based on

(Footnote continued on next page.)

(1) The use of the jurisdictional means, and
(2) the making of material misrepresentations, the omission to state material facts, or the use of manipulative or fraudulent devices, in connection with
(3) the sale of
(4) a security.

For the purposes of this appeal, the presence of the first two elements are not in dispute. The sole questions for determina-

(Footnote continued from preceding page.)

violation of a statute." 3 Loss, *Securities Regulation* 1785 (2d ed. 1961). Cf. *Restatement of Laws, Second, Torts 2d,* Section 286 (1965). That such a private right of action should be implied here under Section 17(a) follows from the important role the 1933 Act plays as a remedial statute in protecting the purchaser of securities from fraudulent sellers. *Tcherepnin,* 389 U. S. at 336. The preamble to the 1933 Act thus states one objective to be: "To prevent fraud in the sale [of securities]." That effective relief to a defrauded purchaser must be available is clear from this Court's reasoning in *J. I. Case* v. *Borak,* 377 U. S. 426, 432, 433 (1964):

> "While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors' which certainly implies the availability of judicial relief where necessary to achieve the results . . . We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

Because such a federal statute "must be construed broadly so that it may be availed of by an injured private person," a federal court held as early as 1949 that a civil remedy exists for defrauded buyers under Section 17(a). *Osborne* v. *Mallory,* 86 F. Supp. 869, 879 (S. D. N. Y. 1949). This conclusion is all the more appropriate here where the allegation is based on fraud and where an appropriate cause of action under Section 10(b) of the 1934 Act has been established:

> "Once it had been established . . . that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such a cause of action under § 17—with the important proviso that fraud, as distinct from mere negligence, must be alleged."

SEC v. *Texas, Gulf Sulphur,* 401 F. 2d 833, 867 (2d Cir. 1968) (Friendly, J. concurring), cert. den., 394 U. S. 976 (1969); see *Globus* v. *Law Research Service, Inc.,* 418 F. 2d 1276, 1283-84 (2d Cir. 1969), cert. den. 397 U. S. 913 (1970).

tion, thus, are whether an interest in the Local 705 Pension Fund is a "security" and whether such "security" was acquired by the plaintiff in a "sale".

A. The Definitions of "Security" in Both the 1933 and 1934 Acts Are Extremely Broad and Have Been Flexibly Construed.

1. The Statutory Definitions.

The term "security" has been defined in Section 2(1) of the 1933 Act to include:

> "Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, *certificate of interest or participation in any profit-sharing agreement*, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, or, in general, any interest or instrument commonly known as a 'security,' . . ." (Emphasis added).

The definition of "security" in Section 3(a)(10) of the 1934 Act also includes a "certificate of interest or participation in any profit sharing agreement" and an "investment contract", and for the purposes of this appeal may be considered "virtually identical" to the Section 2(1) definition of "security" in the 1933 Act. *Tcherepnin* v. *Knight*, 389 U. S. 332, 336, 342 (1967); S. Rep. No. 792, 73d Cong., 2d Sess. 14 (1934).

2. This Court Has Mandated That the Definition of "Security" Be Flexibly Construed.

This Court has held that the definition of security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and varied schemes devised by those who seek the use of the money of others on the promise of profits." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972).

This is in accord with the Congressional purpose behind the enactment of the federal securities laws. This purpose is "remedial." *SEC* v. *Capital Gains Research Bureau*, 375 U. S.

180, 195 (1963). Because the federal securities laws were "enacted for the purpose of avoiding frauds," this Court has stated that they must be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Id.* at 195. Accordingly, in applying the definition of "security" to characterize plaintiff's interest in the Local 705 Pension Fund, this Court must

> "be guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to affectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure . . . In searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality."

Tcherepnin v. *Knight*, 389 U. S. 332, 336 (1967).

The issue of what constitutes a security under the federal securities laws has been the subject of six decisions by this Court, all of which have applied the definition of security broadly and five of which have held a security to be present:

(1) *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), holding an oil exploration program offered together with a land lease to be a security;

(2) *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), holding a land sales contract for an orange grove accompanied by a service contract on the maintenance and harvesting of the orange trees to be a security;

(3) *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65 (1965), (*"VALIC"*) holding a variable annuity insurance contract to be a security;

(4) *SEC* v. *United Benefit Life Insurance Co.*, 387 U. S. 202 (1967), holding a variable annuity contract to be a security even though the contract contained a guaranteed minimum feature;

(5) *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), holding a withdrawable capital share in a savings and loan association to be a security; and

(6) *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975), holding an interest in a low income cooperative housing project not to be a security because of the absence of any profit element, but stating that the touchstone of an investment contract is "the presence of an *investment in a common enterprise* premised on a *reasonable expectation of profits* to be derived from the entrepreurial or *management efforts of others*." Id. at 852.

The teaching of these cases is clearcut. First, contrary to the assertions of petitioners, the definition of "security" encompasses far more than shares of stock publicly traded and listed on a national securities exchange or otherwise traded on the established capital markets. This Court has thus noted that Section 10(b) of the 1934 Act:

> "*is not 'limited to preserving the integrity of the securities markets*' . . . , though that purpose is included . . . But, we read Section 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase and sale of securities *whether conducted in the organized markets or face-to-face.*" *Superintendent of Insurance of the State of New York* v. *Bankers Life and Casualty Co.*, 404 U. S. 6, 12 (1971) (emphasis added).

Thus, in at least four of the five Supreme Court cases finding a security present, the interests held to be investment contracts, and thus securities, were not traded on a market. Indeed, a security may be present even if it is "non-negotiable," *Tcherepnin* v. *Knight*, 389 U. S. at 343, or otherwise non-transferable. See, e.g., *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972) (private non-transferable option is a security). Furthermore, this Court has expressly rejected petitioners' restricted focus on the Great Depression. For example, the lower court in *Tcherepnin* noted that the securities laws "were passed in the aftermath of the great economic disaster of 1929" and therefore should be limited in application to "speculation in securities which had a fluctuating value and which were traded in securities exchanges or in over-the-counter markets." *Tcherepnin*

v. *Knight*, 389 U. S. at 345. In rejecting this argument this Court stated:

> "This statement suggests, and the respondents have argued in this Court, that the petitioners' withdrawable capital shares are not within the purview of the 1934 Act because their value normally does not fluctuate and because they are normally not traded in securities exchanges or over-the-counter. The accuracy of this assertion is open to question. But, more important, it is irrelevant to the question before us. As was observed in *Howey*, 'it is immaterial whether the enterprise is speculative or nonspeculative.' 328 U.S. at 301." *Id.*

Second, the presence of a security is not dependent upon the issuance of a document or the existence of a certificate evidencing the security. See *H. R. Rep.* No. 1838, 73d Cong., 2d Sess. 39 (1934); *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961); *Sire Plan Portfolios Inc.* v. *Carpentier*, 132 N. E. 2d 78 (Ill. 1956); 1 L. Loss, *Securities Regulation* 458 (2d ed. 1961). This Court has thus said in *Howey*, *supra*, at 299, that it is:

> "Immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

Consequently, an undivided interest in an investment contract scheme will be a security even if not evidenced by a written document.

The presence of a security is also not defeated by the fact that the transaction at issue involves other substantive dimensions. For example, the fact that both *Joiner* and *Howey* involved "sales of interest in land," *Joiner*, *supra*, at 348, does not mean that a "security" is not or can not be present. The purchaser of a security can act with more than one motive. Thus, in *VALIC* the purchaser of the variable annuity was interested both in the insurance element of benefit payments for life and in the "security" element of payments dependent on the investment performance of the variable annuity fund. Similarly, in *United Benefit Life*, this Court rejected the argument that the insurance context of the annuity contract precluded applicability of the

securities laws to the "security" part of the contract, commenting:

> "[W]e do not agree with the Court of Appeals that the contract must be characterized in its entirety. Two entirely distinct promises are included in the contract . . ." *Id.* at 207.

And, in *Forman* this Court recognized that a different case would have been presented if there had been an offer of "both a commodity or real estate for use *and* an expectation of profits." *Forman, supra,* at 853 n. 16.

Fourth, the presence of a security is not defeated by the fact that the economic interest at issue is also subject to substantive regulation by another body of state or federal law. For example, the federal securities laws were held applicable to the investment contracts present in *VALIC* and *United Benefit Life* (notwithstanding the McCarran-Ferguson Act and) even though such contracts were also subject to substantive state regulation. In like fashion, although banks are subject to extensive state and federal substantive regulation, bank securities are still securities subject to the federal securities antifraud rules, even though exempt from registration. *Tcherepnin* v. *Knight,* 389 U. S. 332 (1967). And, the Investment Company Act of 1940 provides for the substantive regulation and administration of mutual funds—while the sale of mutual fund securities still must comply with the disclosure and antifraud rules of the 1933 and 1934 Acts.

Finally, and also contrary to the assertions of petitioners, the definition of "security" is not limited to those "instruments[s] commonly known as a 'security'." This argument has been expressly rejected by this Court in *Joiner* and *Tcherepnin:*

> "Thus, the Court of Appeals read the words an 'instrument commonly known as a security' in Section 3(a)(10) as a limitation on the other descriptive terms used in the statutory definition. This, of course, is contrary to our decision in *Joiner* where we rejected the respondent's invitation to 'constrict the more general terms substantially to the more specific terms which they follow.' 320 U.S. at 350 . . ." *Tcherepnin* v. *Knight,* 389 U. S. at 343.

In fact, the definition of "security" is not limited by the particular form an investment vehicle takes or by the label[36] which it bears:

> "The reach of the Act does not stop with the obvious and commonplace. Novel, uncommon or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts' . . ." *Joiner, supra,* at 351.

In addition, therefore, to the five Supreme Court cases where a security has been held to be present, lower courts have found a myriad of diverse financial schemes and economic interests to be securities—despite the fact that, at first blush, they do not resemble the more common and traditional forms of securities.[37] Illustrative of this are the following:

(a) Promotional memberships in a yet-to-be developed country club. *Silver Hills Country Club* v. *Sobieski,* 55 Cal. 2d 811, 361 P. 2d 906 (1961);

(b) Founding memberships sold to raise capital to establish a retail store. *State* v. *Hawaii Market Center, Inc.,* 52 Hawaii 642, 485 P. 2d 105 (1971);

(c) Pyramid schemes and multi-level distributorships. *SEC* v. *Glenn W. Turner Enterprises, Inc.,* 474 F. 2d 476 (9th Cir. 1973); *SEC* v. *Koscot Interplanetary, Inc.,* 497 F. 2d 473 (5th Cir. 1974); *SEC* v. *Jet Travel*

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36. "Because securities transactions are economic in character Congress intended the application of these statutes [viz., the federal securities laws] to turn on the economic realities underlying a transaction, and not on the name appended thereto." *Forman, supra,* at 849.

37. Because of the broad definition of the term "security", and of the need for a liberal construction of "security", this Court and other courts have construed "security" as bringing within the Act "many forms of transactions which, on their face do not appear to be 'securities' in the commercial sense of the word." Feldman & Rothschild, Executive Compensation & Federal Securities Legislation, 55 *Mich. L. Rev.,* 1115, 1117 (1957).

Services, Inc., 1975 CCH Fed. Sec. L. Rep. ¶ 95,317 (M. D. Fla. 1975);

(d) Assignments of oil gas leases with test drilling. *Atherton* v. *U. S.*, 128 F. 2d 463 (9th Cir. 1942); *Roe* v. *U. S.*, 287 F. 2d 435 (5th Cir. 1961); *Buie* v. *U. S.*, 420 F. 2d 1207 (5th Cir. 1969);

(e) Live silver foxes with maintenance agreement. *SEC* v. *Payne*, 35 F. Supp. 873 (S. D. N. Y. 1940);

(f) Live beavers with maintenance agreement. *Continental Marketing Corporation* v. *SEC*, 387 F. 2d 466 (10th Cir. 1967); *Kemmerer* v. *Weaver*, 445 F. 2d 76 (7th Cir. 1971);

(g) Live chinchillas for breeding. *Miller* v. *Central Chinchilla Group, Inc.*, 494 F. 2d 414 (8th Cir. 1974);

(h) Whiskey warehouse receipts. *SEC* v. *Bourbon Sales Corporation*, 47 F. Supp. 70 (W. D. Ky. 1942); *Penfield Co. of California* v. *SEC*, 143 F. 2d 746 (9th Cir. 1944); *SEC* v. *M. A. Lundy Associates*, 362 F. Supp. 226 (D. R. I. 1973); *Glen-Arden Commodities, Inc.* v. *Constantino*, 493 F. 2d 1027 (2nd Cir. 1974); *SEC* v. *Haffenden-Rimar International, Inc.*, 496 F. 2d 1192 (4th Cir. 1974);

(i) Sale of land with contract to develop citrus grove. *Blackwell* v. *Bentsen*, 203 F. 2d 690 (5th Cir. 1953); *Ferland* v. *Orange Groves of Florida, Inc.*, 377 F. Supp. 690 (M. D. Fla. 1974);

(j) Discretionary commodities futures trading accounts. *Maheu* v. *Reynolds & Co.*, 282 F. Supp. 423 (S. D. N. Y. 1967); *Berman* v. *Orimex Trading, Inc.*, 291 F. Supp. 701 (S. D. N. Y. 1968); *Johnson* v. *Espey*, 341 F. Supp. 764 (S. D. N. Y. 1972); *Marshall* v. *Lamson Bros. & Co.*, 368 F. Supp. 486 (S. D. Iowa 1974);

(k) Investments in trust deeds. *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC*, 285 F. 2d 162 (9th Cir. 1960);

(l) Contract for delivery of oil by purchaser of oil royalties. *SEC* v. *Crude Oil Corporation of America*, 93 F. 2d 844 (7th Cir. 1937);

(m) Offer of contracts for sale of land. *SEC* v. *Lake Havasu Estates*, 340 F. Supp. 1318 (D. Minn. 1972).

It may well be that Congress had not considered such specific schemes prior to enactment of the 1933 and 1934 Acts. However, all are properly considered securities because of the clear intent of Congress to cast its net broadly to remedy the abuses that develop when one has the use of other people's money.[38] L. Brandeis, *Other Peoples Money* (1914). Justice Brennan has thus commented:

> "Congress need not go through the initial travail of reenacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage." *VALIC, supra,* at 93 (Brennan, J., concurring).

Petitioners are, accordingly, misguided when they assert that no security is present in the instant case because the investment vehicle involved—an interest in the Local 705 Pension Fund—is (i) non-transferable and not traded on the open capital markets, (ii) an undivided interest in an investment contract scheme not evidenced by a certificate, (iii) acquired by a purchaser who is also an employee, (iv) substantively regulated by pension legislation, or (v) novel, atypical, and (allegedly) not "commonly known as a 'security'." Not to affirm the decision below for these reasons would, of necessity, call into question not only the prior six Supreme Court cases, but also the whole body of law holding novel and atypical investment contract schemes to be a security. Such a decision would be in denigration of the clear Congressional intent to enact a remedial statute governing the use of other people's money.

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38. Professor Loss has thus commented: "The man who left the greatest mark on the philosophy of federal securities regulation in the country . . . was Louis D. Brandeis." 1 L. Loss, *Securities Regulation* 123 (2d ed. 1961). See, e.g., H. R. Rep. No. 85, 73rd Cong., 1st Sess. 2 (1933).

B. Public Policy Compels the Characterization of an Investment in the Local 705 Pension Fund as a Security.

The economic interest a union member has in the Local 705 Pension Fund more clearly should be characterized as a "security" than some of the exotic schemes above. Indeed, under the most elementary analyses, plaintiff's interest in the Local 705 Pension Fund plainly fits within the term "investment contract" and the term "participation in any profit sharing agreement." The security here present is an undivided interest in the Local 705 Pension Fund. This Fund consists initially of the aggregate of all monies invested on behalf of Local 705 union members by covered employers for whom such members have worked. These monies are deposited in trust with the Local 705 Pension Fund trustees, and are managed and invested in stocks, bonds, mortgages, and other investment vehicles for the sole and exclusive benefit of the Local 705 union members.

As such, the Local 705 Pension Fund is not distinguishable from the day to day mutual fund—a pool of money invested for the benefit of the mutual fund shareholders by the mutual fund investment adviser.[39] From time to time, as a Local 705 member retires or otherwise terminates his employment with a covered employer, monies are paid out from the Local 705 Pension Fund to the retiring Local 705 member. The actual amount of pay-out to any particular member will depend on a variety of factors, including, among others, the length of time such member was in covered employment, the extent of funding in the plan, and the monthly pension determined by the trustees. The success of the trustees in managing the pension monies will, in addition, be one of the most important factors in determining the amount of payout, for successful management will allow larger payments to

39. This similarity between employee pension plans and mutual funds was recognized early by the SEC. Commissioner Purcell thus testified before the House Committee on Interstate & Foreign Commerce in 1941: "Many employee plans are in the nature of investment trusts and are *indistiguishable* in legal effect from investment companies offering securities to the public at large." *1941 Hearings* (emphasis added). See pp. 12-13, *supra* and pp. 79-81, *infra*.

be made and unsuccessful management will jeopardize the participants' investment. See pp. 10-11 and n. 20, *supra*. The effect of the pension fund arrangement is that an employee invests substantial assets with the pension fund and its trustees not only during the period of his employment, but during the period of his retirement as well.

As noted above, the 1933 and 1934 Acts have as their objective, among others, to prevent fraud in the sale of securities and to protect investors. This objective of preventing fraud in the sale of securities is particularly important in the context of the role employee pension plans now play in the United States capital markets. Because employee pension plans are now the major, if not the only, form of investment for most workers in America, and because employee pension plans play a crucial role in the capital markets, they are just the type of investment vehicle Congress meant to regulate with the federal securities laws. Petitioners' argument that the decision below is "effect-oriented" thus totally misses the point. It is just the type of capital market fraud perpetrated on plaintiff here that the securities laws were designed to protect against.

Petitioners concede that no specific reference to employee pension plans is made in the language or legislative history of the Securities Act of 1933. IBT Br. at 88; Local 705 Br. at 41. This is attributed by the court of appeals to the

> "fact that in the early 1930's pension plans were still a rarity. In the early decades of the 20th century, only 38% of invested capital was invested indirectly, and of this amount only 1/10 of 1% was invested in pension funds. By 1962, the indirect sector of the capital markets had jumped to 83% and pensions constituted 27% of this amount. Hearings Before the Subcommittee on Fiscal Policy, U.S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 17-18 (1970)." Pet. App. at p. 241a.

This conclusion as to the relative unimportance of employee pension plans in the early 1930's is not overcome by petitioners' references to those plans which did exist at such time. IBT Br.

at 88-90. Moreover, petitioners fail to note that most, if not all, of such early employee pension plans were corporate sponsored plans. Most union plans were not established until after the enactment of Section 302(c)(5) of the Labor Management Relations Act of 1947. More importantly, the type of abuses now complained of just did not exist in the 1920's and early 1930's:

> "The bulk of the testimony at the 1941 hearings on the proposed amendments to the [1933] Act was devoted to . . . pragmatic and sociological matters. The most impressive is the inability of those favoring registration of pension plans to point to any abuses at the present time and remarkably few at any time. *Pension plans are adopted only by established corporations and thus cannot be used as a vehicle for the unscrupulous promotional schemes at which the Act was primarily directed.* Since the sponsors do not benefit from the funds received there is a unique absence of motive fraudulently to conceal material facts about the undertaking." Cited in Daniel Study Group, Daniel v. International Brotherhood of Teamsters, 32 *Bus. Lawyer* 1925, 1942 n. 55 (1977) (emphasis added).

See Comment, Applicability of the Federal Securities Laws to Noncontributory, Defined Benefit Pension Plans, 45 *U. of Chicago L. Rev.* 124, 127 (1977) ("relative insignificance of pension plan abuses at that time"). That is clearly not the situation now. As the facts in the instant case indicate, the pension fund vehicle is used as a fraudulent inducement to employees to invest with others the consideration they receive for labor services performed with the expectation of future profits. As a modern day investment contract scheme fraud, the Teamster pension funds are just the type of "cunning" device that Thomas G. Corcoran, a spokesman for the drafters of Section 10(b) of the 1934 Act, was concerned about:

> "Subsection (c) [Section 9(c) of H. R. 7852—later Section 10(b)] says, 'Thou shalt not devise any other cunning devices . . . of course subsection (c) is a catch-all clause to prevent manipulative devices." Hearings on H. R. 7852 and H. R. 8720 before the House Comm. on Interstate and For. Comm., 73d Cong., 2d Sess. 115 (1934).

See *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 202-203 (1976).

The decision below thus does not expand the scope of the federal securities laws—and *the inquiry should not be "whether" employee pension plan securities are included, but rather "why" as a vital investment vehicle should they be excluded from the protection of the antifraud provisions of the federal securities laws.* Other federal statutes and state laws are not designed to remedy the type of securities fraud present here.[40]

40. Plaintiff seeks relief in the first two counts in this lawsuit—the counts now on review—for an intentional securities fraud. The fact that plaintiff's Complaint contains other counts not on review here is totally irrelevant. Such other counts involve different causes of action relating to different injuries incurred by plaintiff for which there are different standards of proof, different remedies, and different measures of damages. Indeed, the availability of relief elsewhere and on different grounds is hotly disputed by defendants. See, e.g., Local 705 Br. at 50 n. 28. For example, defendants have sought to raise various common law defenses, many of which are not available here. In any event, plaintiff should not be placed in the position of arming defendants for their defense on such other counts in order to sustain his cause of action here. Defendants obviously seek an avenue of escape elsewhere from their clear liability here. Indeed, it is likely that this lawsuit would not have been brought if plaintiff's only apparent remedy had been in state court. The counts now on review involve causes of action arising out of defendants' violations of the antifraud provisions of the federal securities laws. If plaintiff's federal right to be free of such fraud has been infringed, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case* v. *Borak,* 377 U. S. 426, 433 (1964). Furthermore, the provision of a remedy under the federal securities laws is likely to make the most efficient use of limited judicial and legal resources. This court has thus stated:

> "Since there was a 'sale' of a security and since fraud was used 'in connection with' it, *there is redress under Section 10(b), whatever might be available as a remedy under state law." Superintendent of Insurance* v. *Bankers Life and Cas. Co.,* 404 U. S. 6, 12 (1971).

Contrary to the assertions of petitioners, this conclusion has not been weakened by *Santa Fe Ind., Inc.* v. *Green,* 430 U. S. 462 (1977), because there the court found an absence of any deception or manipulation—in direct contrast to the securities fraud complained of

(Footnote continued on next page.)

Indeed, the need for the type of antifraud protection found in the federal securities laws can be nowhere more clear than in the instant case. Part of the compensation which the plaintiff has received from his employment consists of employer contributions to the Local 705 Pension Fund on his behalf. As a result of these contributions, the plaintiff has built up an undivided interest in the Local 705 Pension Fund. These interests can over the years become very substantial in terms of the promised economic payout and, as such, are often the principal reason for entering and continuing covered employment for Local 705 members. Such interests in the Local 705 Pension Fund are thus relied upon by Local 705 union members for financial security in their old age. These expectations are, however, not fulfilled because of defendants' fraud. This fraud on the part of the Teamsters union is particularly egregious because it continues to this very day. The type of disclosure required to properly value a Local 705 Pension Fund security has yet to be made. Indeed, only under the federal securities laws—and not under the national labor laws or ERISA—are defendants required to make this type of disclosure. Because of the crucial importance of these economic interests to plaintiff and other Teamster union members, there is a need for full and fair disclosure of all material terms of the Local 705 Pension Fund prior to making the investment decision.[41]

(Footnote continued from preceding page.)

here. The Court in *Green* thus reaffirmed that "of course the existence of a particular state law remedy is not dispositive of the question whether Congress meant to provide a similar federal remedy." *Id.* at 478.

41. This need is not met by qualification under the Internal Revenue Code. For example, disclosure under the Internal Revenue Service rules

> does not necessarily satisfy Securities Act disclosure standards which require that the facts must be disclosed in a form which is clearly understandable to the ordinary investor.

Mundheim & Henderson at 806. Furthermore, and

> unfortunately, the Internal Revenue Code provides only limited safeguards for the security of anticipated benefit rights in private

(Footnote continued on next page.)

This need can be met under either or both the registration and antifraud provisions of the federal securities laws. Although registration of these securities is not always required, perhaps because of the burden on the issuer, there is at the minimum a clear need to provide a remedy for the type of ills complained of here:

> "Since these anti-fraud provisions do not impose an undue burden on anyone, there is no reason why they should not remain as remedies available to employees for use in cases where fraud of the kind covered by these sections has been committed." Mundheim and Henderson, Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans, 29 *Law and Contemp. Prob.* 795, 814 (1964) (hereinafter referred to as *Mundheim and Henderson*).

In fact, to the extent that petitioners believe the decision below requires the registration of pension fund securities under Section 5 of the 1933 Act, they have made their

> "quintessential error . . . In contradistinction [to the registration requirements] the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents. Rather, the antifraud provisions are essentially a generalized self-executing prohibition against fraudulent activity." Pet. App. p. 252a.

SEC Chairman Williams has thus concluded that:

> "I do not believe that [applying] the antifraud provisions [to employee pension plans] will have . . . adverse consequences . . . either in terms of cost or in terms of uncertainty." Letter from Harold M. Williams to Senator Harrison A. Williams, Jr., dated Jan. 5, 1978, BNA Sec.

(Footnote continued from preceding page.)

> plans. The primary functions of the Code provisions are designed to produce revenue and to prevent evasion of tax obligations.

S. Rep. No. 1150, 92nd Cong., 2d Sess. at 4 (1972). See S. Rep. No. 93-127 in 3 *U. S. Code Cong. and Admin. News* 4841 (1974); *Truncale* v. *Blumberg*, 88 F. Supp. 677, 678 n. 1 (S. D. N. Y. 1950). Neither is this need met by filings under the old Welfare and Pension Plans Disclosure Act of 1958 or ERISA. See p. 98 n. 86 and pp. 104-107 *infra*.

Reg. and L. Rep. No. 436, p. F-1 (Jan. 18, 1978) (hereinafter referred to as *"Williams Jan. 5 Letter"*).

All that the decision below really stands for is the proposition that promoters and sellers of pension plan securities must tell the truth in their representations to buyers.

C. Economic Reality Compels the Characterization of An Investment in the Local 705 Pension Fund as a Security.

Petitioner IBT stresses and plaintiff agrees that "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin* v. *Knight,* 389 U. S. at 336; *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837, 848-49 (1975). Indeed, for the employee the economic reality is that a substantial portion of his invested retirement funds are entrusted to the management of others. Economic reality compels the characterization of an investment in the Local 705 Pension Fund as a security.

Petitioners, however, seek to obscure the fundamental economic reality involved by the use of various "unrealistic and irrelevant formulae." *Howey,* 328 U. S. at 301. Thus, petitioner IBT argues that Daniel had only a "contingent expectancy" which was dependent upon his ability to meet the Local 705 Pension Fund eligibility requirements for receiving a pension payment. IBT Br. at 40. But, the same could be said with respect to many economic interests concededly considered to be securities. In many investment contract schemes, the promise of an economic return depends upon a variety of extraneous factors as well as the successful efforts of the investor. For example, the holder of an employee stock option holds a security—albeit a contingent expectancy—even if the exercise right is dependent upon the employee's remaining on the job for a certain length of time. And, in *Koscot Interplanetary, Inc., supra,* realizing a profit from the pyramid sales scheme would depend upon the successful recruitment of new prospects into the marketing plan by the initial investor. See *Glenn W. Turner Enterprises, Inc., supra,*

at 483 (profits to be earned need not solely come from the efforts of others). In *Collins* v. *Rukin, supra,* for a further example, realizing a profit from the non-transferable stock option given in exchange for services would depend upon the investor having enough money to exercise the option.

The contingent expectancy argument has thus been considered and rejected by the Court of Appeals. Pet. App. p. 224a. It derives no viability from petitioner's recitation of those outside events which may cause an investor in an employee pension plan to lose his entire investment. IBT Br. at 41-42. Indeed, the fact of such risk of loss only adds strength to the argument that a security is present,[42] and that all such risk of loss should be disclosed.

Petitioners also ignore economic reality by arguing that, as an employee, plaintiff cannot also be an investor. This argument just does not wash. There is absolutely no reason why an employee cannot be an investor or why an investment decision cannot be made at the same time as another (e.g. employment) decision is made.[43] As noted above (*supra* pp. 33-34), the underlying investment character of a security is not destroyed simply because the purchaser is acting with more than one motive. It is thus clear from this Court's decisions in *VALIC* and *United Benefit Life* that the security involved can be separated from other aspects of the transaction. In *VALIC* and *United Benefit Life,* for example, the Court separated the conventional life insurance attributes from the security involved. So here, the employment relationship entered into by plaintiff is separate from the security he has purchased There is thus no reason why plaintiff cannot be both an investor and an employee. Indeed, other

42. See pp. 59-60, *infra.* Of course, every investor in an investment contract scheme carries the risk that outside forces may cause a loss of his investment. For example, the investor in *Howey* was subject to the risk that poor weather would diminish the value of his investment.

43. The assistant general counsel of the SEC has thus termed such a participant in an employee pension plan an "employee investor." *1941 Opinion* at p. 75,387. See also the testimony of SEC Commissioner Purcell, *1941 Hearings* at 920.

courts have found no problem with this. *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972) (a securities fraud perpetrated for an employment motive); *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961); *SEC* v. *Koscot Interplanetary, Inc., supra*, at 476 ("case law countenanced the fragmented approach"). And, certainly, those employees who invest in employee pension plans which *concededly involve securities* subject to the 1933 Act registration requirements *are both employees and investors.*

It likewise confounds economic reality to argue that Daniel is not an investor because contributions were made on his behalf direct by his employers into the Local 705 Pension Fund, rather than first to Daniel and then into the Pension Fund. Indeed, as noted above (*supra* n. 5), the primary reason for this arrangement is the tax savings provided by Section 401 et seq. of the Internal Revenue Code. Certainly, petitioners do not dispute that a security would be present were that part of an employee's compensation (otherwise paid directly into a pension fund) paid first to the employee and then into the pension fund. For example, if an employee agreed to work for an employer for $100 per week plus, as a separate part of his compensation, an additional $10 per week to be paid to the employee for him to contribute to a collective pension fund, there would without dispute be a security present. The substance and economic reality is not altered if that $10 per week is paid direct by the employer into the pension fund: the employee's bargained for consideration for labor services performed is still $110 per week, $10 of which (in either case) is invested in a security.

Petitioners' attempt to weigh the relative importance of the various elements in an employee's decision is also misguided. Whether the investment decision taken by the employee-investor is primary or secondary, the fact is that an investment decision is still taken. In any event, an analysis of economic reality reveals that the investment decision here undertaken is not insignificant —on either a relative or an absolute basis. For example, the investment a Teamster member makes in the Local 705 Pension Fund is, on an absolute basis, significant in terms of its size.

Currently, this investment amounts to $30 per week, $1,560 per annum, and over $30,000 over a 20 year career. This size of an investment is surely significant and not merely incidental to an employment relationship. Indeed, such an amount invested annually for 20 years will total over $72,500 if it earns 7½ percent per year on a compound basis.[44] The profit potential is thus tremendous.

Further, on a relative scale, this investment is probably the largest investment a Teamster member will make in his lifetime. See Drucker, *The Unseen Revolution* 13 (1976); see p. 14 and n. 4, *supra*. And, finally, on an aggregate basis, employee pension plans have become a major force in the American capital markets. See p. 13, *supra*. As the sole investment vehicle for millions of Americans, economic reality compels the application of the antifraud rules of the federal securities laws to an investment in such funds.

This economic inducement is a major factor in the lure an investment in the Local 705 Pension Fund had for plaintiff. See *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 296 (1946) ("They [the investors] are attracted by the expectation of substantial profits"). Daniel "expected to receive on retirement a pension of $400 per month or more," and he was induced by the promises of defendants:

> "The purpose of these funds is to take care of you and your family in case of retirement."
>
> "These funds afford protection to you and your wife and unmarried children under eighteen years of age."

Daniel Affidavit Para. 9-10. The defendants know this and, indeed, have intentionally utilized this economic lure to its fullest. See pp. 6-7 and n. 13 *supra*. Further, as noted above, the economic lure of an employee pension plan is, notwithstanding

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44. The above calculation is based on the current maximum bank interest rate of 7½ percent per annum and on the assumption that such interest earnings are allowed to accumulate on a tax deferred basis as provided in Section 401 of the Internal Revenue Code.

petitioners' unsubstantiated assertions, an important element in an employee-investor's decision making. *Id.*[45]

Finally, economic reality distinguishes this case from *Lino* v. *City Investing*, 487 F. 2d 689 (3d Cir. 1973), and *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975). In *Lino*, the plaintiff acquired a franchise agreement in exchange for cash and several promissory notes. In holding that the notes were not securities, the court pointed out the commercial character of the transaction:

> "There was no public offering of the notes, and the issuer was the person claiming to be defrauded. The notes were not procured for speculation or investment . . . To accept [plaintiff's] . . . argument would mean that any consumer who bought an article 'on time' and issued a note [had sold a 'security'] . . ."

Id. at 695. Obviously, the facts in *Lino* have nothing whatsoever to do with the facts here. In the instant case, the plaintiff is not an issuer who issued a note to purchase an asset in a commercial transaction. Rather, Daniel has made a substantial investment by buying a security in an investment fund. *Lino* is thus inapposite.

In *Forman* the Court applied the economic reality test to hold that an interest in a state subsidized and supervised non-profit

45. If on nothing else, all of the briefs that have been filed in this case underscore the fact that the presence or absence of an employee pension plan and the terms of such a plan are of the utmost importance to an employee-investor. An employee pension plan is an important element in selling the employee on entering into employment with an employer; it is an important element in selling the employee on ratifying a collective bargaining agreement; and it is an important element in selling an employee on certifying a particular union as his exclusive representative in labor negotiations. Indeed, to the union employee, the investment he will make in an employee pension plan is as important to him as the investment an executive makes in stock options of his employer. In both cases, the fact that the investment is made by an employee—union member or executive—within an employment context does not detract from the conclusion that a security is present. See generally *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972).

housing cooperative is not an "investment contract" and thus not a security under the federal securities laws.[46]

Forman is thus inapposite because it does not involve the entrusting of money to others to manage with the expectation of profits. Neither does it involve a multi-employer union pension fund. Thus, in finding the interest in *Forman* not to have the requisite profit element needed for an investment contract, the Court emphasized:

> "The Bulletin [explaining the housing cooperative] repeatedly emphasizes the "nonprofit" nature of the endeavor . . . It also informs purchasers that they will be unable to resell their apartments back to Riverbay [the co-operative] at a profit since the apartment must first be offered back to Riverbay 'at the price . . . paid for it.' "

Id. at 854. The Court continued by stating: "In short, the inducement to purchase was solely to acquire subsidized low cost living space; it was not to invest for profit." *Id.*[47] Indeed, it was even *conceded* that there was "no possible profit on a resale of [this] stock." *Id.*

46. The Court also held in *Forman* that "stock" (as that term is used in the definition of "security") did not encompass the interests in the non-profit housing cooperative there at issue. In this first half of the *Forman* decision, the Court noted that the presence of "stock"— as that term is used in the definition of "security"— normally was characterized by the following common features:

> "the right to secure 'dividends contingent upon an apportionment of profits.' . . . they are . . . negotiable; they [can] . . . be pledged or hypothecated; they confer . . . voting rights in proportion to the number of shares owned; and they [can] . . . appreciate in value." *Id.* at 851.

Petitioners' reliance on these features is, however, totally misplaced because such factors merely characterize *one* form of "security" —viz., "stock"—and not the other forms set out in the definition of security—including, for example, "investment contract."

47. The other alleged elements of profit in *Forman*, including tax deductions from the payment of interest, government financed subsidies, and certain "rebates" on the rental of parking spaces and the cost of washing machines, all are obviously of a non-profit nature related to the housing acquired, unique to Forman and having nothing to do with the instant case.

Nothing could be further from the facts in the instant case. Here, the requisite profit element is present in its *traditional forms*. In fact, this is conceded by petitioners.[48] In addition, Daniel purchased his security in the Local 705 Pension Fund not with "the desire to use or consume the item purchased," *Id.* at 852, but with the expectation of substantial profit to be returned to him, together with his initial investment, in the form of retirement benefits. Indeed, it was with this economic inducement that Daniel was lured to invest in the Local 705 Pension Fund. Even in *Forman*, the Court suggested that an investment contract might have been present [illegible] there been an offer of "both a commodity or real estate for u[illegible]an expectation of profits." *Id.* at 853 n. 16. Petitioners' reliance on *Forman* is thus misguided.

D. An Investment in the Local 705 Pension Fund Meets All of the Elements of the Howey Rule.

An investment in the Local 705 Pension Fund is an "investment contract" and thereby included within the definition of "security" under the federal securities laws. An investment contract has been defined by the Supreme Court in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 298-99 (1945), to mean:

> "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

The Supreme Court in *Forman, supra,* has repeated the *Howey* rule, stating that "this test, in short hand form, embodies the essential attributes that run through all of the Court's decisions defining a security." *Id.* at 852.

All of the elements of the *Howey* rule are present in the instant case. Under the Local 705 Pension Fund money is invested in a common enterprise, the management of which is committed

48. See p. 18 and n. 32, *supra.*

to a third party and from which profits and income are expected.[49]

1. The Investment of Money.

To establish the first element of the *Howey* rule all that need be shown is that an investment of value by the plaintiff has taken place. Whether viewed as an investment of services direct or an

49. The conflicting district court cases cited by petitioners provide no support for petitioners' position because they are either inapposite or conclusory. For example, *Hurn* v. *Retirement Trust Fund,* 434 F. Supp. 80 (C. D. Cal. 1977), can provide no support for petitioners because only two sentences in *Hurn* are directed to the issues decided in *Daniel,* and such two sentences are strictly conclusory, wtih no reasons or analyses given. And, *Wiens* v. *International Brotherhood of Teamsters,* BNA Sec. Reg. and L. Rep. No. 397 (C. D. Cal. 1977), provides no support because, as a ruling from the bench, it likewise is merely a conclusory opinion. See Pet. App. p. 247a n. 43. Both *Hurn* and *Wiens* were thus not followed by the court below. *Id.*

Robinson v. *United Mineworkers of America,* 435 F. Supp. 245 (D. D. C. 1977), similarly provides no support for petitioners because it is inapposite. There, surviving spouses and dependents of deceased coal miners sought an order declaring their right to permanent health care coverage by the defendant United Mine Workers of America Health and Retirement Funds. In holding that plaintiff's interest in such Health funds was not a "security", the court in *Robinson* expressly stated that: *"Daniel is distinguishable from the instant case."* 435 F. Supp. at 246 n. 1 (emphasis added). Given this recognition by the *Robinson* court itself, it is surprising that petitioners do not themselves see the distinction. In *Robinson*—and unlike *Daniel*—the plaintiffs as spouses and dependents of the deceased coal miners could:

> "in no sense . . . be viewed as investing in the [Health Funds] . . . since they contributed nothing to the employers in return for the employers' payment of per-tonnage royalties into the [Health Funds] . . . on behalf of and in return for the services of the union miners. The *Robinson* plaintiffs were donees instead of purchasers." Pet. App. p. 228a-229a.

More importantly, *only* the length of time health care coverage was to be extended to the plaintiffs was in issue in *Robinson.*

> "That case therefore involved merely the consumption of 'free' medical care rather than, *as in Daniel, an actual dollar financial return on investment, i.e.,* 'an expectancy of dollar benefits', *which the investor could then use to purchase anything he chose."* Pet. App. p. 229a (emphasis added).

(Footnote continued on next page.)

investment of money through the form of employer contributions made on behalf of the employee into the Local 705 Pension Fund, such an investment has here clearly been made. This proposition is now universally accepted.

Although at one time pension contributions into a pension fund by an employer on behalf of an employee were considered to be in the nature of a gift, they are now *uniformly* viewed by Congress, the courts, and the independent agencies as conceptually a part of wages. "Regardless of the form they take, the employers' share of the cost of these plans or the benefit the employers provide are a form of compensation." S. Rep. No. 1440, 85th Cong., 2d Sess. at 4 (1958). In *Inland Steel* v. *NLRB*, 77 NLRB 1 (1948), enforcement granted 170 F. 2d 247 (7th Cir. 1948), *cert. den.* 336 U. S. 960 (1949), pension and retirement plans were held to be a proper subject for compulsory collective bargaining under the Taft-Hartley Act "on the ground that, realistically viewed, such plans were part of the entire wage structure." 4 Loss, *Securities Regulation*, 2552 (1969). See, e.g., *Employing Plasterers Assoc.* v. *Journeymen Plasterers Protective and Benevolent Society*, 279 F. 2d 92, 99 (7th Cir. 1960); *Wilson* v. *Rudolph Wurlitzer Co.*, 194 N. E. 441, 443 (Ohio 1934); Note, Legal Problems of Private Pension Plans, 70 *Harv. L. Rev.* 490, 494 (1957).

Former SEC Chairman Cohen has thus commented:

> "Both [an] investor [in a mutual fund] and employee [in an employee pension plan] are *investing money which they have earned*. Realistically, the employee is simply putting into a fund for his future use that which he would otherwise get in his paycheck." (emphasis added).

(Footnote continued from preceding page.)

In contrast to *Hurn, Wiens* and *Robinson*, the recent district court decision in *Schlansky* v. *United Merchants & Manufacturers, Inc.*, CCH Fed. Sec. L. Rep. ¶ 96,353 (S. D. N. Y. 1977) is both directly in point and rigorous in its analysis. There, following the decision in *Daniel*, the court held that an interest in the United Merchants Pension Plan was "an investment contract as defined in *Howey* . . . acquired in a sale and subject to the anti-fraud provisions of both the 1933 and 1934 Acts." *Id.* at p. 93,212.

1972 Hearings at 231. See p. 70, *infra*. And, the noted commentator Peter F. Drucker has said:

> "Payments into a pension fund, whether made by employer, employee, or both, are 'deferred wages' and 'labor costs.' "

The Unseen Revolution at 8 and 34 (1976). Indeed, even Petitioner IBT has conceded that Daniel's investment in the Local 705 Pension Fund "constitutes a form of compensation for an employee's labor." IBT Court of Appeals Br. p. 12.

Daniel's employer contributions into the Local 705 Pension Fund represent a substantial economic portion of his wages received in return for services performed. In any event, the initial investment required may take the form of property *or services, SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961), as well as cash. The commentators who have touched on this point are thus unanimous in observing that the *Howey* rule does not mandate a cash contribution. For example, in Hewitt, *Investment Contracts*, Univ. of Calif. Securities Law Institute (January, 1975) at p. 11 it is said:

> "no cases are known to seriously dispute that 'money' as used in the *Howey* test can, and does, include any item of value and not merely 'currency'. In other words, a 'cash equivalency" satisfies this first element."

See also, e.g., Hannan and Thomas, The Importance of Economic Reality and Risk in Defining Federal Securities, 25 *Hastings L. Rev.* 219, 236 (1974) ("There seems to be no analytic reason, however, to suggest that Justice Murphy purposely excluded the investor who furnishes property or services"); and in Long, An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation, 24 *Okla. L. Rev.* 135, 161 (1971), it is said:

> "This investment is often expressed in terms of money, *but there is no requirement that it actually be paid in money*. For example, it is well recognized that stock in a corporation or an interest in a partnership can be given for services rendered or property transferred, or that such interests can be transferred for a combination of money and other

considerations. *There must be money's worth invested, but the consideration does not have to take the form of cash received.*" (Emphasis added).

The courts which have considered this point have also held that the investment of cash money is *not* required in order to satisfy the *Howey* test.[50] Any legally sufficient consideration is adequate. For example, the "investment contracts" at issue in *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961), were actually mere oral agreements between the defendant-employers and various workers pursuant to which the defendants employed the workers on a non-salary basis and promised the workers a share in the company's profits by reason of the defendants' "extreme gratitude" for the workers' services and friendship. *Id.* at 716. There, the court held that the performance of services constituted the giving of value and that such oral agreements were, indeed, "investment contracts." *Id.* at 722. In like fashion, in *Collins* v. *Rukin*, 342 F. Supp. 1282, 1290 (D. Mass. 1972), the court held that "plaintiff's performance of service satisfies the 'value' requirement of a sale of securities." Similarly, other courts have held the investment of money element of the *Howey* test satisfied by the giving of property. See, e.g., *Ed Khadem* v. *Equity Securities Corp.*, 494 F. 2d 1224 (9th Cir. 1974) (rehypothecatable collateral); *SEC* v. *Bourbon Sales Corp.*, 47 F. Supp. 70, 73 (W. D. Kan. 1942) ("it is immaterial whether the public invests money or property in the enterprise").

Finally, this Court itself has also recognized that employer contributions on behalf of employees into an employee pension fund "are really another form of compensation to the employees, and as such the obligation [to make the contribution] . . . might be thought to be incorporated into the individual employment

50. There is abundant authority warning against too narrow a reading of the *Howey* standards. See, *e.g.*, *SEC* v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473, 480 (5th Cir. 1974) ("a literal application of the *Howey* test would frustrate the remedial purposes of the Act . . . The Supreme Court admonished against such a rigid and quixotic application, . . . The admitted salutary purpose of the Acts can only be safeguarded by a functional approach to the *Howey* test.").

contracts." *Lewis* v. *Benedict Coal Co.*, 361 U. S. 459, 469 (1960).[51] In fact, unlike the instant case, the employee pension plan at issue in *Lewis* involved the United Mine Workers Retirement Fund which provided for employer contributions on behalf of the employees based on a certain sum *for each ton* of coal produced. Here, where the employer contribution is (now) $30 *per week* of employee service, the conclusion of this Court that such contributions are "compensation" to the employee is all the more clear.

Petitioners are, therefore, misguided if they read *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), to overturn this Court's conclusion in *Lewis*. In holding that a returning veteran is entitled to a pension as a benefit to be included within the rights of "seniority" secured by the Military Selective Service Act, this Court in *Alabama Power* did not find that such employer contributions are not "compensation" to the employee. Rather, for the sole purpose of the Military Selective Service Act, the Court considered such contributions as compensation for all the years of service of an employee rather than for any particular year.[52] In addition to the Military Selective Service Act, petitioners also cite other completely unrelated statutes, and cases interpreting them, in their vain effort to overturn the decision below.[53] Petitioners, however, strangely ignore another

51. The Court noted the following comment in Congress by Senator Taft:

"This [i.e., the employer contributions] represents money earned by the employees."

93 Cong. Rec. 4747. See also S. Rep. No. 105, 80th Cong., 1st Sess. 52 (supplemental views).

52. The Court in *Alabama Power* thus said (at pp. 592-93):

"It is obvious that pension payments have some resemblance to *compensation for work performed.* Funding a pension program is a current cost of employing potential pension recipients, as are wages. The size of pension benefits is a subject of collective bargaining, *and future benefits may be traded off against current compensation.*" (Emphasis added.)

53. For example, *Joint Industry Board* v. *U. S.*, 391 U. S. 224 (1968), and *U. S.* v. *Embassy Restaurant*, 359 U. S. 29 (1959),

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recent decision of this Court which clearly characterizes employer contributions into employee pension plans as "compensation," and were unaware of an even more recent decision of this Court which reaches the same conclusion. *Los Angeles Department of Water & Power* v. *Manhart*, ... U. S. ....., 46 U. S. L. W. 4347, 4350 and n. 23 (April 25, 1978) ("the Department's pension benefits, and the contributions that maintain them, are 'compensation' under Title VII [of the 1964 Civil Rights Act]"); *Allied Structural Steel Co.* v. *Spannaus*, ... U. S. ....., 46 U. S. L. W. 4887, 4890-91 (June 28, 1978) (pension plan is an "additional form of compensation"); cf. *Malone* v. *White Motor Corp.*, ... U. S. ....., 98 S. Ct. 1185 (1978).

In any event, petitioners ignore in their analysis the statutory definition of "security" and "sale" under the federal securities laws, and the mandate of this Court that "the starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723

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hold that unpaid pension contributions in the hands of a bankrupt are not entitled to priority as "wages" under the Bankruptcy Act; and *SIPC and SEC* v. *Morgan, Kennedy & Cox, Inc.*, 533 F. 2d 1314 (2d Cir. 1976), holds that certain beneficiaries of a profit sharing trust are not "customers" of a bankrupt broker-dealer under the Securities Investor Protection Act. More relevant is the recent case of *Klamberg* v. *Roth*, CCH Fed. Sec. L. Rep. para. 95,747 at 90,630 (S. D. N.Y. 1976), where the court held that the plaintiff as beneficiary in an employee pension plan had standing by himself to bring an action against the plan trustees for violation of the antifraud rules of the 1934 Act:

> "Fraud perpetrated by a trustee in the purchase or sale of securities on behalf of the trust has a tangible impact on each beneficiary, no matter how many beneficiaries are thereby affected and regardless of the precise purposes of the trust. The policies behind the *Birnbaum* rule are not undermined. . . ."

See also *James* v. *Gerber Products*, 483 F. 2d 944 (6th Cir. 1973); *Heyman* v. *Heyman*, 356 F. Supp. 958 (S. D. N. Y. 1973). Petitioners' reliance on *SIPC and SEC* v. *Morgan Kennedy & Cox, Inc.*, is thus misplaced because it relates to an entirely different statute, the Securities Investors Protection Act of 1970. 15 U. S. C. §§ 78aaa *et seq.* Obviously, those cases dealing directly with the ability of a beneficiary to sue under the antifraud rules of the 1933 and 1934 Acts are more directly in point.

756 (1975) (J. Powell concurring). *Other statutes are irrelevant to this inquiry:*

> "The Local defendants attempt to erect a dichotomy between wages *per se* and the fringe benefits of employment which together make up an employee's total compensation by referring to sections of the Bankruptcy Act, the Internal Revenue Code, the Social Security Act, the Fair Labor Standards Act and the Sherman Act which purportedly raise such a distinction for the purposes of those Acts. *The existence of a wage/compensation dichotomy in other unrelated statutes is wholly irrelevant to whether a union member has made an investment under the Howey rule.*" Pet. App. p. 224a-225a (emphasis added).

All that need be shown is that the investments into the Local 705 Pension Fund are properly considered to be economic compensation to the employee. This is now universally accepted. Accordingly, the first element of the *Howey* rule is met.

2. The Common Enterprise.

The Local 705 Pension Fund which receives the investments of the Local 705 union members constitutes the common enterprise element of the *Howey* rule. Of course, "today, at any rate, 'where, as in a pension trust, the trust is created in connection with an employment relation . . . the trust is created for business purposes and is not non-commercial.' " 4 Loss, *supra*, at 2535-36, quoting *Mundheim & Henderson*, at 804. Moreover, an investment contract type of security may clearly take the form of an undivided interest in such a trust, see *Sire Plan Portfolios, Inc.* v. *Carpentier*, 132 N. E. 2d 78 (Ill. 1956), without issuing certificates and without permitting the transfer of interests in the trust. See *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972) (private non-transferable option is a security). *Mundheim & Henderson* at 803. This Court has thus held it to be "immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1945). In the instant case, the Local 705 Pension

Fund trustees self-admittedly have the sole power of control over the common enterprise and the investment of all assets contained therein. Amended Trust Agreement, Article 4. Sections 1-3, Exh. 1B to Louis F. Peick Affidavit; Pet. App. p. 64a.

3. Profits from the Efforts of Others.

Finally, profits to the investors in the Local 705 Pension Fund are expected from the successful management of the monies in the Local 705 Pension Fund and in the form of retirement benefits. See, e.g., *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65 (1959); *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967). Indeed, it is just this promise of profits in the form of retirement benefits far in excess of the plaintiff's investment that formed the *economic inducement* to plaintiff to invest in the Local 705 Pension Fund. The profit to plaintiff here is a *dollar* profit for these retirement benefits are dollar benefits. Moreover, this profit is substantial both on an absolute and relative basis. See pp. 46-47, *supra.*

Petitioners complain that such profits are, alternatively, fixed by the trustees of the pension fund or determined by the life expectancy of the employee. IBT Br. at 44, 47. However, that the level of retirement benefits per month is fixed by the trustees —from time to time—does not eliminate the element of profits. This Court has thus observed in *Howey* that "it is immaterial whether the enterprise is speculative or nonspeculative." *Howey*, 328 U. S. at 301. Furthermore, the total expected payout for a Local 705 union member will greatly exceed the aggregate of such member's investment in the Local 705 Pension Fund—and to a substantial extent this excess will be a profit element in the form of capital gains, interest, dividends, and other accumulated earnings realized from the (hopefully) successful management of the Fund.[54] In any event, the profit element need not even be

54. That this profit element is fixed is also, of course, no different from a fixed interest rate on a debenture or bond—or from a fixing of profits through the establishment of a repurchase guaranty at a price equal to the original purchase price plus a set percentage in an

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a financial profit. *Silver Hills Country Club* v. *Sobieski*, 361 F. 2d 906 (Cal. 1961) (use of club facilities).

Furthermore, the fact that the total profit to the investor in the Local 705 Pension Fund is determined on the basis of actuarial assumptions and the investor's actual life span no more eliminates the presence of such profits here than in *VALIC*. *VALIC*, *supra*, at 70. There, the total payout to the annuitant was (as here) determined on the basis of actuarial assumptions and the annuitant's actual life span.

> "His [i.e., the annuitant's] rights are technically assignable, but practically unmarketable since *they depend on his individual life span.*" *Id.* at 89 (J. Brennan, concurring) (emphasis added).

Petitioners also complain that the retirement benefits paid to the investor in the Local 705 Pension Fund are received only subsequent to vesting by employment with covered employers for the requisite period of time. But, as noted above (at pp. 44-45), this, too, does not eliminate the element of profits.

In addition, as with any investment in a security, there is a risk of loss.[55] The benefits due the plaintiff are not insured. See

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investment contract transaction. See, *e.g.*, *Longines Symphonette Society*, [72-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,151 (1972); Coffey, 18 *West Res. L. Rev.* at 401.

55. The presence of such risk is an important factor to consider in the present inquiry:

> "The concept of risk is central to any capitalist economy. The profit received by those who assume risk . . . is the economic equivalent of the return on other major factors of production."

Note, the Regulation of Risky Investments, 83 *Harv. L. Rev.* 603 (1970). The presence of profits is, therefore, just the other side of the coin to the presence of risk. See *Webster's New Collegiate Dictionary* 919 (1973) (profits are "the compensation accruing to entrepreneurs for the assumption of risk . . .") Furthermore, the so-called "risk capital theory" was not rejected by this Court in *Forman*, for there the Court only declined to apply the "risk capital" approach in that case—noting that, even if applicable, the buyer of the alleged securities there "take no risk in any significant sense." *Forman* at 857 n. 24. The Court thus did not reject the risk capital approach as improper.

El Khadem v. *Equity Securities Corp.*, 494 F. 2d 1224 (9th Cir.), *cert. den.*, 419 U. S. 900 (1974); *Silver Hills Country Club* v. *Sobieski, supra.* If the Local 705 Pension Fund trustees are unsuccessful money managers, or if they countenance abuse or fraud in the management of the trust assets, the plaintiff will not receive the return expected. Indeed, the plaintiff may lose all or part of his initial investment in the Local 705 Pension Fund. Thus, reports in a highly reputable financial newspaper indicate that this may well be the case with at least one Teamster pension fund:

> "As of Feb. 29, 1972 . . . the [Teamsters Central States, Southeast and Southwest Areas Pension Fund] . . . listed total assets of $917.9 million, of which $819 million, or 89% was either already invested or firmly committed to real estate loans—against less than 5% for the average similar fund, according to a survey in 1973 by the Securities and Exchange Commission . . . Moreover, it wasn't all prime real estate. For one thing, much was invested in second and even third mortgages . . . As of 1972 at least, it wasn't coming up roses, not for the half million Teamsters relying on the fund for their retirement income, anyway. The fund records state that real estate deals accounting for 30% of these mortgage loans were delinquent, not including properties acquired by the fund from borrowers, presumably in lieu of payment. With these properties thrown in, it appears that some 36.5% of the real estate loans were coming a cropper." *Wall St. J.*, Thursday, July 22, 1975.

Consequently, the plaintiff and other Local 705 union members bear a substantial element of risk in this major investment in the Local 705 Pension Fund.

Petitioners finally attempt to discredit the profit Daniel expects to receive from his investment in the Local 705 Pension Fund by tracing its source and claiming the profit derives from the forfeited pensions of other union members. However, this attempt must fail. First, Petitioner's *own* description of the Local 705 Pension Fund to its members stresses the earnings on the contributions paid into the Fund by each member's employer:

> "Pensions are paid for out of the Employer contributions *for each covered Employee-member employed by him . . .* The actuaries take into consideration the amount of money which a covered Employer has contributed to the Fund in 20 years and then determine *how much more money the Fund will have to earn on that contribution in order to be able to make the monthly payments required under the Plan . . . without this income growth the Fund could not accumulate enough money to pay the $250.00 monthly pensions provided in the Plan.*" Pet. App. 70a at p. 14-15 (emphasis added). See p. 11, *supra.*

Second, the source of gain is irrelevant to the presence of profits. Profits exist when the return received, regardless of their source, exceeds the investment. Thus, profits are defined in *Black's Law Dictionary* at 1376 (1957):

> "An excess of the value of returns over the value of advances."

And, in *Webster's New Collegiate Dictionary* at 919 (1973):

> "The excess of returns over expenditures in a transaction."

Because the expected payout to Daniel is *conceded* to exceed Daniel's investment in the Local 705 Pension Fund, the profit element of *Howey* is satisfied by this fact alone. For example, in both *SEC* v. *Koscot Interplanetary, Inc., supra, and SEC* v. *Glenn W. Turner Enterprises, Inc., supra,* the profit there present for any particular investor in the pyramid sales scheme had as its source a substantial part of the investment of another investor in the scheme. Likewise, the payout to an annuitant in *VALIC, supra,* could well come from the investments of and fees charged new annuitants rather than from a return to the maturing annuitant of his original investment and the income earned on it. *Id.* at p. 89.

Third, and most important, even if part of the profits to an investor in the Local 705 Pension Fund derives from forfeited investments of other investors,[56] the fact remains that a sub-

56. Petitioners' argument in essence is an attempt to utilize its fraud as a shield from liability. Thus, if petitioners fraudulently

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stantial part of the profits also derives from *traditional earnings* on the Local 705 Pension Fund participant's investment. Thus, as calculated above, the investment of $1,560 per year in the Local 705 Pension Fund for 20 years should earn over $42,500 in hard dollar profits over and above the investor's total $30,000 investment. In fact, petitioners *concede* that traditional forms of return make up part of the profit to an investor in the Local 705 Pension Fund, but go on to argue that the amount which they constitute is insignificant. IBT Br. at 46-47. However, even on the basis of petitioners' own arithmetic, the traditional profit element ($5,032) amounts to over 52 percent of the total amount invested ($9,510). *This is not insignificant.* The profits promised to Daniel in the form of retirement benefits are substantial. They constitute the economic "carrot" used to induce Daniel to invest substantial sums into the Local 705 Pension Fund from its inception until his retirement.

E. Both Legislative History and SEC Interpretation Support the Characterization of an Interest in the Local 705 Pension Fund as a Security.

That an economic interest in the Local 705 Pension Fund should be characterized as a "security" is supported by both legislative history and SEC interpretation.

1. The Rejection of the 1934 Amendment to the 1933 Act.

In 1934 the Senate adopted an amendment to the 1933 Act which provided that:

> "An offering made solely to employees of an issuer or its affiliate in connection with a bona fide plan for the payment of *extra compensation or* stock-investment plan for the exclusive benefit of such employees. . ." 78 Cong. Rec. 8708 (1934) (emphasis added)

(Footnote continued from preceding page.)
deny a pension to most investors, and if, as a result, most of the profits derive from the forfeited investments of other investors, all that has been established is petitioners' own fraud.

would *be exempt from registration.* See *1941 Hearings* at 895. This amendment, therefore, would apply not only to stock-investment plans—as petitioners would so limit it—but also to employee plans for the payment of *extra compensation,* such as the more common employee pension plan designed to invest employee funds in a variety of different types of assets. In any event, the Senate adopted amendment was eliminated in conference on the ground that participants in such plans "may be in as great need of protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H. R. Rep. No. 1838, 73d Cong., 2d Sess. at 41 (1934). And, Senator Hastings himself, the sponsor of the amendment, stressed the "additional compensation" language—and not the "stock investment plan" language—when complaining on the Senate floor as to the conference rejection:

> "I do not see why the Federal Government should insist upon having anything to do with the plan of a corporation which decides that, as part of its policy, it will give certain *additional compensation* or bonus to its employees." 78 Cong. Rec. 10181 (emphasis added).

That Congress thus considered interests in employee pension plans as securities (which should not automatically be exempt from registration) and that the SEC so understood this was emphatically pointed out some seven years later by then SEC Commissioner Purcell. In commenting on the proposed 1934 amendment and its rejection in conference, Commissioner Purcell stated:

> "In addition to the detailed language of the act itself, there is legislative history which has made it *quite apparent to the Commission that Congress intended investments in employees' plans to be included within the term "security."* You may remember that among the proposals for amending the Securities Act which were advanced in 1934 there was one which would have exempted from registration . . .
>
> > an offering made solely to employees of an issuer or its affiliates in connection with a bona fide plan for

the payment of extra compensation or stock-investment plan for the exclusive benefit of such employees.

My recollection, so far as that amendment is concerned, is that it was adopted in the Senate and went to conference. The proposal was eliminated by the conference committee. . . . *With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security.*" *1941 Hearings* at 895-96 (emphasis added).

A more clear exposition of the meaning of this proposed amendment and its rejection could not have been made.

2. The 1941 Opinions.

In September, 1941, the SEC published two opinions of Assistant General Counsel John F. Davis. [1941-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,195 (1941) (hereinafter referred to as "*1941 Opinion*"). Contrary to petitioners' assertion, however, these opinions deal primarily with the question of whether interests in employee pension plans must be registered under the 1933 Act. For example, in response to the initial inquiry the First Opinion begins:

"The Commission has not issued any new ruling with respect to *the registration of interests* in employees' pensions or profit-sharing plans. The Commission has always taken the position that the offer or sale of interests in certain types of voluntary, contributory plans is *subject to the registration and prospectus requirements* of the Securities Act of 1933, unless one of the general exemptions in Sections 3 and 4 of the Act is available . . .

The question of *registering interests* in employees' benefit plans has been considered in connection with discussions during the past few months looking toward amendment of the Securities Act in other respects. . . As a result of discussions with representatives of various interested persons, the Commission intends to recommend to the Congress as a part of the current revision program certain amendments to the Securities Act which it is hoped will *avoid the necessity of meeting the full registration requirements* in offering and selling interests in certain types of plans. The Commission is seeking to achieve this objective without at the same time relaxing the safeguards of the Act in *those situations in which employee investors are in need of protection.*" *Id.* at pp. 75,386-87 (emphasis added).

And, the Second Opinion sets out the so-called "no-sale" rationale as justification for not requiring registration of compulsory and non-contributory employee pension plans. What is important for our purposes here, however, is the fact that the Second Opinion makes it clear that an interest in an employee pension plan is a security:

"You are correct in surmising it to be our position that the security which is involved within the meaning of Section 2(1) of that Act in connection with the offer or sale of interests in certain types of [employee pension] plans is normally an 'investment contract.' Frequently the interests may come also within the phrase 'certificate of interest or participation in a profit-sharing agreement." *1941 Opinion* at p. 75,387.

3. The 1941 Hearings.

In June, 1941 Congressman Paddock introduced a bill, H. R. 5065, which would exclude from the definition of security

"*any interest* (or any instrument representing such interest) of employees arising out of or resulting from the creation or operation of *any* employees' stock bonus, pension, or profit sharing trust which meets the conditions of Section 165 [now Section 401] of the Internal Revenue Code . . ." *1941 Hearings* at 919 (emphasis added).

Of course, had Congress never intended pension plans to come within the definition of "security," this proposed bill would have been unnecessary.

The SEC opposed enactment of this bill. That the SEC clearly considered interests in all pension plans to be securities and *that such securities are subject to the antifraud provisions of the securities laws* is revealed in its comments on H. R. 5065:

"Although the Commission believes that in general employees' plans are highly desirable, it believes also that there are many plans as to which employees are entitled to assurance that there will be disclosed to them the essential facts concerning their payments, how those payments will be invested, and the conditions upon which they will be returned. . . In addition, H.R. 5065 would not only exempt employees' plans generally from the registration provisions of the act, *but it would also deprive employees of the protection afforded them by the fraud provisions of the statute.* Even if it be assumed that there are situations in which the protection of employees does not justify the expense of registration, it hardly follows that employees should be denied a right under the act to recover from employers who have actually deceived them. Under the act no securities at all, not even Government securities, are exempted from the fraud provisions of section 17(a). Only Government securities are exempted from the civil liability provisions of section 12(2). *The Commission knows of no reason why employee-investors should be singled out from all other investors for discrimination in this respect.*" SEC, Proposals For Amendments To the Securities Act of 1933 and the Securities Exchange Act of 1934, H.R. Comm. Print, 77th Cong., 1st Sess. at 15 (1941) (hereinafter referred to as *"1941 SEC Report"*) (emphasis added).

This unambiguous declaration was repeated in the Congressional hearings on H. R. 5065 and related bills[57] by SEC Commissioner Purcell. *1941 Hearings* at 920.

SEC Commissioner Purcell also clearly stated in the *1941 Hearings* that the definition of "security" included interests in employee pension plans:

57. In contrast to Congressman Paddock's proposal that interests in *all* employee pension plans be excluded from the definition of "security," the SEC proposed that certain employee pension plans (where the employee-investors' interests were better "safeguarded") be automatically exempt *from registration,* that other employee pension plans be subject to an exemption *from registration* by SEC rule, and that the balance remain subject to the registration requirements. *1941 SEC Report* at 15.

"You will notice that section 2(1) includes in the definition of 'security' not only stocks, bonds, notes and other securities, but specifically 'investment contracts.' Now, any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an 'investment contract.' In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large . . .

Employees' retirement and pension plans also involve investing an employee's earnings with the intention of returning them to him at a future date. It has not appeared to the Commission that it was possible to distinguish investments in these plans from other securities, so far as the registration requirements are concerned, merely because the repayment is made in installments, which is sometimes the case, rather than in a lump sum, which is usually the case in the purchase of a security of another type." *1941 Hearings* at 895 (emphasis added).

In making this statement Commissioner Purcell has in no way limited his remarks to any particular type of pension plan. Daniel has been given the opportunity to place his earnings in the Local 705 Pension Fund, to be invested for his benefit and returned to him in the future. The fact that his compensation is placed in the Fund direct by his employer is a quirk of the tax code and is not in derogation of his rights under the federal securities laws.

Commissioner Purcell clearly opposed the H. R. 5065 proposal that interests in *all* tax qualified pension funds (such as the Local 705 Pension Fund) be excluded from the definition of security. *1941 Hearings* at 920. He has clearly stated that, since the Congressional rejection of the proposed 1934 Amendment to the 1933 Act, the SEC has considered the federal securities laws to apply to interests in all employee pension plans. *1941 Hearings* at 896. The major thrust of his testimony, however, focused on when registration is required for such employee pension plans. As noted above (see n. 57), in 1941 the

SEC proposed amending the registration requirements in a way to meet this problem. And, indeed, even petitioner IBT has conceded that "Mr. Pur[illegible]s testimony focused on the registration requirements of the Act." IBT Br. at 110. Unfortunately, however, this focus has blurred petitioners' reading of this testimony. Petitioners' references to certain statements of Commissioner Purcell in the *1941 Hearings* and to the *1941 Opinion* are misleading because they are taken out of context: such statements were made in the context of whether all employee pension plan interests had to be registered under the 1933 Act. Thus, for example, Commissioner Purcell has stated:

> "Now, in anything that I have said, I do not mean to imply that every employees' plan requires registration. It is only those plans which involve the *sale* of an investment contract or some other type of security. . . Moreover, *even where the plan involves securities, registration is not required* in the many cases where the employees pay nothing for the securities, but receive an interest in an investment fund by way of bonus from their employer; for, of course, a gift is not a sale, and the Securities Act is concerned only with sales of securities. . .
>
> Similarly, compulsory plans *do not require registration*. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved." *1941 Hearings* at 895 (emphasis added).

Such a clear statement that compulsory, non-contributory pension plans do not need to register under the 1933 Act because there is no-sale *for registration purposes* need not have been made had Commissioner Purcell thought that interests in such plans were not securities.[58] Thus, although certain employee

58. Petitioners' reliance on statements by Congressman Wolverton in the *1941 Hearings* is equally misplaced. See Pet. App. p. 235a n. 32. Such statements reflected his concern that the amendments proposed by the SEC—setting out the "rigid" (*Mundheim and Henderson* at 811) conditions to be met by an employee pension plan to qualify for an automatic exemption from the registration requirements (and reproduced in *1941 Hearings* at 908)—would

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pension plans may or may not be subject to the 1933 Act registration requirements, the SEC interpretation that all such plans involve the presence of a security is both consistent and clear. Of course, this lawsuit expressly does not involve a violation of the registration requirements.

4. SEC Administrative Interpretation.

As noted above, the consistent interpretation of the SEC since the rejection of the 1934 amendment has been that an interest in an employee pension plan is a security. Petitioners' are just, plain wrong when they assert that the SEC only recently has adopted this view. Furthermore, at no point has the interpretation of the SEC been limited to any one particular type of employee pension plan. Petitioners have nowhere pointed out any statement by the SEC that interests in the so-called compulsory, non-contributory employee pension plans are not securities. Rather, the position that interests in all employee pension plans constitute "investment contracts" or "certificates of interest or participation in a profit sharing agreement" has been characterized as that "traditionally taken" by the SEC. *Mundheim and Henderson* at 801.

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put the SEC into the *substantive* business of regulating the internal workings of employee pension plans. For example, Congressman Wolverton stated:

> "By the Securities Commission getting into that field of *regulation*, it seems to me it is getting away beyond what the title of the Securities Act intended. . . . I cannot see the propriety of the basis upon which you are working in all this *pension regulation* into the Securities Act." *1941 Hearings* at 911 (emphasis added).

See also, *e.g.*, *1941 Hearings* at 912 ("Do you have any power in the Commission now to *direct* investments [of employee pension plans] in that type of securities?"). In response, Commissioner Purcell, not surprisingly, disavowed any such attempt in the SEC proposals to regulate in this fashion:

> "I am sorry, sir, to have to repeat again that we are not attempting any *regulation*. We are merely attempting to set standards for exemption from meeting the [*registration*] requirements of the Act." *Id.* at 911 (emphasis added).

This traditional position of the SEC has been confirmed by Manuel F. Cohen, former chairman of the SEC, who has stated categorically:

> "The first and perhaps the most important point I can make to this subcommittee [is that] . . . *Pension plans represent an investment medium*. Interests in a private pension plan *fall within the definition of a security* under the Securities Act of 1933, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute. . ." *1972 Hearings* at 251 (emphasis added).

Chairman Cohen continued by outlining the *similarities* between employee pension plans and mutual funds, quoted above at pp. 12-13. Then, Chairman Cohen made it quite clear that his remarks *included* compulsory, non-contributory employee pension plans, such as the Local 705 Pension Fund involved here:

> "Unlike the mutual fund investor, the employee's investment is usually mandatory. It comes with the job—that is, where it exists . . . Unlike the mutual fund investor who can demand the return of his investment at any time, the employee must leave his job under certain specified conditions before he has a right to the return of his investment and of his interest in the contributions of his employer made for his benefit." *Id.*

Former Chairman Cohen also included in the record of the *1972 Hearings* Chapter VIII of the Summary Volume of the *Institutional Investor Study* (1971) which states quite clearly that:

> "Interests of participants in [employee pension] plans meet the definition of 'security' under the Securities Act of 1933." *Id.* at 69.

That this conclusion also covers the type of multi-employer pension plan at issue here is also made clear in the Summary Volume of the *Institutional Investor Study* at 70 ("multiemployer pension-benefit plans generally are subject to all of the above legal provisions and must *in addition* comply with the provisions of the Taft-Hartley Act. . .) (emphasis added), and

in the full study report at p. 996 ("employees' interests in [compulsory non-contributory] . . . plan . . . recognized to be 'securities'.").

Perhaps the most telling point is that petitioners concede certain employee pension plans are subject (both to ERISA and) to the federal securities laws. Petitioners acknowledge that certain "voluntary and contributory" pension plans are subject to the antifraud rules as well as to the registration requirements of the 1933 and 1934 Acts.[59] Yet, the fact that these admitted securities—including that portion attributable to the employers' direct contributions—are sold in an employment context periodically over the employee's career has not generated any demand that they be excused from the requirements of the federal securities laws. Rather, SEC administrative practice here merely confirms the SEC position that interests in all employee pension plans are securities. Other plans, although perhaps not subject to the registration requirements, are not considered by the SEC not to involve the presence of a "security".[60]

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59. A participant's interest in an employee pension plan in which an amount in excess of the employer's contribution is allocated to the purchase of securities issued by the employer or by a company, directly or indirectly, controlling or controlled by, or under common control of, the employer, must be registered under the 1933 Act, usually on Form S-8, a short registration form developed for this purpose. More importantly, the interest which is so registered includes the employer's contributions as well as the employee's contribution. In addition, any such employee pension plan must comply with ERISA, and be qualified under Section 401 and other relevant sections of the Internal Revenue Code. See Letter of the Assistant Director, Division of Corporation Finance, SEC, to CCH, CCH Fed. Sec. L. Rep. ¶ 2105.51 (May 12, 1953); Letter of the Chief Counsel, Division of Corporation Finance, SEC, to CCH, CCH Fed. Sec. L. Rep. ¶ 2105.52 (August 1, 1962).

60. SEC Commissioner Harold M. Williams has thus recently stated:

> "Much the same approach has been taken by the Commission with respect to the applicability of the Securities Exchange Act to pension plans . . . Reflecting the Commission's views that interests in pension plans are securities—but should not be the subject of regulatory requirements otherwise applicable to such securities—the Commission, in 1965, specifically

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5. The 1970 Amendment to the 1933 Act.

Petitioners place great reliance on their interpretation of the Investment Companies Amendments Act of 1970 (the 1970 Act). However, the 1970 Act only goes to confirm the understanding of Congress that interests in employee pension plans are securities. In the 1970 Act, Congress—specifically recognizing that such interests are securities—provided for the exemption of certain of those securities from the *registration* requirements of Section 5 of the 1933 Act:

> "Section 3(a). Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities: . . .
>
> (2) . . . any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under Section 401 of [the Internal Revenue Code of 1954] . . ."

Section 3(a) of the Securities Act of 1933.[61] Consequently, if an employee pension trust fund is maintained at a bank, the interests in such a fund are securities which are exempt from registration. *Indeed, because most employee pension funds are bank maintained, registration is not required for most employee pension funds.* On the other hand, if an employee pension fund is maintained elsewhere, the clear Congressional implication[62]

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exempted pension plans, as issuers of securities, from the need to file periodic reports. That exemption is codified in Securities Exchange Act Rule 12h-2(a)."

Statement of SEC Chairman Williams before the Subcomm. on Labor of the Senate Comm. on Human Resources, (Oct. 11, 1977) (hereinafter referred to as *"Williams Testimony"*).

61. The 1970 Act provided for a similar amendment to the 1934 Act definition of exempted security. See Section 3(a)(12) of the Securities Exchange Act of 1934; Pet. App. p. 237a n. 34.

62. The Supreme Court has thus noted in *Tcherepnin* v. *Knight*, 389 U. S. 332, 341 (1967), that Congress would not have granted

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is that interests in this fund are securities which are not automatically exempt from registration. In either case, however, the interests in such an employee pension trust fund are securities.

Petitioners' attempt to restrict the clear language of the 1970 Act is clearly wrong. First, although the 1970 Act was designed to deal with a variety of problems, the applicability of the 1970 Act to bank common trust funds and to so-called H. R. 10 self employed retirement funds is dealt with in *other* language in amended Section 3(a)(2) and elsewhere in the Investment Company Act of 1940.[63] Consequently, Section 3(a)(2), as amended by the 1970 Act, deals with the exemption from registration of both interests in employee pension plans *and* interests in bank common trust funds. Second, the language itself of Section 3(a)(2) of the 1933 Act, as amended by the 1970 Act, clearly refers to "any interest or participation in a single . . . trust fund . . . which interest or participation is issued in connection with . . . a pension plan." This is an exact description of the interest plaintiff has acquired in the Local 705 Pension Fund.

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an exemption from the registration requirements for a withdrawable capital share issued by a savings and loan association "unless there was a general agreement that the Act's definition of security in § 2(1) brought building and loan shares within the purview of the Act."

63. Section 3(a)(2) of the 1933 Act thus also provides:

> "Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities . . . (2) . . . any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian . . . The Commission, by rules and regulations or order, shall exempt from the provisions of Section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of Section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors . . ."

See also Section 3(c)(11) of the Investment Company Act of 1940. 15 U. S. C. Section 80a-3(c)(11).

Petitioners' efforts, moreover, to make something of the difference between a pension "fund" and a pension "plan" are without meaning here. IBT Br. at 126. The Local 705 Pension Fund is, as petitioner Local 705 indicates, a *trust fund* created by a trust agreement. Local 705 Br. at 6. See Trust Agreement Creating the Local 705 International Brotherhood of Teamsters Pension Trust Article 2, "Creation of Trust Fund," Pet. App. p. 62a. And, Daniel's acquisition of an interest or participation in this trust fund constitutes his investment at issue here.

This conclusion is not altered by petitioners' focus on the phrase "maintained by a bank." The meaning of this phrase relates to the extent of the role which a bank might play with respect to any such trust fund. This is made clear from the House Committee Report on amended Section 3(a)(2) which uses the words "bank administered" in describing this section. Report of the House Comm. on Interstate and For. Comm. on the Investment Companies Amendments Act of 1970, H. R. Rep. No. 1382, 91st Cong., 2d Sess. at 10 (1970) (hereinafter referred to as "1970 Act House Report"). As a further example, since 1971 the SEC has interpreted the phrase "maintained by a bank" to require the bank to be more than a "mere custodian" for the funds held in trust, see, *e.g., Bank of America,* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,614 (1971); *Sterling National Bank and Trust Co.,* [75-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 80,433 (1976); but that the bank can have less than full investment powers. See, *e.g., Northeast Bancorp, Inc.,* [77-78 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 81,293 (1976); *Gilbert Assoc., Inc.,* [77-78 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 81,406 (1977).

In the instant case, the Local 705 Pension Fund may well be maintained by a bank. If so, the interests involved will be securities exempt from registration. Of course, exemption from registration does *not* mean exemption from either Section 17(a) of the 1933 Act or Rule 10b-5 of the 1934 Act. Although petitioners correctly note the manifold objectives of the 1970 Act, they cannot ignore the clear statement of Congressional intent:

> "[This section] would exempt . . . bank . . . *administered* corporate pension plans from the registration and reporting requirements of the Federal Securities Act, *but it does not exempt them from the antifraud provisions of those acts.*" 1970 Act House Report at 10 (emphasis added).

See Section 17(c) of the 1933 Act. This Congressional conclusion would, *a fortiori,* be even stronger with respect to pension plans not exempt from the registration requirements because they are individually, rather than bank, administered.

Petitioners at great length delve into the legislative history of the insertion of the phrase "single or" into amended Section 3(a)(2). In so doing, petitioners mistakenly assert that amended Section 3(a)(2) was designed to exempt from registration only the sales of interests in certain bank trust funds to the underlying pension funds and not the sales of interests in the underlying pension funds to its employee-investors. Such an argument can provide no support for petitioners. First, as noted above, the clear language of amended Section 3(a)(2) covers an interest in the Local 705 Pension Fund trust fund and not some separate bank trust fund in which the Local 705 Pension Fund may invest. Whether the Local 705 Pension Fund is exempt from registration pursuant to Section 3(a)(2) thus depends on the degree of bank "administration" of such Fund.

Second, it makes better common sense to read the "single . . . trust fund" phrase to apply to the underlying pension fund and not to a bank trust fund sold to an underlying pension trust fund. Otherwise, the question would be: Why must a single bank trust fund, 100 percent of the interest of which is to be sold to a single underlying pension trust fund, register such *single,* lump sale under the 1933 Act even without the Section 3(a)(2) exemption? The Section 3(a)(2) amendment is needed because it refers to the sales of interests in the underlying pension trust fund to the *many* employees who participate in it.

Finally, the addition of the "single or" language followed from a suggestion of the General Counsel of Sperry Rand. Letter of Stannard Dunn, General Counsel, Sperry Rand Corp., Hear-

ings Before the Subcomm. on Comm. and Fin. on H. R. 11995, House Comm. on Interstate and For. Comm., 91st Cong., 1st Sess. at 929-30 (1969). He noted that it was the long time administrative practice of the SEC to exempt by no-action letter from the registration requirements interests in most employee pension funds (*viz.*, those in which an amount in excess of the employer's contributions is not invested in employer securities), meaning the *underlying* pension trust funds and not the collective bank trusts in which some are invested. He thus suggested that such policy be codified following the earlier 1967 suggestion of the SEC.[64] Hearings Before the Subcomm. on Comm. and Fin. on H. R. 14742, House Comm. on Interstate and For. Comm., 90th Cong., 2d Sess. 121 (1968). This suggestion was adopted first by the House and subsequently in conference, and the sale of interests in such employee pension funds was by its enactment exempted from registration under the 1933 Act.[65]

64. The fact that the actual language suggested by Mr. Dunn—the appropriate insertion of the clause "or in any employee's stock bonus, pension, or profit sharing trust"—was not adopted is unimportant since the phrase actually used—the appropriate insertion of the clause "single or"—had the same effect.

65. Two subsequent changes in the language of the proposed amendment to Section 3(a)(2) further reflect the change in focus of the amendment to cover not only interests in collective funds, but also interests in the individual employer's pension fund. Thus, although the conference committee agreed with the House to exempt both single and collective funds, it modified the House provision in one respect. Since that provision exempted interests in all pension funds, it was contrary to the longstanding position of the SEC that non-registration of pension interests did not apply in all situations. Specifically, the SEC requires registration where an amount in excess of the employer's contribution to a pension fund is allocated to the purchase by the fund of securities issued by the employer. In order to conform the exemption to SEC practice, a provision was added in conference excluding the above situation from the exemption.

However, the addition of this exclusion created yet another problem, which was remedied in separate legislation adopted a week after the passage by Congress of the conference bill. As noted, the exclusion applied whenever an amount in excess of the employer's contribution was used to purchase *securities* issued by the employer. Since interests in pension funds are themselves securities, the exclusion might have been interpreted to subject to registration *all pension plans* where any money is contributed to the pension fund *directly*

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Consequently, it was this long standing administrative policy—referred to by Mr. Dunn—which was codified into Section 3(a)(2).[66]

No recourse to a colloquy on the floor of the House is needed to confirm this interpretation of Section 3(a)(2).[67] As noted above, the House Report itself describes this Section:

> "The bill would exempt . . . bank . . . administered *corporate pension plans* from the registration and reporting requirements of the Federal Securities Acts, but it does not exempt them from the antifraud provisions of those acts." 1970 House Report at 10 (emphasis added).

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by employees. In such plans, it could be argued that this money is purchasing securities of the employer—viz., the interests in the pension plan. There is no indication, as petitioners assert, that this second change was meant *only* to deal with employee pension plans maintained by a bank (or insurance company) for its *own* employees. Pet. Br. at 132. Accordingly, Section 3(a)(2) was amended again to make it clear that the term "security issued by the employer" as used in the amendment did not include the securities consisting of the interests in the pension fund. See 116 Cong. Rec. at 40608 (Dec. 9, 1970) for a discussion of this final change.

66. The Conference report thus described this change as follows:

> "The House amendment would have codified a long established administrative practice of the Commission by making it clear that this *exemption* [*from registration*] *applied not only to collective trust funds, but also to single trust funds.* The conference agreement follows the House version."

H. Conf. Rep. No. 1631, 91st Cong., 2d Sess. 31 (1971).

67. The colloquy cited by petitioner IBT does not in any event explain Section 3(a)(2) in the fashion petitioner argues. IBT Br. at 126-127. All it does is restate the Section 3(a)(2) exemption for single trust funds and confirm the long standing SEC administrative practice that employee pension plans in which amounts in excess of employer contributions are invested in employer securities must register under the 1933 Act. By confirming the latter codification of the SEC administrative practice referred to by Mr. Dunn, such colloquy in fact supports the interpretation above that the phrase "single . . . trust fund" refers to the underlying pension trust fund and not to some single bank trust fund in which the underlying pension fund may invest.

The language is unambiguous: the corporate pension plans themselves are exempted and not some single bank trust fund in which they may invest.

Consequently, Congressional intent in the securities law area is best seen by looking directly to the federal securities laws and the recent Investment Company Amendments Act of 1970. It will thus be demonstrated below that the language and legislative history of ERISA do not establish a Congressional intent to deny employees investing in pension plans the protection of the antifraud provisions of the federal securities laws. Rather, ERISA was designed to cure a variety of abuses in the pension area which complement the applicability of the federal securities laws. See *SEC* v. *Garfinkle*, CCH Fed. Sec. L. Rep. Para. 95,020 ("the fact that ERISA gives the Secretary of Labor power to regulate welfare funds in no way offsets the SEC's authority over securities transactions . . . the SEC clearly has concurrent, if not exclusive, standing to sue").

F. Blue Sky Law Supports the Characterization of an Interest in the Local 705 Pension Fund as a Security.

That an interest in an employee pension plan is a security finds further support in both the state definition and the Uniform Securities Act.[68] The Illinois Securities Law of 1953 definition of "security" is for our purposes identical to that found in the federal securities laws. Ill. Rev. Stat. Ch. 121½, Section 137.2-1. That it includes interests in employee pension plans is made clear by the exemption of such "securities issued by or pursuant to . . . employee pension trusts or plans" from the registration

68. The relevance of what is considered a "security" under state law to the definition of "security" under the federal securities laws is demonstrated by the approval by the Supreme Court in *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202, 211-212 (1967), of Professor Loss' statement:

> "At the state level the Uniform Securities Act makes explicit what seems to be the view of the great majority of blue sky administrators to the effect that variable annuities are securities." 1 Loss, *Securities Regulation* 499.

requirements. Ill. Rev. Stat. Ch. 121½, Section 137.3-0.[69] A similar definition of "security" and exemption from registration for "any investment contract issued in connection with an employees' . . . pension . . . plan" is found in the Uniform Securities Act.[70] 7 Uniform Laws Ann., Uniform Securities Act §§ 501(1) and 402(a)(11) (1970). Of course, because ERISA specifically saves all state securities laws, the sale of securities by employee pension plans remain subject to the regulation of all state blue sky laws. Section 514(b)(2)(A) of ERISA.

G. An Interest in a Pension Fund Is Analogous to an Interest in a Mutual Fund or a Variable Annuity.

The interest of the plaintiff in the Local 705 Pension Fund is for our purposes analogous to both an interest in a mutual fund and an interest in a variable annuity contract.

As noted above (pp. 12-13), the similarities between an interest in a mutual fund acquired through a periodic investment program and an interest in an employee pension plan have been recognized by the SEC for over 35 years. For example, SEC Commissioner Purcell noted at the *1941 Hearings* that Congress, having recognized the similarity between employee pension plans and ordinary mutual funds, believed interests in such plans to be securities and so provided in enacting the Investment Company Act of 1940:

> In fact, many employee plans are in the nature of investment trusts and are *indistinguishable in legal effect* from investment companies offering securities to the public at large. The Congress in the Investment Company Act of 1940 recognized this fact by providing certain limited exemptions from the provisions of that act for 'employees'

69. The Chamber of Commerce likewise has counted 32 states which "provide an exemption for securities issued in connection with an employee benefit plan." Chamber of Commerce Br. at 14 and n. 15. Clearly, such an exemption would not be needed were such employee pension plan interests not considered to be "securities."

70. The Uniform Securities Act has been adopted in 32 jurisdictions. 7 Uniform Laws. Ann.: Cumulative Annual Pocket Part. at 342 (1976).

> securities companies' in section 3 (c) (13) [now Section 3 (c) (11)] and 6(b)." *1941 Hearings* at 895 (emphasis added).

Congress thus defined an "employees' securities company" as one type of "investment company" in Section 2 (a) (13) of the 1940 Act. Consequently, any employee pension plan which falls within that definition is subject to the registration requirements of the 1940 Act unless otherwise excluded or exempted.

Petitioner IBT's discussion on this point is without focus and provides no support for its position. First, both of the SEC rulings cited involved (admitted) "employees' securities companies" (as defined in Section 2(a)(13)) which sought and received exemptions, pursuant to Section 6 (b), from many of the requirements of the 1940 Act. *Electrical Securities Corporation*, [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,227 (1941) (general exemption granted except from Section 30 (a)); *G. E. Employees Securities Corporation*, [41-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,226 (1941) (exemption granted from provisions applicable to closed-end non-diversified management companies). Second, an "employees' securities company" (as defined in Section 2 (a)(13)) can, indeed, take the form of a "trust." See *General Electric Company—General Electric S & S Program Mutual Fund*, [67-69 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,630 at p. 83,354 (1968) (G. E. S & S Program Mutual Fund is a "trust" which qualifies as an "employees' securities company" for certain exemptions pursuant to Section 6(b)).

Petitioner's attempt to make something of the difference between Sections 3(c)(11) and 6(b), consequently, just does not work. This was recognized in 1941 by the Assistant General Counsel of the SEC:

> "Quite apart from the Securities Act of 1933, the Investment Company Act of 1940 also has a bearing upon certain types of employees' pension or profit-sharing plans. Any plan which falls within the definition of an "employees' securities company" under Section 2 (a)(13) of that Act

> must register unless it is excluded from the definition of the term 'investment company' by Section 3(c)(13) or exempted from registration by an order of the Commission upon application and hearing under Section 6(b)." *1941 Opinion.*

For a practical example, the trust involved in *General Electric S & S Program Mutual Fund, supra,* was not able to take advantage of what the SEC called the "complete exemption" of Section 3(c)(11)—because it was not qualified under Section 401 of the Internal Revenue Code—and thus had to make do with the partial Section 6(b) exemption granted to it. *Id.* at p. 83,355. In either event, the important fact for our purposes is that an employee pension plan is (1) indistinguishable "in legal effect" from a mutual fund, and, in recognition of that similiarity, (2) falls within the definition of a mutual fund and, in certain cases, within the definition of "employees' securities company," unless completely exempted by Section 3(c)(11)—when also a trust qualified under Section 401 of the Internal Revenue Code—or otherwise exempted by Section 6(b).

Both *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65 (1959) (*VALIC*), and *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967), also support the conclusion that an interest in the Local 705 Pension Fund is a security. In *VALIC*, the Court held that variable annuity contracts were securities under the federal securities laws and not insurance policies exempt from registration under Section 3(a)(8) of the 1933 Act. And, in *United Benefit Life*, the Court also held that a flexible fund annuity—in which the annuity holder had a minimum guarantee as well as a participating interest in an investment fund—was a security under the federal securities laws and not exempt under Section 3(a)(8). The securities at issue in both *VALIC* and *United Benefit Life* were investment vehicles designed to provide the buyer with a financial return on retirement. Even though both the annuity contract in *VALIC* contained several elements of conventional life insurance, *VALIC* at 80-81 (Brennan concurring opinion), and the flexible fund

annuity in *United Benefit Life* contained a minimum insurance type guarantee, *United Benefit Life* at 205-208, the Court construed them as "securities" because of their similarity to a mutual fund. As such, the detailed disclosures required by the 1933 Act (and the 1940 Act) were needed to provide the annuity buyer with protection from fraud. *VALIC* at 76-77, 85; *United Benefit Life Ins.* at 212.

In a similar fashion, an investment in the Local 705 Pension Fund is an investment vehicle designed to provide the buyer with a financial return on his retirement akin to a mutual fund or variable annuity. First, the fact is clear that the investment performance of an employee pension plan does, indeed, affect the economic return to a participant on his retirement. See pp. 10-11 and 59-60, *supra*. Second, and particularly with respect to the Teamster pension funds, the risk of loss is substantial. See pp. 59-60, *supra*. Third, as in *United Benefit Life*, the "advertisements" of the Local 705 Pension Fund "appeal[ed] to the purchaser not on the usual . . . basis of stability and security but on the prospect of 'growth' and sound investment management." *Id.* at 211 and n. 15. See pp. 11 and 60, *supra*.

Just as the Court in *VALIC* and *United Benefit Life* separated the conventional life insurance attributes from the security involved, so is the employment relationship entered into by plaintiff here separate from the security he has purchased. There is no reason why plaintiff cannot be both an investor and an employee. See pp. 45-46, *supra*. Indeed, other courts have found no problem with this. *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972); *SEC* v. *Addison*, 194 F. Supp. 709 (N. D. Tex. 1961). Thus, the court in *SEC* v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473, 476 (5th Cir. 1974), separated the marketing of cosmetics aspect from the recruiting aspect of the pyramid sales scheme there at issue, commenting "case law countenanced the fragmented approach." And, certainly, those employees who invest in employee pension plans which concededly involve securities subject to the 1933 Act registration requirements are both employees and investors.

Finally, in *VALIC* and *United Benefit Life Ins.*, the fact that the issuers were subject to stringent state insurance company regulations did not fill the need for full and fair disclosure as required under the federal securities laws:

> "The emphasis is on disclosure: the philosophy of the Act is that full disclosure of the details of the enterprise in which the investor is to put his money should be made so that he can intelligently appraise the risks involved.
>
> The regulation of life insurance and annuities by the States proceeded, and still proceeds, on entirely different principles. It seems as paternalistic as the Securities Act of 1933 was keyed to free, informed choice. Prescribed contract clauses are ordained legislatively or administratively. Solvency and the adequacy of reserves to meet the company's obligations are supervised by the establishment of permissible categories of investments and through official examination . . . In this sort of operation, examination by state insurance officials to determine the adequacy of reserves and solvency becomes less and less meaningful."

VALIC at 77 and 85 (Brennan concurring opinion).

In similar fashion here, the existence of ERISA does not preempt the need for a truthful statement of all material risks attendant to an investment in the Local 705 Pension Fund prior to the investment decision.

H. An Investment in the Local 705 Pension Fund Is Also a "Certificate of Interest in or Participation in a Profit Sharing Agreement."

The plaintiff's investment in the Local 705 Pension Fund is also a "certificate of interest in or participation in a profit sharing agreement" and, as such, is included within the definition of "security" under the federal securities laws. This has been recognized by the SEC since 1941:

> "you are correct in surmising it to be our position that the security which is involved within the meaning of Section 2(1) of that Act in connection with the offer or sale of interests in certain types of [employee pension] plans . . . frequently . . . may come . . . within the phrase 'certificate

of interest or participation in a profit sharing agreement.'" *1941 Opinion.*

Thus, Daniel holds an interest or participation in the Local 705 Pension Fund. This Fund is managed by the Local 705 Pension Fund trustees with a view to making a profit and paying out such profits, along with the initial investments, to retiring Local 705 union members in the form of retirement benefits. In other words, disregarding form for substance, and with an "emphasis on economic reality," *Tcherepnin, supra,* at 336, the Local 705 Pension Fund is a "profit sharing agreement" because those investors who hold an interest therein share the profits made. *SEC* v. *Wickham,* 12 F. Supp. 245, 249 (D. Minn. 1935); *SEC* v. *Addison,* 194 F. Supp. 109, 721-22 (D. Tex. 1961). That the particular sharing formula depends upon a variety of factors, including vesting requirements, does not destroy this conclusion. There is no requirement that the sharing be done on a per capita or pro rata basis. Neither is there any requirement that the "participation" in the profit sharing agreement be evidenced in writing by a written certificate or otherwise. See p. 33, *supra.*

I. The Security in the Local 705 Pension Fund Was Acquired by Plaintiff in a "Sale".

1. The Statutory Definitions.

The term "sale" has been defined in Section 2(3) of the 1933 Act to include:

> *"Every* . . . disposition of a security or interest in a security for value." (Emphasis added).

And, the term "sale" has been defined in Section 3(a)(14) of the 1934 Act to include:

> "Any contract to sell *or otherwise dispose of.*" (Emphasis added).

Whether there is a "sale" of a security in the Local 705 Pension Fund *for purposes of the 1934 Act* thus depends on whether

there has been a sale *or other* disposition of such security. Contrary to petitioners' assertions, the plaintiff has acquired some sort of an interest in the Local 705 Pension Fund. And, as shown above, even though an undivided interest not evidenced by a certificate, that interest is a security. Consequently, whether by gift, purchase, or otherwise, there has been a *disposition* of this security in the Local 705 Pension Fund to the plaintiff. The *unambiguous* definition of "sale" in the 1934 Act has thus been satisfied.[71]

This is particularly so because policy considerations, as well as economic reality, compel the importance of a "non-restrictive" approach to the definition of "sale." Employee pension plans have become so large that they now play an integral role in the financial well being of tens of millions of Americans. Petitioners' argument that no investment decision is present is thus wrong. As noted above, there is simply no reason why an employee cannot also be an investor. See pp. 33-34 and 45-46, *supra;* see also *1941 Opinion* at p. 75,387 (calling such a person an "employee-investor"). Further, petitioners are again wrong when they assert that an employee pension plan is of no importance to an employee in his investment decision-making. This assertion just does not make any common sense and the studies show it.

2. Plaintiff Has Acquired His Security in the Local 705 Pension Fund in a Disposition for Value.

Whether there is a "sale" of the security in the Local 705 Pension Fund for purposes of *the 1933 Act* depends on whether

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71. The court in *International Controls Corp.* v. *Vesco,* 490 F. 2d 1334 (2d Cir.), *cert. den.* 417 U. S. 932 (1974), has thus held that a dividend consisting of stock in a corporate spin-off was a "sale" of the stock even though the receiving shareholders had no control over the issuance of the dividend and gave *no consideration* for it. The court reasoned (*Id.* at 1345):

> "[I]t is a transaction involving, as it unquestionably does, the disposition of securities and, therefore, one for which the corporation is well deserving of and entitled to the protection of § 10(b)."

there has been a (1) disposition of such security (2) for value. Clearly, as shown above, there is no question but that the first element of this definition is present here. If this disposition has been for "value", then the second element of the definition of sale in the 1933 Act will also be present. That value has been given, however, is just as clear as the presence of a disposition. There is no requirement that the value element can be satisfied only by a cash payment or by the delivery of property. Here, the value element is satisfied by the plaintiff's giving of services, or, alternatively, by the contribution on behalf of the plaintiff of a portion of his economic compensation.

As discussed above (see pp. 51-57) the giving of services constitutes value and adequate consideration for an investment in the Local 705 Pension Fund.[72] Indeed, given the vast amounts paid by employees or on their behalf into employee pension plans—now estimated to exceed $150 billion—the only responsible view is that such monies are invested in return for value given by the employee in the form of services rendered. While this is true for a corporate pension plan voluntarily established by an employer without bargaining, it is even more so for those multi-employer union pension plans which are the product of collective bargaining.

Equally important, both Congress and the courts have adopted the view that employer payments to employee pension plans constitute a part of the wage structure. See pp. 52-56, *supra*. The consideration here given by the plaintiff for the acquisition of a security in the Local 705 Pension Fund thus includes not only the services he has rendered but also, by another view, a portion of the wages he has received.

The conclusion that the giving of services in exchange, in part, for the security involved constitutes "value" is not affected by the petitioners' characterization of the Local 705 Pension Fund

72. Most courts find adequate consideration in the fact of continued employment, without a showing that the employee would not have remained at his job in the absence of the pension plan. Note, Problems of Private Pension Plans, 70 *Harv. L. Rev.* 490, 494 (1957).

as "non-contributory".[73] To call a pension plan non-contributory is a misnomer if it is also to mean that members of the plan do not give value in exchange for their acquisition of securities in the plan. The Congress, the courts, and commentators have uniformly recognized that:

> Regardless of the form they take, the employers' share of the costs of these plans or the benefits the employers provide are a form of compensation.

S. Rep. No. 1440, 85th Cong., 2d Sess. at 4 (1958). See, *e.g.*, Hearings Before the Special Subcomm. on Labor of the House Comm. on Ed. & Labor, 87th Cong., 1st Sess. at 27 (1961) (Secretary of Labor Goldberg) (pension element is part of "wage settlement"); See *Lewis* v. *Benedict Coal Co.*, 361 U. S. 459 (1960); *Los Angeles Department of Water and Power* v. *Mannhart*, 46 U. S. L. W. 4347 (April 25, 1978); *Allied Structural Steel Co.* v. *Spannaus*, 46 U. S. L. W. 4887 (June 28, 1978); *Inland Steel* v. *NLRB*, 77 NLRB 1 (1948), enf. granted 170 F. 2d 247 (7th Cir. 1948), *cert. den.* 336 U. S. 960 (1949). Petitioners are thus a generation out of date in their attempt to apply the "gold watch theory"[74] of employee pension plans to the federal securities laws. IBT Br. at 62.

These bargained for employer contributions on behalf of the Local 705 union members thus represent a substantial economic portion of their wages received in consideration of services performed. From the employer's point of view, the pension fund payments constitute part of the employee's compensation package: whether paid as wages or pension contributions, both are

73. "The reality of the situation is that the employee contributes the fruits of his labor, regardless of the form of contribution. All benefit plans are compensation for employment; therefore all plans are contributory. Likewise, all employment choice is voluntary; therefore all plans are voluntary." Note, Employee Compensation Plans: The Need for Stricter Regulation, 6 *St. Mary's L. J.* 192, 204 (1974).

74. This is Senator Javits' description of the now discredited "gift theory" of employee pension plans. Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits (Sept. 19, 1974).

cash outlays, tax deductible to the employer. However, as part of an employee's compensation, such payments constitute the employee's giving of value for his security in the Local 705 Pension Fund.

The fact that the dollars invested go directly from the employer into the Local 705 Pension Fund, of course, makes no difference. This is merely a reflection of certain tax provisions designed to encourage the adoption of employee pension plans. See p. 4 n. 5, *supra*. For example, that payment of value can be indirect is confirmed in *SEC* v. *Harwyn Ind. Corp.*, 326 F. Supp. 943 (S. D. N. Y. 1971). There, securities in a subsidiary were spun off by the parent corporation to the parent corporation shareholders without direct payment by the shareholders. In holding that the parent corporation shareholders acquired the securities of the subsidiary for value, meeting the definition of sale under the 1933 Act, the Court stated:

> "We see no reason to construe §§ 2(3) and 5 as requiring that the 'value' requiring registration must flow from the immediate parties who received the stock [of the subsidiary] . . ."

Id. at 954. Thus, value flowed there *not* directly from those who acquired the securities involved (the parent corporation shareholders) but was inherent in the parent's prior transfer of assets to the subsidiary. Here, the source of the value given is the employee even though the form of payment may be indirect. The important point is that in both *Harwyn* and here value is given in return for the disposition of a security. In *Harwyn*, a third party payment satisfies the "value" requirement. Here, whether from the employee indirectly or from the employer directly, value is clearly given for the disposition of a security in the Local 705 Pension Fund.[75]

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75. Cf. *Hector* v. *Wiens*, 533 F. 2d 429, 431-433 (9th Cir. 1976) (investor in a cattle feedlot investment contract scheme gave his promissory note to a bank and the bank gave money to the feedlot); *International Controls Corp.* v. *Vesco*, 490 F. 2d 1334 (2d Cir. 1974).

In any event, there is no conceptual distinction between the instant facts and the situation wherein the employee first receives as part of his wages the employer contribution in cash and then pays over such cash into the pension fund. See p. 46, *supra*. In both cases, value is given and a security is received. In fact, the employees must vote on the union negotiated package dividing employee compensation between cash wages, pension investments, and other benefits. Surely, few, if any, Local 705 members would vote for a labor contract which provides for employer contributions to a pension fund in lieu of additional wages if they knew they had a minimal chance of ever receiving back any retirement benefit, or if they knew their investments would be poorly managed.

In fact, the presence of value given in this situation has been affirmed by judicial interpretation. Thus, in *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass. 1972), an employee brought a claim under the antifraud provisions of the federal securities laws against his employer in connection with certain incentive stock options issued to the employee. There, the defendants argued, as petitioners do here, that the antifraud rules should not apply to a security which is "incident to and part and parcel of an employment contract for personal services," and that "certainly, Section 10 of the 1934 Act and Rule 10b-5 promulgated . . . thereunder were not intended to create a federal right for alleged misrepresentations in private employment negotiations." *Id.* at 1286-87. In response the Court stated (at 1287-88):

> "No compelling reason has been suggested to this Court why one who, in the interest of promoting his company and employing the most talented people in a particular field, engaged in fraudulent practices in connection with the offer or sale of securities should enjoy any greater freedom from the operation of the federal securities laws than one who perpetrates a fraud without promotional or employment motive."

Further, in response to the defendants' argument that no "sale" was involved because of the employment context, the court noting that (at 1289):

> "the broad design of the federal securities laws should not be frustrated by restrictive application of the purchase-sale requirement . . . [and that] the wording of each definitional section warrants non-restrictive interpretation of the concept of sale . . ."

held that

> "plaintiff's performance of service satisfies the 'value' requirement of a sale of securities." *Id.*[76]

Similarly, the court in *SEC* v. *Addison,* 194 F. Supp. 709, 722 (N. D. Tex. 1961) said

> "The giving of personal loan notes, evidences of indebtedness, certificates of interest or participation in profit-sharing agreements and investment contracts whether as a gift out of gratitude for, or in consideration or exchange of, the personal loans of money *or services of labor rendered,* constitute sales of securities because either way it amounts to a disposition or giving of a security for value." (Emphasis added).

Accord, *Lawrence* v. *SEC,* 398 F. 2d 276 (1st Cir. 1968); *cf. Vine* v. *Beneficial Finance Co.,* 374 F. 2d 627, 634 (2d Cir. 1967). Further judicial support is found in the cases under Section 16(b) of the 1934 Act which hold that securities issued to an employee for services under an employment contract are acquired in a purchase. See *Truncale* v. *Blumberg,* 88 F. Supp. 677 (S. D. N. Y. 1950).

The conclusion that value is given here has also received support from recent SEC interpretation. For example, in *Oklahoma National Gas Co.,* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,583 (1971), the employer established an Executive Incentive Compensation Plan whereby certain em-

76. See *Spector* v. *L. D. Motor Inns, Inc.,* CCH Fed. Sec. L. Rep. ¶ 95,261 at 98,346 (5th Cir. 1975) ("The 'purchase or sale' referred to . . . are not limited to technical common law sales").

ployees would receive, if a vesting requirement were met, certain deferred benefits, all in exchange for no consideration other than continuing to work for the employer for the duration of the Plan. There, the Commission refused to issue a no-action letter because it considered that "value will pass to ONG [the employer] in the sense that Participants will be induced to continue their employment with ONG from which ONG will derive substantial benefits." *Id.* at 81,252. Similarly, the SEC refused to issue a no-action letter because of the presence of value, and hence a sale, through the continuing performance of services in a matter involving a stock bonus plan for employee inventors, *Allis-Chalmers Corp.,* [72-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,803, a matter involving the disposition of employer securities to high performing salesmen, *Keene Corp.,* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,475, and a matter involving an executive bonus plan, *Missouri Research Laboratories, Inc.,* [72-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,036. *Cf. Girard Trust Bank,* [71-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,547.

Petitioners' citations to allegedly contrary SEC interpretations are inapposite because they were made in the context of whether all such pension plan interests have to be registered under the 1933 Act.[77] As made clear by both the assistant general counsel of the SEC in the *1941 Opinion* and by Commissioner Purcell in the *1941 Hearings,* compulsory and non-contributory employee pension plans do not have to register

77. The court in *Harwyn,* 326 F. Supp. at 953-54, has thus rejected the same sort of argument petitioners assert here:

> "Defendants take the position that a long-standing loophole in the 1933 Act had been recognized by the Commission and relied upon by counsel as permitting spin-offs of the type here involved to be made without registration. . . . Feeding upon itself the view became accepted as a 'loophole' that could be closed only by Congress. . . . [However,] to stop the abuse of what had theretofore been . . . a relatively harmless crack in the integrated structure of the securities laws . . . [and] in interpreting the statute we must look to its overall purpose, which is to provide adequate disclosure to members of the investing public, rather than engage in strangulating literalism."

under the 1933 Act because for purposes of the registration requirements such plans do not involve a sale.[78] See pp. 64-69, *supra*. As such, this no-sale theory was part and parcel of old Rule 133 and was *only* applied in the context of the registration requirements. Finally, as noted below (see pp. 99-104), petitioners' citations to the legislative history of the Welfare and Pension Plans Disclosure Act and to ERISA are inapposite because they were made in the context of the substantive regulatory legislation then under discussion—and not in the context of the far different types of obligations imposed by the antifraud rules of the securities laws.

3. There Is No "Volitional" Requirement to the Definition of Sale.

The presence of both elements of the definition of "sale" under the 1933 Act should end the inquiry. However, petitioners argue further that because the contribution is "compulsory" there can be no sale—despite the categorical language of the statute that "*every* disposition of a security . . . for value" is a sale. This attempted artful dodge is what Judge Wisdom has cautioned against: "The securities laws are intended to protect investors, not merely to test the ingenuity of sophisticated corporate counsel." *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579, 592 (5th Cir. 1974).

78. The second *1941 Opinion* thus states:

> "No 'offer' or 'sale' is involved in the case of a noncontributory plan, where the employees are not requested to make contributions, or in the case of a compulsory plan, where there is no element of volition on the part of employees whether or not to participate and make contributions. Thus, there are both the presence of a 'security' and the presence of a 'sale' *in those cases in which the Commission considers that registration of interests in employees' plans is required.*" (Emphasis added).

There is no "volitional" element contained in the definition of sale in the federal securities laws. The words "dispose" and "disposition" are not modified by the adjective "voluntary." Indeed, the recent Supreme Court decision in *Ernst and Ernst* v. *Hochfelder*, 47 L. Ed. 668, 679 (1976) underscores the importance of this statutory language.[79] However, even if required, "volition" is present here in that every Local 705 member has the option of not working for his present employer and thereby not purchasing the security. See n. 73, *supra*. Thus, the Affidavit of plaintiff makes it clear that he would not have worked for a Local 705 covered employer had full and fair disclosure been made with respect to the Local 705 Pension Fund. Daniel Affidavit Para. 7.

Volition is also present in the individual voluntary act of each Local 705 member exercising his vote as to whether to accept or reject the labor contract which sets out the required employer contribution. The inescapable fact is that an employee pension plan is an important determinate in an employee's employment decision.[80] This is especially true in light of the extent of job mobility in the country today.[81] It is thus likely that an employee

79. See *Blue Chip Stamps, supra*, at 756 ("The starting point in every case involving construction of a statute is the language itself") (J. Powell concurring).

80. For example, then Secretary of Labor Arthur Goldberg has testified:

> "It is commonplace today when you go into a firm for employment that one of the things you discuss is what type of welfare and pension plan an employer has. That is an essential condition of employment as any employer, I am sure, would tell you testifying before you."

Hearings Before the Special Subcomm. on Labor, House Comm. on Ed. and Labor, 87th Cong., 1st Sess. at 32 (1961); See S. Rep. No. 1734, Welfare and Pension Plan Investigation, 84th Cong., 2d Sess. 11-13 (1956); Hearings Before the Subcomm. on Labor, S. Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 99 (1972) (then Secretary of Labor Hodgson) ("Indeed, the variety of pension plan types is a significant element in the competition among employers for the workforce").

81. The Bureau of Labor Statistics has, for example, found that in a period of one year, ten percent of the labor force shifted from

(Footnote continued on next page)

will be faced with a number of employment decisions in his lifetime and, as he gets older, such shifts will be more and more affected by the pension plan offered by his employer. Accordingly, an employee will be faced with a meaningful decision, even in the case of a compulsory plan, whether to acquire an interest in a pension fund. And, this voluntary decision is sufficient to satisfy the "sale" requirement under the antifraud provisions of the securities laws.

Finally, diluted from the *1941 Opinion*, the volition argument is part and parcel of the now rescinded Rule 133. 17 C. F. R. Section 230.133 (1964). Rule 133 provided that, if a merger were authorized by an appropriate majority vote binding on all shareholders, there would be "no sale" of a security exchanged for a new security in a merger because of the lack of a volitional element. Even while applicable, however, Rule 133 was interpreted by both the SEC and the courts to bar the existence of a sale because of its compulsory nature *only* for purposes of the registration requirement, and *not* to deny the existence of a sale for purposes of the antifraud provisions. Sec. Act. Release No. 3420 (1951).

This Court in *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1959), has, for example, impliedly rejected the "volition argument." There, the Court held that a corporate merger involved a "sale" for purposes of the antifraud rules, notwithstanding the existence of Rule 133 providing that "no-sale" was involved for the purposes of the registration requirements. See, *e.g., Exchange National Bank of Chicago* v. *Touche Ross and Co.*, [76-77] CCH Fed. Sec. L. Rep. ¶ 95,614 at p. 90,064 (2d Cir. 1976) ("The purposes of the registration and antifraud provisions differ . . ."). This Court has thus recognized the appropriateness of treating a transaction as a sale for purposes of the antifraud rules, but not for purposes of the registration

(Footnote continued from preceding page.)
one job to another. See Hearings Before the Subcomm. on Labor, S. Comm. on Labor and Public Welfare, 90th Cong., 2d Sess. 249-254 (1968).

requirements.[82] Petitioners thus misread *National Securities*. Whether a *dissenting* shareholder in *National Securities* ultimately agrees to exchange his shares in the merger or seek an appraisal remedy, a "sale" still exists over his objections—albeit compulsory. In fact, many cases have held that under the antifraud rules a "sale" may occur in a variety of situations where there is no "voluntary" action by the alleged purchaser. See, *e.g., Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262, 267 (7th Cir. 1967); *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627, 635 (2d Cir. 1967); and *Voege* v. *Amer. Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965); *Coffee* v. *Permian Corp.*, 434 F. 2d 383 (5th Cir. 1960).

Rule 133 was in any event roundly criticized, 1 Loss, *supra*, 528-534, and rescinded in 1972. Sec. Act. Release No. 5246 (1972); 17 C. F. R. 230.145 (1973). In rescinding Rule 133 the SEC rejected the compulsory, lack of volition argument:

> "The Commission is of the view that the "no-sale" approach embodied in Rule 133 overlooks the substance of the transactions specified therein . . . The fact that such relationships [between stockholders and a corporation] are in part controlled by statutory provisions of the state of incorporation does not preclude as a matter of law the application of the broad concepts of "sale", "offer", "offer to sell", and "offer for sale" in Section 2(3) of the Act which are broader than the commercial or common law meanings of such terms.
>
> The basis on which the "no-sale" theory is predicated, . . . in the Commission's opinion, is at best only correct in a formalistic sense and overlooks the reality of the transaction.
>
> The corporate action . . . is derived from the individual consent given by each shareholder in voting on a proposal to merge . . . The corporate action . . ., therefore, is not some type of independent fiat but is only the aggregate effect of the voluntary decisions made by the individual stockholders to accept or reject the exchange." *Id.* at 2.

82. It is certainly no new idea that "the same words may have different meanings in different parts of the same act . . ." *Lamar* v. *United States*, 240 U. S. 60, 65 (1916) (Holmes, J.).

The same reasoning of the SEC can be applied to reject the application of the "no sale" theory to the instant case where the pension fund is a product of collective bargaining. The collective bargaining agreement between an employer and his employees is negotiated by Local 705. The resulting labor contract will allocate a certain portion of employee compensation to employer pension fund contributions (and other benefits) and the balance to cash wages. This labor contract will then be presented to the Local 705 union members for their vote. A volitional element is thus present when the Local 705 members vote to ratify or reject the labor contract encompassing such Local 705 Pension Fund investments. The effect is the same as a shareholder vote on a merger proposal.[83] The fact that a merger plan or a labor contract will contain a myriad of other features does not detract from the presence of a volitional element with respect to the exchange of value. The Local 705 Pension Fund contributions are not some type of independent employer "fiat" but the aggregate effect of the voluntary decisions of the union members. Petitioners' focus on the lack of a volitional element is as stale as old Rule 133.

II.

ERISA DOES NOT IMMUNIZE PETITIONERS FROM LIABILITY UNDER THE ANTIFRAUD RULES OF THE FEDERAL SECURITIES LAWS.

Petitioners embrace the recently repealed Welfare and Pension Plans Disclosure Act of 1958 (the "WPPDA") and the recently enacted ERISA as witness to Congressional intent to shield employee pension plans from the antifraud rules of the federal securities laws. This recourse to the federal labor laws as a shield from liability, in fact, evidences the weakness of peti-

83. For the same reasons set out in the discussion on *National Securities, supra,* the presence under certain conditions of an appraisal remedy for a dissenting shareholder in some jurisdictions is irrelevant to the conclusion set out in the text. In any event, an appraisal remedy for the dissenting shareholder on a merger vote is directly analogous to the option of leaving employment for a dissenting employee on a ratification vote.

tioners' arguments here. Congressional intent in the securities law area is best seen by looking directly to the federal securities laws, including the recent Investment Companies Amendments Act of 1970. Petitioners' argument is thus an empty embrace.[84]

A. ERISA Is Irrelevant to a Pre-ERISA Securities Fraud Case.

Petitioners place their primary reliance on ERISA as a shield from liability for their intentional securities fraud. This reliance is completely misplaced. There is no conflict between ERISA and the decision below because this case involves a pre-ERISA securities fraud. The plaintiff invested in the Local 705 Pension Fund on the fraudulent inducement of defendants over the period from April, 1955, through November, 1973. In contrast ERISA was enacted on September 2, 1974, and its provisions only take effect prospectively. ERISA Sections 111, 211, and 414; See, *e.g.*, ERISA Section 203(b)(1)(F).

Furthermore, and of equal importance, Daniel would have *no remedy under ERISA* even were ERISA to apply retroactively. This has been expressly recognized by the petitioners below.[85] ERISA has no provisions prohibiting the making of false or misleading representations to induce an employee to invest in a pension fund. Indeed, neither does ERISA have any general antifraud provision of the sort found in the federal securities laws. Consequently, to apply ERISA retroactively and to allow ERISA to preempt the antifraud provisions of the federal securities laws—also retroactively—would be to deny Daniel any relief whatsoever. This Congress did not intend.

84. That even petitioner IBT considers this to be an empty embrace is evidenced by IBT's own *concession* that ERISA does not exempt "employee pension plans from the Federal Securities Laws, either expressly or by implied repeal." IBT Supp. Memo. In Support of Its Motion to Dismiss at p. 4 (filed Oct. 9, 1975).

85. Counsel for petitioner IBT thus stated on oral argument below:

> "We agree, if agreement be needed, that Mr. Daniel . . . has no remedy under ERISA." Transcript, p. 41.

B. Both the Language and Legislative History of ERISA Indicate Continued Applicability of the Antifraud Rules of the Federal Securities Laws.

There is nothing in the language of ERISA or in the WPPDA[86] to support the conclusion that ERISA was intended to pre-empt the antifraud rules of the federal securities laws. *To the contrary,* Section 514(d) of ERISA specifically repeals only the WPPDA (and certain provisions of Title 5 of the U. S. Code relating to administrative procedure) and *specifically saves* all other federal legislation:

> "Nothing in [ERISA] . . . shall be construed to alter, amend, modify, impair, or supersede, any law of the United States . . . or any rule or regulation issued under any such law."

86. Repealed by ERISA, the WPPDA is immaterial to an allegation of securities fraud from 1955 to the date of filing of plaintiff's Complaint. First, the WPPDA has a "savings" provision providing for the continued application of all other relevant legislation. 29 U. S. C. Section 309(b). Thus, this Court has recently held that the WPPDA did *not* pre-empt a state law substantively regulating employee pension plans. *Malone* v. *White Motor Corp.*, ... U. S. ....., 98 S. Ct. 1185 (1978). Second, the WPPDA is part and parcel of a comprehensive set of federal labor laws. Designed to protect against a myriad of abuses which could undermine the national commitment to collective bargaining, it includes substantive regulatory provisions such as certain bonding requirements and prohibitions against theft, embezzlement, bribery, and kickbacks, as well as certain disclosure obligations. These disclosure obligations, however, are more limited than those protections established by the federal securities laws. For example, the WPPDA sets out those specific matters which must be made part of the public record. Accordingly, disclosure under the WPPDA is limited to these matters even though other matters may be as materially important or more so. Finally, the WPPDA did not work. Thus, disclosure under the WPPDA was not accessible to the employee-investor, the person most concerned with such matters. The annual reports and plan descriptions which were prepared were "published" only by filing with the Secretary of Labor, by holding copies in office files and the principal office of the plan, and by mailing only upon written request certain summary information to a plan participant. Section 307. The burden was thus on the participant to uncover any frauds against him. *Mundheim and Henderson* at 818. It is thus not surprising that the WPPDA was not very successful. S. Rep. No. 93-127 in 3 *U. S. Code Cong. and Admin. News* 4841 (1974).

Indeed, this savings provision takes on additional light here when read against the recent 1970 Act—in which Congress expressly recognized interests in employee pension plans to be securities and exempted most of such plans from the registration requirements.

In addition, not only does ERISA not pre-empt the federal securities laws, it also does not pre-empt state securities laws. The ERISA provisions pre-empting all state laws relating to employee benefit plans expressly do not pre-empt state securities laws relating to employee benefit plans. Section 514(b)(2)(A) thus states:

> "Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates . . . securities."

This state savings provision also takes on additional light when it is recognized that interests in employee pension plans are considered to be securities under most state blue sky laws. See pp. 78-79, *supra.*

Not only the express language of ERISA (and the WPPDA), but also the legislative history of ERISA and the WPPDA supports the conclusion that they were not designed to pre-empt the federal securities laws. For example, the legislative history of the WPPDA cited by petitioners does not indicate that either Congress or the SEC considered interests in employee pension plans outside the scope of the antifraud rules. Rather, the focus of this legislative history was on the legislation then variously pending before Congress, providing for, among other things, the detailed and complex substantive regulation of pension funds through the prescribing of duties and responsibilities in their day-to-day operations, the filing of disclosure documents with a government agency, and the adopting by such agency of detailed rules and regulations. See, *e.g.,* Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess.

at 8-10 (1956).[87] And, the comments of the SEC were directed to the fact that, except for certain pension plans involving the purchase of employer securities, SEC administrative policy was to exempt all such plans from the registration requirements. See, *e.g.*, Hearings Before the Senate Subcomm. on Welfare and Pension Funds of the Comm. on Labor and Public Welfare, 84th Cong., 1st Sess. at 944 (1955).

This focus on the substantive regulation of employee pension plans is made most clear by the role envisaged in this regulatory scheme by the SEC. Initially, the SEC had prepared a detailed plan based on the expectation that 175,000 plans would be subject to *registration* and that between 30,000 and 40,000 plans would be subject to *annual reporting* requirements—all on an estimated budget of $1,325,000. Hearings Before the Senate Subcomm. on Welfare and Pension Plans Legis., Comm. on Labor and Public Welfare, 85th Cong., 1st Sess. at 62-70 (1957). However, Senators Kennedy and Ives subsequently indicated that the scope of the proposed legislation would be much greater—involving registration and reporting of up to 300,000 plans. *Id.* at 107 *et seq.* And, they asked the SEC to prepare a new plan giving cost estimates for processing up to 500,000 pension plans. *Id.* at 118. This new SEC report (*Id.* at 119-124) projected costs up to $3,125,000 and concluded:

> "The magnitude of the task imposed by this legislation would tend to overshadow the Commission's present work." *Id.* at 119.

Obviously, the federal securities laws do not in this fashion substantively regulate employee pension plans—and the SEC has indicated this. However, this legislative history in no way indicates that Congress or the SEC considered interests in pension funds not subject to the antifraud rules.

87. Interestingly, this Report also noted (at 3):

> "These employer-employee plans, whether or not collectively bargained, or whether contributed to solely by management, or on a joint management-employee basis, actually, and under existing law, proceed on the basis that the contributions to them by management *are in the nature of employees' compensation for employment* or, stated in another way, * * * that the cost of an employee's service is greater than the amount currently paid him as wages. * * *" (Emphasis added).

The legislative history of ERISA confirms this. It makes plain the Congressional understanding that interests in employee pension plans are "securties"—in most cases exempt from registration under the 1933 Act. For example, the summary of pension related legislation prepared for the *Senate Pension Study* notes that in some cases an employee pension plan may have to register under the 1933 Act and comply with the reporting requirements under the 1934 Act. *Senate Pension Study* at 96. In addition, the *Senate Pension Study* explicitly recognizes that "private pension plans generally fall under the definition of investment companies under the Investment Company Act of 1940," and must register under the 1940 Act unless otherwise exempted. *Id.* Certainly, the conceded applicability of the federal securities laws to certain employee pension plans removes any doubt from the conclusion that ERISA does not pre-empt such securities laws.

Four months after the issuance of the *Senate Pension Study*, the Senate Labor Subcommittee heard testimony from the former Chairman of the SEC, Manuel F. Cohen, who stated:

> "Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933."

1972 Hearings at 231. Chairman Cohen also referred in the *1972 Hearings* to the *Institutional Investor Study* which reached the same conclusion. See pp. 35 *et seq.*, *supra*. Furthermore, although his testimony was necessarily directed at the specific participation, vesting, funding and enforcement provisions of the then pending bill (S. 3598), former Chairman Cohen indicated in response to a question from Sen. Williams, Chairman of the Senate Labor Subcommittee, that the bill "and additional authority and responsibility vested in the Commission" would be necessary for the protection of investors, employers, and the securities market. *1972 Hearings* at 239.

The bill which eventually became ERISA was initiated by Senator Jacob Javits' administrative assistant who had been

counsel for the Studebaker Company when its South Bend, Indiana, plant closed—leaving most of the 8,500 employees without pensions or with reduced pensions. To prevent similar tragedies in the future, he drafted legislation based on minimum standards that had recently been adopted in Canada. Most of the debate on ERISA thus focused on the costs of imposing minimum participation, vesting, and funding standards and of establishing a pension insurance scheme. And, it is this type of substantive minimum standard which makes up ERISA as enacted. However, even these minimum standards do not fully protect employees who are misled into investing into overly risky employee pension plans.

As the replacement for the WPPDA, ERISA is designed better to guard against the type of substantive abuses the WPPDA focused on. ERISA thus contains, for example, specific provisions regulating the funding of employee benefit plans, establishing a plan termination insurance program, and outlining a voluntary program for the portability of vested pension benefits. As such, ERISA is designed to cure a variety of abuses in the pension area, including primarily those dealing with the ongoing administration of employee pension funds. However, ERISA does not mandate full and fair disclosure to an employee prior to his making an investment in an employee pension plan. ERISA *does not regulate the circumstances of entry* into an employee pension plan. Instead, ERISA mandates minimum standards relating to the *operation* of an employee pension plan.

Much of the ERISA legislative history cited by petitioners correctly notes and builds upon the fact that many if not most employee pension plans need not register with the SEC pursuant to the 1933 Act. That this follows Congressional intent is made clear from the Investment Companies Amendments Act of 1970 and the House Report on this legislation. See pp. 72-78, *supra*. As such, the SEC cannot be said to regulate employee pension plans to the extent that they need not register under the 1933 Act. Petitioners' misreading of the ERISA legislative

history and of the SEC role in that history has thus recently been confirmed by SEC Chairman Williams.[88] There is nothing in the legislative history of ERISA to indicate that the antifraud rules of the federal securities laws do not continue to apply.

In fact, only when both ERISA and the antifraud rules of the federal securities laws apply to employee pension plans does the regulatory pattern make good common sense. ERISA deals primarily with the substantive regulation and administration of employee pension plans, while the 1933 and 1934 Acts mandate full and fair disclosure of all material facts prior to the making of an investment decision. In an analogous fashion, the Investment Company Act of 1940 provides for the substantive regulation and administration of mutual funds—while the sale of mutual fund securities still must comply with the disclosure rules of the 1933 and 1934 Acts. In further like fashion, although banks are subject to extensive state and federal substantive regulation, bank securities are still securities subject to the antifraud rules, even though exempt from registration *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967). The substantive regulation of an industry by one statute (viz., ERISA) together with the regulation of the sale of securities by issuers

88. "Briefly, the argument overlooks the fact that the legislation which Congress was considering involved, among other things, detailed and complex regulation of pension funds through the prescription of duties and responsibilities in the day-to-day operation of pension funds, requirements for the filing of disclosure documents with a government agency, and the delegation to the agency of authority to adopt detailed rules and regulations with respect to pension funds.

The Commission's position that it was not the appropriate agency to administer such a statute is entirely consistent with its long-standing refusal to require, in the case of pension fund interests, compliance with the registration provisions.

That does not mean, however, that these securities are not covered by the antifraud provisions. The commission's reluctance to administer provisions of a regulatory nature, or provisions requiring detailed affirmative disclosure, in no way affects the separate question of the applicability of the far different antifraud provisions." Letter of SEC Chairman Williams, dated February 8, 1978, to Senator Harrison Williams, BNA Daily Rep. for Exec. No. 29, p. J-1-J-2 (February 10, 1978).

in that industry by another statute (viz., the federal securities laws) is *not unusual in our federal scheme*. The question of overlapping jurisdiction of employee pension plans was specifically recognized by Congress and dealt with in the Investment Company Amendments Act of 1970.

The 1933 and 1934 Acts are part and parcel of a comprehensive set of federal securities laws. They are designed in part to protect the buyer of securities from fraud. Neither by its terms nor by implication does ERISA in any way indicate a Congressional intent to supersede the antifraud provisions of these federal securities laws. Rather, because both the federal labor and securities laws serve to protect the employee-investor in a pension plan—albeit in different ways—they must be viewed as complementary to one another. This is made abundantly clear from the fact that even petitioners concede that certain employee pension plans are subject both to ERISA and to the federal securities laws. See p. 71 and n. 59, *infra; SEC* v. *Garfinkle*, CCH Fed. Sec. L. Rep. Para. 95,020 (S. D. N. Y. 1975). There is no incompatibility between ERISA and the federal securities laws. Repeal of the securities laws is not "necessary to make [ERISA] . . . work . . ." *Silver* v. *New York Stock Exchange*, 373 U. S. 311, 357-58 (1963); *Gordon* v. *New York Stock Exchange*, 422 U. S. 659, 682-83 (1975); *cf. Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289, 301 (1973); *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 268 (7th Cir. 1970). The effective application of both the federal securities laws and ERISA to employee pension plans will in no way impede or interfere with either statutory scheme. They work together.

C. Disclosure Under the Federal Securities Laws and ERISA.

The registration requirements under the 1933 Act—commonly referred to as the "disclosure" provisions—are designed to assure that investors are given that information needed to make a reasoned investment decision prior to or at the time such a decision is taken. The mechanism of meeting this objective is the filing with the SEC of a registration statement, and the delivery to the investor of a detailed prospectus. By contrast, the antifraud rules require the filing of no such documents. Rather, the antifraud provisions require that whatever representations are made to induce a purchaser to invest be complete and truthful. Consequently, if a seller makes a representation rendered intentionally misleading by the failure to disclose other material facts, he is under an obligation to make such further disclosures. In the context of an *intentionally* misleading statement to an employee contemplating an investment in an employee pension plan, the employee-investor needs to be told the true facts relative to the value of his investment—including the risk of loss—at a time when such information has meaning, at a time when the employee can still decide not to make, or not to continue making, the investment. In contrast, the disclosure required by ERISA generally need only be made 90 days (or more) *after* an employee becomes an investor in an employee pension plan. ERISA Sections 104(b)(1)(A) and (B).

Even more important than the differences in timing of disclosure are the differences in the content of disclosure. When defendants communicate the details of an employee pension plan to an employee and seek to induce his investment and participation on the basis of misrepresentations and omissions, all facts which a reasonable investor would consider important in the making of an investment decision must be disclosed under the antifraud rules of the federal securities laws. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 450 (1976). The most important fact that an employee investing in a pension fund would want to know is that the investment carries with it a risk of loss, as well as the possibility of profit. In the context of the instant case the employee would also want to know the nature of the risk, its extent, and the factors contributing to the risk.

In contrast, there is no requirement under ERISA that an employee-investor in the Local 705 Pension Fund be told that there is a risk of loss or the nature and extent of this risk. All that ERISA requires is that the employee be told the substantive plan provisions. For example, an employee-investor being offered an investment in a pension plan which will pay monthly retirement benefits for each year of service need not be told that there is a risk he may not participate in the plan for the period necessary to acquire a "vested" right. Similarly, he need not be told the extent of that risk, *e.g.*, that the plan's actuary has assumed or that the plan's experience studies show that three-quarters, or two-thirds, or some other percentage of the employees covered by the plan will terminate employment before vesting or die before retirement age. Further circumscribing the nature of ERISA disclosure are those disclaimers of liability for statements contained in most post-ERISA summary plan description booklets.[89]

The reasons for the differences in the timing and content of disclosure under ERISA and under the federal securities laws relate to the different purposes each statute is meant to serve. The federal securities laws are designed to provide investors with the full and accurate information they need to make

89. Employee-investors are told by such disclaimers that they can rely on such booklets only at their peril and that, in the event of a conflict between the booklet's description of the plan provisions and the technical language of the plan document on file at the main office of the plan, the provisions of the plan document are to control. The effect of such disclaimers is to discourage the careful reading of such descriptive booklets. They thus effectively undercut the disclosure function of the booklet. The Department of Labor has not acted to ban such disclaimers. Letter dated Nov. 28, 1977, from Ian Lanoff, Administrator, Pension and Welfare Benefit Program, U. S. Dept. of Labor, to Victor Kramer, Director of the Inst. for Public Int. Rep., published in B. N. A. *Pension Rep.* No. 167 p. R-4 (Dec. 12, 1977). In contrast, Section 14 of the 1933 Act and Section 29 of the 1934 Act specifically make waivers of liability ineffective. See *Wilko* v. *Swan*, 346 U. S. 427 (1953).

reasoned and informed investment decisions. In contrast, ERISA disclosure is primarily addressed to employees who are already investors in an employee pension plan. The purpose of this disclosure is not to allow the investor to make a reasoned investment decision, but to protect the employee-investor from losing his pension benefits inadvertently, through ignorance of the plan provisions. ERISA disclosure is based on the premise that it is "grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets." S. Rep. No. 127, 93rd Cong., 2d Sess. in 3 *U. S. Code Cong. and Admin. News.* at 4847 (1974).

Because of the differences in content, timing, and the purposes of ERISA and securities law disclosure, ERISA can only be said to complement, and not to replace, the antifraud provisions of the federal securities laws. Were this not the case, an intentional securities fraud could be perpetrated against an investor in an employee pension plan outside the scope of ERISA and without a remedy to such investor. This surely Congress did not intend.

III.

PETITIONERS' ARGUMENTS OF PROSPECTIVE FINANCIAL RUIN AND DISTORTION OF THE COLLECTIVE BARGAINING SYSTEM DO NOT INSULATE PETITIONERS FROM LIABILITY UNDER THE ANTIFRAUD RULES.

Because petitioners cannot overcome the decision below by analysis of the federal securities laws, their main arguments are directed to a doomsday prophecy. However, with almost uncanny precognition, Mr. Justice Harlan disposed of the doomsday argument 74 years ago. Although the Court in *Northern Securities Co.* was speaking of the application of the anti-trust laws, its rejection of the doomsday argument is no less applicable to the effort by Congress to curb abuses in the securities field. Petitioners have thus learned nothing from history. In defense

of an egregious securities fraud which has robbed the Teamster rank and file of their retirement savings, defendants offer up what the Court of Appeals has termed a *concursus horribilum*. Pet. App. p. 258a. The same "suggestions of disaster" which the Supreme Court rejected 74 years ago must also be rejected today.[90]

A. Application of the Antifraud Rules to a Securities Fraud Case Will Not Distort the National Collective Bargaining System.

Without support in either law or fact, the major argument of petitioners consists of the misapprehension that application of the antifraud rules of the securities laws to defendants' fraud will somehow undermine the entire collective bargaining system in the country. Such "predictions of ruin" cannot withstand analysis. Viewed in the harsh light of day, this argument is nothing more than a lame plea that the defendants should be permitted to defraud the Teamster rank and file.

Such arguments are, in fact, not novel. They seem to be marshalled whenever an attempt is made to remedy the wide-

90. "Many suggestions were made in argument based upon the thought that the anti-trust act would in the end, prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that Act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the states . . .

The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the Court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate . . . commerce is to be governed, that every combination, whatever its form, in restraint of such commerce . . . shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department . . ." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 351-52 (1904).

spread abuses found prevalent in employee pension plans. For example, the Court in *Malone* v. *White Motor Corp.*, ... U. S. ....., 98 S. Ct. 1185, 1192 and n. 9 (1978), noted that similar arguments were made in the discussions preceding enactment of the Welfare and Pension Plans Disclosure Act of 1958:

> "Indeed, the bill met opposition in both the Senate and the House on the ground that its approach would 'require employers to surrender to labor unions economic and bargaining power which should be negotiated through the normal channels of collective bargaining.' S. Rep. No. 1463, [85th Cong., 2d Sess.] . . . at 34 (Minority View of Sen. Abbott); accord H. R. Rep. No. 2283 [85th Cong., 2d Sess.] . . . at 25 (Minority Views). . . . [and] opponents of the bill argued that the legislation would 'seriously interfer with . . . bargaining relationships by given labor access to information about the costs of certain employer-administered benefit plans. 104 Cong. Rec., at 7209 (remarks of Sen. Abbott)." *Id.*

These arguments were not persuasive in forestalling the enactment of the WPPDA—which had a far more pervasive impact on employee pension plans than any application of the antifraud rules of the federal securities laws will ever have. And, these arguments are not persuasive here.

1. The Antifraud Rules Will Not Jeopardize Union Status or Labor Peace.

Section 9 of the National Labor Relations Act, 29 U. S. C. Section 159, provides that the union as the collective bargaining representation will be the exclusive representative of the employees in negotiations with employers concerning wages, hours, and other conditions of employment. Affirmation of the decision below will in no way denigrate the exclusive representative status of the collective bargaining representative. Petitioners assert that as a result of the application of the antifraud rules of the securities laws—the plaintiff, and other Teamster union members, will have the right to bargain *individually* with their employers in violation of Section 9 of the

NLRA. Although petitioners do not clearly identify the source of this alleged "right to bargain individually," it must arise, if at all, from the fact that plaintiff and other Local 705 members vote to ratify Local 705 labor contracts with covered employers.

This right to vote, however, does not give plaintiff the right to bargain individually. First, this right to vote *antedates* this lawsuit. The right of Local 705 members to vote in ratification on any Local 705 negotiated collective bargaining agreement is called for in the Local 705 *constitution*. The application of the antifraud rules of the securities laws to defendants' fraud has *nothing whatsoever* to do with granting plantiff an individual right to vote. Plaintiff had no right to bargain individually with employers prior to the bringing of this lawsuit, and has no right now.

Petitioners' argument are thus misdirected and unpersuasive. Application of the antifraud provisions of the federal securities laws to the fraudulent sale here of a security in the Local 705 Pension Fund will not interfere with the national commitment to collective bargaining. The plaintiff is not suggesting that either he or any other individual union member be chosen to supplant Local 705 as the exclusive representative in collective bargaining negotiations with employers. This conclusion is not altered by the fact that, by virtue of the Local 705 and IBT constitution, all Local 705 members do have the right to vote on the labor contract. And, that contract does allocate employee compensation between cash wages, investments in the Local 705 Pension Fund, and other economic benefits. In like fashion, a corporate merger may be negotiated by corporate management, approved by the board of directors, and then put out to the shareholders for their vote. In neither case do the corporate shareholders or the Local 705 union members supplant the right of corporate management and directors or the right of the Local 705 union officers, respectively, to negotiate the terms of sale of the securities involved, even though that be but one aspect of the corporate merger or labor contract.

Petitioners also pose the threat of untimely delays, widespread strikes, and the loss of labor peace throughout the country. These speculative horribles have an existence only in the eyes of petitioners and not in reality. Because it does not exist, petitioners cannot provide the connection between application of the antifraud rules in this case and such horribles as they prophesize. The fact that many employee pension plans are *concededly subject* to the federal securities laws, including the registration requirements, without endangering the entire collective bargaining system in the country, exposes the emptiness of defendants' argument. By providing in their union constitution for a ratification vote, petitioners certainly seek not a "rubber stamp" but bona fide guidance on the substantive terms of the proposed labor agreement.

2. The Decision Below Does Not Require Registration with the SEC.

Petitioners also raise the speculative horrible of a vast new bureaucracy, laying its heavy hands on the American pension system. Here again, the horrible is more phantom than substance, for petitioners in their "quintessential error" again confuse the registration requirements with the antifraud rules of the federal securities laws. Application of the antifraud rules to defendants' securities fraud does not require registration under the 1933 Act. It does not require the filing of any reports, registration statements, or documents with the SEC. It only requires defendants not fraudulently to induce employee-investors to invest into the Local 705 Pension Fund.

The decision below is expressly limited to the antifraud provisions of the securities laws:

> "We wish to emphasize that we are not holding the registration requirements of the 1933 Act or the reporting requirements of the 1934 Act to be applicable to these pension funds. We do not require the filing of any document or establish judicial control over pension fund operations." Pet. App. 258a.

In fact most employee pension plans will be exempted from the registration requirements of the 1933 Act by Section 3(a)(2).[91] And, those not exempted by Section 3(a)(2) "might be deemed beyond the scope of the registration requirements . . . because of . . . long time and consistent [SEC] administrative practice." Pet. App. p. 258a n. 61. As noted throughout this Brief, this policy is to require registration *only* for those employee pension plans in which an amount in excess of the employer's contributions are invested in employer securities.[92] See p. 71 and n. 59, *supra*. And, the present Chairman of the SEC, Harold M. Williams, has recently reiterated this policy.[93] Finally, as noted above (pp. 94-95), what is considered a "sale" for purposes of the antifraud rules is not necessarily a "sale" for purposes of the registration requirements. See, *e.g.*, *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969).

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91. The Court of Appeals has estimated that up to 96 percent of all pension plans may be exempted from registration by Section 3(a)(2) of the 1933 Act. Pet. App. p. 258a n. 61. This has been challenged by the IBT, IBT Br. at 25, although without citation or support. However, even accepting, *arguendo*, the IBT figure ($50 billion), pension funds with assets in excess of *two-thirds* of the total assets of all private noninsured pension funds (approximately $180 billion) in the country will be so exempt. See n. 25, *supra*.

92. See n. 59, *supra*. Although a "longtime and consistent" administrative policy of the SEC, Pet. App. p. 258a n. 61, the SEC also has the clear authority to promulgate a rule exempting from registration all such employee pension plans. Pursuant to its authority under Section 19(a) of the 1933 Act to define "accounting, technical, and trade terms," the SEC has in the past defined the term "sale" as excluding a particular type of transaction from the registration requirements, but not from the antifraud rules. See, e.g., SEC Rule 133, 17 C. F. R. § 230.133 (1964). A similar rule could be promulgated by the SEC to reflect its long held position that a distribution of interests in compulsory, noncontributory pension plans to employees does not constitute a "sale" for purposes of the registration requirements. See *1941 Opinion*.

93. "In sum, the situation today at the Commission with respect to the registration of pension interests is fundamentally the same as it has been since the Commission's creation." *Williams Testimony*, *supra* n. 60, at 5-6.

Petitioners are, therefore, misguided when they assert that compliance with *Daniel* will be unduly burdensome. First, the antifraud rules of the federal securities laws differ from the registration requirements in that they "do not establish an affirmative disclosure system requiring the filing of documents. Rather, [they] . . . are essentially a generalized self-executing prohibition against fraudulent activity." Pet. App. p. 252a. All that they require is that whatever disclosure is made not be intentionally "deceptive or misleading." *Williams Jan. 5 Letter*, p. 44, *supra*, at F-1.

> "The antifraud provisions . . . are a generalized prohibition upon fraudulent conduct, including the making of false or misleading representations. If a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures. But, the antifraud provisions do not constitute a general requirement of detailed affirmative disclosure, either oral or written."

Letter from SEC Chairman Harold M. Williams to Senator Harrison A. Williams, Jr., dated Dec. 7, 1977, BNA Sec. Reg. & L. Rep. No. 433, p. I-2 (Dec. 21, 1978). Compliance with this requirement will "not impose an undue burden on anyone." *Mundheim and Henderson* at 814; *Williams Jan. 5 Letter* ("no adverse consequences . . . in terms of cost").

In this regard, Chairman Williams has noted:

> "A document which makes satisfactory disclosure under ERISA, in compliance with ERISA's requirements as to the contents of disclosure documents, would not, except in highly unusual circumstances, be violative of the antifraud provisions of the federal securities law . . . [and] the significant role to be served in the pension area by the antifraud provisions of the federal securities laws is that of providing protection where false or misleading representations are made either orally or in written materials other than the documents required by ERISA." *Id.*

Furthermore, petitioners misread the decision below if they infer from it that the Court of Appeals would require disclosure of the actuarial probability of ever receiving a pension benefit or disclosure of any other *particular* fact. Of course, the only issue before the court below was whether the antifraud rules of the federal securities laws were applicable, and not what disclosures were required. In addition, the remarks of the Court of Appeals as to what should have been disclosed were made within the context of the deceptive and misleading statements made by the Teamster defendants in the instant case. In any event, as indicated by one group of actuaries, there should be no problem in coming up with a percentage indicating the likelihood that the participants as a *group* will receive a pension.[94] B. N. A. Pension Rep. No. 173, p. A-18 (Jan. 30, 1978).

Compliance with the antifraud rules of the federal securities laws thus should be no more difficult for an honest employee pension plan than for any other issuer—including those, like a mutual fund, which periodically issue securities. Petitioners therefore cannot support their proposition that application of

94. Petitioners and their *amicae* harp on the invalidity of developing the probability that any *particular individual* will ever receive a pension. In so doing, petitioners expose their misunderstanding of the antifraud rules of the federal securities laws. First, as noted above, no particular fact is required to be disclosed under the antifraud rules—all that is required is that whatever disclosure is made not be intentionally misleading or deceptive. Second, in the context of certain possibly misleading or deceptive representations, a statement of the *group likelihood* of ever receiving a pension might well go to correct any such possible misrepresentations. Such a group likelihood could, for example, either be a statement of the *actuarial assumptions* used by a pension plan's actuaries in constructing the pension plan, or a statement of *actual group experience* in receiving pension benefits under such plan. Such actuarial assumptions are, of course, easily available to the plan's administrators, and, as the *Grubbs Study, infra,* indicates (at p. IV-6), actuaries do make experience studies to determine actual rates of termination of employment and other factors. Furthermore, in many if not most cases of possible misrepresentation, all that is called for is disclosure of the material fact of the *existence* of the possibility of a risk of loss of a participant's investment in a pension plan due to a variety of factors. Cf. *TSC Ind., Inc.* v. *Northway,* 426 U. S. 438, 450 (1976).

the antifraud rules of the federal securities laws to employee pension funds will deter the formation of employee pension plans. Surely, all honest employee pension plans and their sponsors would applaud the application of the antifraud rules to their industry.

Finally, perhaps the most telling point is the fact that certain employee pension plans are conceded by petitioners to be subject both to ERISA and the federal securities laws. Petitioners acknowledge that certain so-called "voluntary and contributory" pension plans are subject to the antifraud rules as well as to the registration requirements of the 1933 and 1934 Acts. Notwithstanding petitioners' fears, the application of the federal securities laws to these plans has not wreaked havoc on such plans. Indeed, the continuing creation of such plans, even though they must register under the 1933 Act, indicates well the lack of any detrimental burden. Petitioners thus are unable to demonstrate that the application of the federal securities laws have in any way disrupted these plans.

In fact, the securities laws and ERISA have become increasingly complementary as the SEC continues its efforts to revise Form S-8 to avoid duplication of, *but not defer to,* the ERISA requirements. Sec. Act Rel. No. 5767 (Nov. 22, 1976), CCH Fed. Sec. L. Rep. ¶ 80,809 at 87,110-11; *SEC* v. *Garfinkle,* CCH Fed. Sec. L. Rep. Para. 95,020 (S. D. N. Y. 1975). As SEC Commissioner Williams has recently indicated, these efforts are quite extensive.[95]

95. "The Subcommittee's final question sought the Commission's policy views on the possible overlap between ERISA and other federal laws, including the securities laws. The Commission does not, of course, endorse duplicative government regulation. . . . Since ERISA's adoption, the Commission has endeavored to coordinate the requirements of ERISA with its own regulations. The Commission formed a special task force to study and deal with any problems of over-regulation or conflicting regulation that could arise, and that special task force had a significant impact on coordinating the requirements of ERISA with the legitimate needs of the brokerage community. Thus, the Commission commented upon, and helped develop, regulations issued by the Department of Labor and the

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B. Petitioners' Doomsday Prophecy Is No Shield from Liability for Securities Fraud.

Petitioners' most incredible argument is the doomsday prophecy that application of the securities antifraud rules will result in "vast liabilities". The size of this king's ransom has been estimated by amicus below to be 200 billion dollars ($200,000,000,000). ERIC Court of Appeals Br. p. 29. As might be expected with such an incredible figure, petitioners' apprehension of disaster rests on a misconception of this case and of the federal securities laws.

1. The Issue of Damages Is Not Now Before This Court.

Petitioners are rather presumptuous to set out at this stage of the litigation their own preferred remedy for their securities fraud, and then to work out in some magical fashion the arithmetic consequences. Indeed, the issue of what is an appropriate remedy for defendants' fraud is not before this Court. Rather, what is before this Court on appeal is solely whether the antifraud rules of the federal securities laws are applicable to defendants' fraudulent sale to plaintiff of a security in the Local 705 Pension Fund. The question of damages is for the District Court to decide. This is particularly so here where the

(Footnote continued from preceding page.)
Internal Revenue Service dealing with several issues arising under ERISA and affecting the securities industry . . . The Commission has also acted to help ease the reporting requirements of the securities laws for those entities which are also subject to ERISA. A major step in this effort was a revision of Form S-8, the registration form used by issuers selling securities to their employees pursuant to certain employee benefit plans. Since many of these plans must now also file disclosure statements under ERISA, the Commission worked with the Department of Labor to develop a form that would reduce the possibility of duplicative regulation. The form now provides that, to reduce the burdens imposed by Form S-8, issuers may utilize the summary plan descriptions prepared for ERISA, by including a copy of the summary plan descriptions as part of the S-8 prospectus in lieu of all or part of certain items of information required by the form. This is a good example, in my opinion, of the Commission's efforts to adapt its regulatory requirements to the new environment created by ERISA. . . ." *Williams Testimony, supra* n. 60, at 9-11.

present appeal is on an interlocutory order denying defendants' motions to dismiss. This Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 386 (1970), has thus stated quite clearly that a finding of liability is unrelated to a determination of the appropriate remedy:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation *implies nothing about the form of relief to which they may be entitled.* We held in *Borak* that upon finding a violation the courts were 'to be alert to provide such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief." (Emphasis added).

See *J. I. Case* v. *Borak*, 377 U. S. 426, 433 (1964). Also directly in point is *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 288, 241 (2d Cir. 1974), where the Second Circuit stated:

> "Finally, having held that all defendants violated Section 10(b) and Rule 10b-5 and that they are liable to plaintiffs in this private action for damages, we leave to the district court the appropriate form of relief to be granted, including the proper measure of damages. This comports with the procedure followed in other cases where appellate courts have determined issues of liability for violations of the securities laws. . . . In the instant case there are *especially compelling reasons for following this procedure. Since the appeal comes to us from an interlocutory order denying defendants' motion for judgment on the pleadings, there was no issue before the district court and of course no adjudication below on the form of relief to be granted.*" (Emphasis added).

Thus, it is for the District Court, at first instance, to fashion a remedy so as to grant the necessary relief where federally secured rights are invaded.

2. Petitioners' Financial Doomsday Argument Is Wrong.

Petitioners' financial doomsday argument is not only improper, it is also just plain wrong. The initial 200 billion dollar liability prophesized is absurd. Recognizing this, petitioners now have lowered their sights by at least one order of magnitude to between $3.5 to $13.5 billion dollars. Local 705 Br. at 36; Grubbs, Report to the Secretary of Labor-Potential Effects of *Daniel* at p. III-2 (March 20, 1978) (the *"Grubbs Study"*). Even these figures, however, are incredible. They ignore reality and rest on a misconception of the federal securities laws.[96] Petitioners thus should not be allowed to camouflage their securities fraud.

Petitioners, first, ignore the fact that, the extent of any liability for pension fund securities fraud is limited by, among other factors, the applicable statute of limitations, the requirement of scienter, and remedy considerations. The decision below is restricted to the particular facts of a Teamster union multi-employer pension fund. It is not necessarily applicable to a non-union corporate employee pension fund which may have characteristics unlike those of the Teamsters pension fund here involved.[97] These limitations have, moreover, been *expressly* recognized by the Court of Appeals:

96. For example, petitioners fail to note that the *Grubbs Study* is based on *a sample of only seven pension plans,* only two of which were multiemployer plans covering union employees. *Id.* at p. A-7-A-9. Furthermore, the measure of damages projected in the *Grubbs Study* proceeds on the outrageous assumption that all interests in all employee pension plans in the country have been sold by means of an intentional securities fraud, and is itself based on outdated information more than ten years old. *Id.* at p. B-3. In addition, Petitioner Local 705's attempt to rely on the A. S. Hansen actuarial study is improper as well as faulty. First, with this study appended to its brief, *Local 705 has improperly sought to augment the record on certiorari review by this Court.* Second, the A. S. Hansen study itself blithely ignores the complex body of law underlying the question of the proper measure of damages in a securities fraud case. It also conveniently ignores the extent of liability of the other—non Local 705 Pension Fund—defendants in this case.

97. The decision below that Daniel's investment in the Local 705 Pension Fund represents the purchase of a security for the purposes

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> "Moreover, plan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all material facts are disclosed in a manner comprehensible to the average workers, as in any other securities fraud case, no damage causation will exist under the securities laws. . . . Thus if the plan documents sent to a plan beneficiary understandably disclose this information, a retiree who does not meet the vesting requirements will have no remedy under the securities acts, even if he subjectively did not comprehend the disclosed information. In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability." Pet. App. p. 259a.

Of most importance, however, is the fact that liability is limited to those pension fund securities sold by means of a fraud.[98] As noted above, the securities fraud here is particularly egregious because of its continuing nature, the unique risk of

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of the antifraud rules is limited to the particular facts of a Teamster union negotiated multi-employer pension fund. Consequently, the holding below is not necessarily applicable to a non-union corporate employee pension fund which may have characteristics unlike those of the Teamster pension fund here involved. In addition, other union negotiated multi-employer pension funds may not be subject to ratification by member vote, and for that reason may fall outside the present analysis. However, for the reasons discussed above, plaintiff does not believe there to be a "volitional" requirement to the definition of "sale," and, in any event volition is present in an employee's decision to work or to continue working for his employer, in addition to the volitional dimension of the employee's ratification vote. Finally, and for these reasons, this case has *no applicability* to any employee benefit plans other than the type of employee *pension* or *retirement* fund Daniel has invested in. See, e.g., *Robinson* v. *United Mineworkers of America,* 435 F. Supp. 245, 246 n. 1 (D. D. C. 1977) (U. M. W. *Health* Fund).

98. For example, after holding that an interest in an employee pension plan is a "security" acquired by way of a "sale," the court in *Schlansky, supra* n. 49, dismissed plaintiff's complaint—with leave to replead—for failing properly to plead defendants' scienter.

wholesale loss in a Teamster pension fund, and the Draconian nature of the vesting requirements. The Teamster pension funds stand out because of the *scienter* underlying the fraudulent inducement to the rank and file to invest on the promise of profits in the form of retirement benefits. ***Ernst and Ernst*** v. ***Hochfelder, supra.***

Plaintiff is not alleging any securities fraud in the sale of any other pension fund security outside of the Teamsters union. Furthermore, petitioners' implied assertions that all, or even most, other pension funds are sold by means of an *intentional* securities fraud simply have no basis in fact. Accordingly, in response to a question about the extent of possible retroactive liability following *Daniel,* SEC Chairman Williams stated:

> "I appreciate your concern about the threat of lawsuits asserting liability for past events, but *honest plan sponsors, who have operated pension plans honestly need not fear retroactive liability* under the antifraud provisions of the federal laws." *Williams Jan. 5 Letter at F-2.*

Finally, even the *Gubbs Study* cited by petitioners recognizes this:

> "Most terminated non-vested participants have *not* been led to expect that they were entitled to a pension. If liability exists only with respect to terminated participants who received information leading them to expect a pension, *it does not apply to most terminated participants. In such a case the potential liability would be a very small fraction of the amounts shown. . .*" *Id.* at p. II-3.

Equally wrong, if not irrelevant, is petitioners' implication that a proper remedy here to petitioners' own securities fraud would endanger the pensions due presently vested Local 705 members. This argument is wrong because vested union members should not benefit from fraud perpetrated against fellow employees. Indeed, this argument is also offensive because it ignores the fact that there are defendants other than the Local 705 Pension Fund in this case who have participated in this intentional securities fraud. Surely, the defendant unions and the

individual defendants (sued also in their individual capacities) must share the burden of any damages assessed by the District Court. Finally, this argument is irrelevant because this case involves "no issue of priority of claims" against the Local 705 Pension Fund. Indeed, this Court has rejected just such an argument:

> "The respondents have argued that we should not declare the petitioners' withdrawable capital shares securities under § 3(a)(10) because the petitioners, if they are successful in their suit for rescission, will gain an unfair advantage over other investors in City Savings in the distribution of the limited assets of that Association, which is now in liquidation. *This argument, at best, is a non sequitur. This case in its present posture involves no issue of priority of claims against City Savings.* This case involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners—a question which turns on our construction of the term 'security' as defined by § 3(a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to that narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in that Association." (Emphasis added).

Tcherepnin v. *Knight,* 289 U. S. 332, 346 (1967).

Petitioners also derive no support from their extensive reliance on *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723 (1975).[99] Indeed, Respondent rejects petitioners' allegations and

99. In *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723 (1975), an offeree declined to purchase certain securities because of the defendant-offeror's alleged misleading statements. There, the Court decided against expanding the scope of persons protected by Rule 10b-5 to frustrated buyers and, therefore, beyond the scope of the purchaser-seller requirement of *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (2d Cir. 1952). *Blue Chip Stamps* thus provides no support for defendants here because the plaintiff, John Daniel, as a purchaser of securities, clearly falls within the *Birnbaum* rule. The decision below does not expand the class of persons protected by the antifraud rules of the federal securities laws beyond that allowed by *Blue Chip Stamps* and *Birnbaum.*

asserts that the instant lawsuit can in no way be construed as "vexatious" or as a "strike suit".[100] The fraud of petitioners here is particularly egregious because of its continuing nature: even now, over four years from the filing of the Complaint, petitioners have failed to disclose the material facts attendant to an investment in the Local 705 Pension Fund. Petitioners thus cannot be allowed to turn their continuing fraud into a shield from liability under the federal securities laws.

The concern of *Blue Chip Stamps* over the problems of proof which would result from the abandonment of the *Birnbaum* rule also provides no support for petitioners because the *Birnbaum* rule was not breached by the decision below and because proof of the fraud here may be established by independent documentary evidence. The problems of proof of concern to this Court in *Blue Chip Stamps* relate to the burden of showing that an offeree did not rely on a misleading statement in deciding *not* to purchase a security. *Blue Chip Stamps*, 421 U. S. at 745-47. Because a security was *not* purchased, if *Birnbaum* were not followed, a whole universe of potential investors would have standing and of necessity only oral testimony could be relied on:

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock." *Id.* at 746.

Here, Daniel's purchase of an interest in the Local 705 Pension Fund is subject to independent documentary verification.

Finally, petitioner IBT seeks the last safe harbor from its intentional securities fraud in a plea for the prospective application of the ruling below.[101] IBT Br. at 135-140. In doing so,

100. Even the petitioners "acknowledge the equities" of plaintiff's case here. Counsel for petitioner IBT on oral argument below, Transcript p. 42.

101. There is, interestingly, another side to this coin. The adoption, *arguendo*, of petitioners' ERISA pre-emption argument would provide a shield from liability for pension fund securities fraud *subsequent* to the enactment of ERISA. In this way, the extent of any liability for pension fund securities fraud would be *limited*—although petitioners would remain liable here because this lawsuit involves a pre-ERISA securities fraud.

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petitioner relies heavily on *Los Angeles Dept. of Water and Power* v. *Manhart, supra,* rather than establishing the *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106-107 (1971), criteria for limiting a ruling to a prospective application only. There is, in fact, a serious question whether the first Chevron factor—"a new principle of law . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed"—can be met here. Certainly, if anything the legislative history set out above establishes that, if not an *old* principle of law, the holding below was "clearly foreshadowed."

In any event, assuming, *arguendo,* that all three *Chevron* criteria are met and that a prospective application of *Daniel* precludes retroactive liability elsewhere, petitioners still are not out of the storm. The intentional securities fraud perpetrated on the plaintiff would, in such event, mandate the application by this Court of the (then) prospective *Daniel* rule to this case and to its consolidated companion case.[102] Not to do otherwise would be to reward the defendants for their fraud, and to punish the defrauded plaintiff for his efforts. Cf. *Molitor* v. *Kaneland Community Unit District No. 302,* 163 N. E. 2d 89, 97-98 (Ill.), cert. den. 362 U. S. 968 (1960). It would, further, produce the type of "inequitable result" which constitutes the third *Chevron* factor.

The petitioners here, therefore, do not stand on the same ground as the Water Department in *Manhart.* Not only is a completely different statute involved—the federal securities laws as distinguished from Title VII of the 1964 Civil Rights

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102. See *Dutchak* v. *International Brotherhood of Teamsters, supra* n. 29, consolidated with the instant case by the District Court below. The defendants in *Dutchak* include (among others) the infamous Teamsters Central States, Southeast and Southwest Areas Pension Fund and the Local 710 Pension Fund, as well as the Local 705 Pension Fund and the IBT.

Act—but also the Water Department in *Manhart* was not reaping the fruits of its intentional fraud.[103] The same reasoning distinguishes the petitioners here from the employer in *Allied Structural Steel Co.* v. *Spannaus*, 46 U. S. L. W. 4887 (June 28, 1978).

Recognizing interests in employee pension plans to be securities, Congress in the 1970 Act expressly exempted most of such plans from the registration requirements, but not from the anti-fraud rules. In 1974, Congress expressly saved such legislation from pre-emption by ERISA. Any need the petitioners feel for further legislation in this area should be directed to Congress. And, indeed, at least one bill introduced in the Senate last session deals with these issues. See ERISA Improvements Act of 1978, S. 3017 (introduced May 1, 1978, by Senators Harrison Williams and Jacob Javits).[104] Finally, this has been specifically recognized by SEC Chairman Williams:

> "The Commission is, of course, aware that there is some sentiment for a legislative response to the issues which the *Daniel* case raises. Whether there is a need for further legislation addressing the protections against fraud to which those acquiring interests in pension funds are entitled is, of course, a question which Congress, and not the Commission, is best able to resolve. Our concern is, as the *Daniel* case illustrates, with protecting investors within the framework of the existing securities laws. At present, while other important federal legislation governs various aspects of pension plans, *the federal securities laws offer an important protection against fraud in connection with the acquisition of pension interests which is unavailable outside of those laws.*" *Williams Testimony, supra* n. 60, at 13.

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103. The sponsors of the Teamster pension funds are a far cry from the "conscientious and intelligent administrators of pension funds" present in the *Manhart* case. *Manhart, supra,* at p. 4352.

104. If enacted, this bill would, among other things, exclude interests in compulsory, noncontributory employee pension plans from the definition of "security" under the federal securities laws.

CONCLUSION.

For all of the reasons set forth above, we submit that the unanimous decision of the Court of Appeals was correct, consistent with the statutory language and applicable case law, and should be affirmed.

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FOR ARGUMENT

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OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ARGUMENT

I. REVERSAL OF THE JUDGMENT BELOW WOULD NOT "UNDERMINE THE SECURITIES LAWS" AS THE SEC FEARS; RATHER, REVERSAL IS REQUIRED BY ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION AND THE ECONOMIC REALITY OF COMPULSORY NONCONTRIBUTORY PENSION PLANS.

The SEC professes concern that reversal of the decision below would undermine the protections given inves-

tors under the securities laws. (SEC Br. 2, 3, 6, 36, 50-51, 100).[1] This is a familiar refrain (see, *e.g.*, the peroration of its brief in *SEC* v. *Sloan* at the last Term.)[2] But accepting the argument at face value, there is no justifiable basis for concern, for the judgment below can be reversed without "dilution of long-established principles of statutory construction of terms in the securities laws" (SEC Br. 6). Indeed, in order to reverse in this case it is necessary only to follow those principles, particularly the principle recognized in *Forman* that the focus of the securities laws limits their coverage and the principle in *Ernst & Ernst* that commonly accepted meaning is the guide to interpreting the language of those laws. What those principles require here is simply a holding that mandatory noncontributory pension plans are in a different universe of discourse from the world of capital investment which Congress addressed in the 1933 and 1934 Acts; a holding which in no way threatens the protection of genuine investors. On the other hand, affirm-

[1] "IBT Br." refers to our opening brief in No. 77-753; "Local 705 Br." refers to the opening brief of Local 705 and Louis F. Peick in No. 77-754; "NCCMP Br." refers to the brief of the National Coordinating Committee for Multiemployer Plans; "U.S. Br." refers to the brief tendered by the United States; "AFL-CIO Br." refers to the brief tendered by the American Federation of Labor and Congress of Industrial Organizations; "Pl. Br." refers to plaintiff-respondent's brief in this Court; "Pl. CA Br." refers to its brief in the court below; "SEC Br." refers to the brief of the Securities and Exchange Commission in this Court; "SEC CA Br." refers to its brief in the court below; "PROD Br." refers to the brief of PROD et al.; "Grey P. Br." refers to the brief of the Grey Panthers; "A." refers to the record Appendix in this Court.

"Compulsory" and "involuntary" will be used interchangeably as they apply to pension plans in which coverage is a mandatory incident of employment. The Securities and Exchange Commission will be referred to interchangeably as "the SEC" and "the Commission." "Our adversaries" will refer to plaintiff and the SEC, who have filed the principal briefs in favor of affirmance.

[2] Brief for the Securities and Exchange Commission, No. 76-1607, p. 38.

ance here requires the use of fragmentation and literalism in order to torture mandatory noncontributory pension plans into the securities laws categories of security and sale. And affirmance will create enormous potential liability for all such pension plans under the antifraud provisions and for many, if not most, such plans under the registration provisions as well. The SEC's efforts to minimize the scope of this potential liability can best be characterized as a series of carefully couched ambiguous suggestions which have the effect of giving with one hand and taking away with the other.

Thus, the SEC suggests that little liability would result if the antifraud provisions were held to be violated only where a pension plan failed to disclose its break-in-service rule. SEC Br. 26. But the SEC nowhere concedes that liability under the antifraud provisions should or can be so limited. The SEC quotes the statement in the Grubbs Report that if liability exists only with respect to participants who were led to expect a pension, claims by most terminated participants would be barred. SEC Br. 27. But again, the SEC nowhere states that liability should or can be so limited. Since the SEC elsewhere indicates that liability may be based on oral as well as written misrepresentations, SEC Br. 96-97, the ease with which disappointed participants could allege that they were led to expect a pension would as a practical matter undercut the effectiveness of any such limitation. The next palliative offered by the SEC is that a private plaintiff claiming under Rule 10(b)(5) must establish that the defendant acted with *scienter*. SEC Br. 28, n.22. But in the same breath the SEC notes that this Court has not yet decided whether scienter is also required under § 17(a) of the Securities Act and urges that neither that question nor the question whether an implied private right of action exists under § 17(a) need be reached in this case.

Although the rejection of retroactive liability would in no way deprive any, let alone "many investors, in future

schemes totally unrelated to pensions or the labor milieu, of protection from fraud" (SEC Br. 6) and is essential in the considered judgment of the agencies in which Congress has placed responsibility for the regulation of pension plans,[3] the SEC gratuitously suggests that the devastating effect on pension plans which led this Court to deny retroactive liability in *Manhart* should not deter the imposition of such liability here because " 'conscientious and intelligent administrators of pension funds' would not commit the type of fraud alleged here * * *." SEC Br. 29. Elsewhere, however, the SEC observes that "there may well be a temptation to over-promote the investment" and quotes testimony by a pension industry spokesman that oversimplification and an advertising sales approach are general problems and that plan documents are often incomplete and misleading. SEC Br. 73-74. Moreover, even the SEC draws back from the spectre of general retroactive liability with the guarded concession that if the antifraud provisions do impose a specific affirmative disclosure requirement, then "perhaps" the *Manhart* rationale would preclude the imposition of retroactive liability upon persons who acted in good faith, SEC Br. 29.

Led by its desire to assert jurisdiction over mandatory noncontributory employee pension plans, if only under the enforcement provisions of the 1933 and 1934 Acts, the SEC even displays a willingness to jeopardize the protection of investors under the antifraud provisions of the federal securities laws by arguing, contrary to interpretations which it has successfully urged in this Court, that those antifraud provisions do not impose any specific affirmative disclosure requirements but are instead only generalized prohibitions of fraudulent conduct. And in

[3] See the brief tendered by the United States on behalf of the Treasury and Labor Departments and the Pension Guaranty Corp., pp. 50-51.

contending that subjecting employee pension plans to coverage under the antifraud provisions of the securities laws would not conflict with the specific regulatory scheme provided in ERISA, the SEC hints that it would be appropriate for the courts to deny claims based on omissions of material facts where the disclosures required by ERISA have been made. SEC Br. 97-98. At the same time, the SEC states "there may be exceptional situations where a failure to make a disclosure which ERISA does not require would constitute a violation of the antifraud provisions * * *", SEC Br. 97, without offering any explanation of what would constitute such an "exceptional situation."

The pattern is clear. The seeming concessions are ambiguous and carefully couched hypotheticals offered only for momentary reassurance and only for purposes of this case.

Let there be no mistake about what is really at issue in this case. Although the grievance here masquerades as a claim of fraud and nondisclosure, the real attack is on the entire system of mandatory noncontributory private pension plans. (See Pl. Br. 61-62 n.56 and Prod. Br. 11 and 15-16 n.8) That system has enabled employers to pay pensions while keeping costs within an acceptable range by relying on pooled funds and actuarial projections which assume that many employee participants will never satisfy the eligibility requirements. If this attack succeeds, then every such pension plan will be an easy target for claims of fraudulent nondisclosure and misrepresentation by vast numbers of participants who did not attain eligibility.

The SEC points to the snail darter case, *TVA* v. *Hill*, 46 U.S.L.W. 4673, as a pertinent precedent. (SEC Br. 93-95, 101.) The proposition there reaffirmed, that it is for Congress to establish public policy, is one with which we are totally in accord; we only wish that the agencies which Congress has created would consistently keep faith with that principle. Congressional policy regarding the

subject matter of this case is, in our view, entirely clear; it was declared in a major enactment just four years ago —a statute designed to spell out in meticulous detail the time, place and content of the disclosure obligations of pension plans; to continue and rationalize administration of the pension laws; and to preserve the assets of pension funds against claims for failing to comply with legal duties of which they were unaware. That policy does not leave room for superimposing the disclosure obligations of the pension laws; and to preserve the assets of pension ERISA.

A. *Under Settled Principles of Statutory Construction There Is No Security*

"Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." *United Housing Corp.* v. *Forman*, 421 U.S. 837, 849 (hereafter "*Forman*"). An appreciation of the "economic realities of the Local 705 pension plan (or any other involuntary, noncontributory pension plan) compels the conclusion that a participant in such a plan does not acquire a "security", as that term has consistently been construed.

1. Compulsory, noncontributory pension plans are not created by "promoters" (SEC Br. 3) for raising capital to fuel an enterprise which they will manage, but are established by employers (often, as here, in conjunction with the bargaining representative of the employees) to attract and maintain a stable labor force and to reward employees "for continuous employment with the same employer", *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 594.[4] The payment of benefits is financed from a fund

[4] The SEC points out that the plan in *Alabama Power* involved a single-employer plan, while the plan at issue here is a multi-employer one (SEC Br. 41). That is a distinction which makes no difference in this context. Multi-employer plans normally arise out of the economic necessities of the industries with which they are associated and serve for the participating employers the same purposes served by single employer pension plans. "Multi-employer plans are often found in industries characterized by numerous small and financially unstable employers." Melone, *Collectively Bargained Multi-Employer Pension Plans* at 7. Such small employers could not carry the administrative costs of a single-employer plan, and they enjoy other economies of scale in a multi-employer arrangement. Where "the employees' attachment to the trade is considerable" but "employment relationships are short-term", single-employer plans are not feasible because employees would never "acquire the necessary service credits to qualify for a pension benefit" (*id.* at 8-9). Moreover, by providing rewards for continuous employment with the same multi-employer group, the plans aid in the maintenance of an available employee pool for the entire industry.

Thus, while we of course do not contend that *Alabama Power* is a *precedent* on the meaning of the securities laws, cf. *id.* at 592-593, n.16, it provides an instructive and accurate description of the economic reality of compulsory noncontributory pension plans such as that in this case.

to which the employer contributes periodically; that contribution may be, but need not be measured by the labor of any individual. (See IBT Br. 38-39.)

The employee for his part performs labor for the employer for which the major financial consideration he receives is his wage or salary; and he may also receive other fringe benefits, such as the possibility of future pension rights if he remains in covered employment for the requisite time, and, where the plan rules so provide, with the requisite continuity. The employee places no money into the fund which is the source of the pension benefits. He does not acquire an "interest" in the fund. (See IBT Br. 11-12, 40.) The value of the pension benefit he ultimately receives is related only indirectly, if at all, to the employer contributions made with respect to his labor,[5] and even more remotely to the investment

[5] As noted in *Alabama Power*; "Periodic adjustments of the benefit formulas to account for unanticipated increases in living costs * * * emphasize the dissociation of payment levels from the work that * * * the payments compensate." (431 U.S. at 594.) Moreover, many plans, like the 705 plan, credit employees for service performance before the plan is instituted, and with respect to which no contributions have been made. In sharp contrast, mutual funds and variable annuity funds, to which analogy is pressed (Pl. Br. 12, 38, 59, 61), recalculate the cost to new purchasers periodically (in the case of some mutual funds twice daily) to reflect the changing value of shares or units.

performance of the fund. Indeed, the major portion of the benefit is traceable to contributions made with respect to the labor of individuals who will never qualify to receive a pension. (See IBT Br. 46-48.) The investment return is not only a small fraction of the total size of the fund, but does not necessarily redound to the benefit of the employees; in a defined benefit plan such as this, it may serve rather to reduce the employer's contribution. See IBT Br. 44-45.[6] And, even as the employee does not participate, except remotely, in the pension fund's investment success, so its lack of success reduces his pension if at all, only indirectly. By "risk of loss", the court below meant the risk that a pension plan participant may never receive a pension, a risk which relates to his inability, often through no fault of his own, to satisfy the eligibility requirements for a pension. This is unlike an investor's risk of loss, which is that the interest he acquires by contributing capital may not produce the anticipated yield or may decline in value.

The foregoing characteristics (and others described at IBT Br. 33, 37-38) differentiate compulsory noncontributory pension plans from "investment contracts" and any of the other "many types of instruments that in our commercial world fall within the ordinary concept of a secu-

[6] Pl. Br. 10, n. 20 quotes a portion of a footnote of the AFL-CIO's discussion of this point, and totally distorts its meaning. The AFL-CIO's position was:

> The investment success of a defined benefit plan will be to the advantage of the employee participant only if the employer (or employers, in a multi-employer plan) who sponsors the plan chooses to raise the level of benefits. (AFL-CIO Br. 13.)

The footnote from which plaintiff quotes reads in full:

> Of course, where the level of the defined benefits is collectively bargained, employers generally will be more willing to promise higher benefits to the extent that the contributions required are less because of the plan's investment income; but there too, the impact on the employees is indirect, and their own bargaining strength is at least an equally significant fact. (*Id.*, n. 16.)

rity." H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933). They demonstrate that the Local 705 pension plan and others like it serve an important function in the labor market, that their form and substance is molded to serve a labor market purpose, and that they are not established "to raise capital for profit-making purposes" (*Forman*, 421 U.S. at 849). Therefore, like the housing cooperative in that case, they are beyond the "focus of the [1933 and 1934] Acts [, which] is on the capital market of the enterprise system." (*Id.*)[7]

2. Thus, if the reasoning and methodology of *Forman* is followed, the judgment below would be reversed without any adverse effect on the securities laws' operation in the area of their intended coverage. It is observed at SEC Br. 46 that the foregoing language appeared only where the Court was discussing the term "stock" in the definition of "security" rather than in its discussion of the term "investment contract", which is in issue here.[8] But this in no way diminishes the controlling significance of *Forman*. The Court's own words show that it was setting forth "the purpose of the Acts" and "the focus of the Acts" because it was "construing *these Acts* against the background of their purpose" (421 U.S. at 849, emphasis added). Indeed, this Court's quotation from the 1933 House Report which the SEC *also* says is "used by the Court in *Forman* only in its discussion of the term 'stock'" (SEC Br. 48), appears not only there (421 U.S. at 851) but also in the introduction to its entire discus-

[7] All this was well understood by the SEC in 1957. See the testimony and memorandum quoted at IBT Br. 71.

[8] Rather than come to grips with the real teaching of *Forman*, as it bears on, and we submit controls, this case, see IBT Br. 30-32, the SEC distorts the meaning of this Court's opinion beyond recognition: "In determining whether the 'stock' of the cooperative was the type of 'stock' which Congress contemplated, the Court appears to have considered it significant that the cooperative stock was not traded in the securities markets." (SEC Br. 46.)

sion of the definition of "security" (*id.*, at 847-848).[9] More fundamentally, there is implicit in the SEC's argument the paradoxical proposition that while the courts must look to the purpose of the securities laws to determine whether their literal language is applicable, and may on that basis avoid their literal meaning (as the Supreme Court did with the word "stock"), the courts need not consider that purpose in construing a more ambiguous term (like "investment contract"). *Forman* leaves no doubt that each of the terms within the statutory definition of "security", must be construed in terms of their purpose. Although the term "investment contract" "embodies a flexible rather than a static principle * * *" (*Howey*, 328 U.S. at 299), it is not infinitely elastic.

3. Our adversaries invoke the teaching of *Howey* that "the statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."[10] We, of course, accept that principle, but insist that it does not establish that each element of a transaction which is said to negate the existence of an investment contract is automatically to be disregarded or to be examined in isolation. Thus, in *Howey* itself the fact that the transaction involved a sale of land was held not to affect the outcome because it was unnecessary to the basic transaction, which was determined to be an investment of money in a citrus growing enterprise rather than the sale of land; but that same fact could be significant in characterizing other transactions. In short, *Howey* poses the question in every case whether the factors relied upon *are* "unrealistic and irrelevant". The elements of a compulsory noncontributory pension

[9] The same technique is followed at SEC Br. 51 in responding to the United States' reliance on another passage.

[10] *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 301.

plan on which we rely, and which our adversaries would dispel by an incantation of *Howey*, are of the essence of such plans rather than incidental to them, and are therefore not only relevant but indispensable in determining whether there is an "investment contract."

We think that this appears with sufficient clarity from our original discussion of those elements, but it may be useful to examine some examples of what is deemed "unrealistic and irrelevant" on the other side (SEC Br. 36-43; Pl. Br. 24-25), for it may further illustrate the difference between us regarding what the securities laws are all about.

One fact which the Commission regards as "completely irrelevant" is that the employee may never obtain a pension because he gives up or loses his job; in its view that fact is germane only "to the relative merits, as an investment, of participation in a pension fund in comparison to other forms of investment," (SEC Br. 37). That fact, far from being irrelevant, is proof positive of the labor, and non-investment character of compulsory noncontributory pension plans. The Commission's very statement of its point inadvertently highlights one of the factors which distinguishes participation in such a plan from true investments: namely, that an individual cannot choose between "participation in a pension fund" on the one hand, or "other forms of investment", as he can choose between purchase of shares of this or that any of many thousand publicly traded securities, or real estate, bank savings plans, etc. There is almost an infinite variety of possible investments of money, some of which are and some of which are not subject to the securities laws. But the employment alternatives available to any individual at any time are sharply limited and, as we have stressed, involve numerous factors, one of which is

the compensation package, of which the pension plan is but one component.[11]

Moreover, the SEC is quite mistaken in drawing an analogy between the employee's risk that he will lose his pension because his employer goes out of business, with an investor's risk that his security will become worthless because the issuer goes out of business. In a word, the employee is not investing in his employer. Nor is he investing in his own capacity to perform his job adequately, although if he is discharged he also loses the opportunity to earn a pension. Plaintiff's and the SEC's theory is that he is investing in a pension fund. And the possibility that a particular employee will lose his job has nothing to do with the investment success of the fund or any of the other factors which determine the value of the pension benefits received by eligible employees.

One argument at Pl. Br. 24 attributes to us the position that an employee cannot be an investor. Of course he can be, as when he purchases the employer's stock in an employee stock purchase plan. The employee is an investor because he puts up his own money to purchase the stock of his employer whereby he provides capital for

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[11] At SEC Br. 50-51, yet another fear is expressed:

> To encumber the definition of "security" with factors relating to the motivation of particular individuals—which motivation may vary from individual to individual—would seriously hamper the goals of the Commission's enforcement program which include quickly identifying fraudulent activity and "nipping it in the bud" by immediately seeking injunctive relief in the federal courts.

Since nothing in the respective arguments of the IBT and the United States to which the foregoing is addressed (IBT Br. 32, 33; U.S. Br. 16), would call for examination of "the motivation to particular individuals", the raising of this spectre is but another tactic to avoid the precedential force of *Forman*. The SEC's point comes with particularly poor grace since it dismisses out of hand the difficulties of *defending* an action brought on its theory that there is a "sale" of an interest in a pension fund occurs whenever an employee accepts or remains in covered employment. *See* SEC Br. 88-89.

his employer's business. Such stock of course is a "security". That the sale of employer stock is limited to employees or even that it is part of a pension plan in the sense that the employees receive part or all of their return in the form of retirement benefits, does not alter the essential nature of a purchase of stock. Those facts, therefore, are "unrealistic and irrelevant' 'in the sense of that phrase as used in *Howey*. Accordingly, we have always acknowledged that this form of a pension plan (in which an employee does, of course, receive an "interest") involves a "security".[12] But it by no means follows that

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[12] Plaintiff relies on the Illinois Securities Law, § 3-0, Ch. 121 1/2, Ill. Rev. Stat. § 137.3-0 exemption from registration for "securities issued by or pursuant to employee profit-sharing trusts or plans or employee pension trusts or plans" for his argument that the Blue Sky Laws support his claim that the pension coverage at issue is a security (Pl. Br. 78). The exemption, however, is for "securities" and whether or not an employee's coverage under a compulsory noncontributory pension plan is a security is exactly the question. If an employee has no security arising from his coverage then the registration provisions of Illinois law do not apply—there is nothing to exempt. *See* references to opinions by Attorneys General from various States to the effect that nontransferable certificates of a non-profit retirement plan or retirement system trust are not "securities" at CCH Blue Sky Law Rep. ¶ 1683.

Only by assuming his conclusion can plaintiff find support in either Illinois law or the Uniform Securities Act, § 402(a)(11) for his argument. Indeed the official Code comment to § 402(a)(11) addresses the question of "various kinds" of pension plans and suggests the need to exempt from registration only those voluntary contributory plans which might otherwise require registration:

> This exemption is designed to solve the problem which arises in those states whose Administrators take the position, also taken by the SEC, that employees' benefit plans of various kinds involve an offer of a security in the nature of an 'investment contract,' at least if participation is voluntary with each employee and he must contribute under the plan in order to participate. See Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 326-29. CCH Blue Sky Law Rep. ¶ 4932.

Plaintiff's alternative theory that a pension fund is a "certificate of interest in or participation in a profit sharing agreement" (Pl. Br. 83-84) is equally without merit.

Congress clearly recognized that profit-sharing plans and pensions plans were not one in the same. In 1926 it amended the tax laws

any other, let alone all other forms of pension plans in which the employee does not buy his employer's stock are securities. It is, indeed, one of the principal vices of our adversaries' argumentation that they refer indiscriminately to "pension plans" or "pension funds" without specifying the type of plan and thereby becloud the analysis of the status under the securities laws of the only type of plan involved in this case.[13]

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to add pensions to stock bonus and profit-sharing plans as categories of trusts exempt from tax, § 219(f), Revenue Act of 1926. If, as plaintiff suggests pensions are profit-sharing plans, there is no explanation for this congressional act. The distinction was carried forward by subsequent Congresses and is now incorporated in the Internal Revenue Code of 1954, § 401(d). The Regulations promulgated pursuant thereto amplify the differences between profit-sharing plans and pensions. Treas. Reg. § 1.401-1(a)(2)(i) and (b)(1)(i) (1978) define pension plans, while Treas. Reg. § 1.401-1(a)(2)(ii) and (b)(1)(ii) (1978) define profit-sharing plans. Moreover, there is no "profit-sharing" in the Local 705 pension plan as that term is understood in common parlance. The benefits paid under that plan do not constitute a share of the profits of any or all of the signatory employers. And while we deny that the pension fund makes a "profit" in any sense known to the securities laws (IBT Br. 43-50), it is in any event clear that in a defined benefit plan such as the Local 705 plan the amount of the value of a pension which those who are eligible receive is only indirectly, if at all, relative thereto. The two District Court cases cited at Pl. Br. 84 illustrate what a profit sharing agreement really is: in both cases individuals who put up money were thereby entitled to a percentage of interest in the income and profits deriving from the employer's enterprise. In the final analysis, a determination as to whether a compulsory, noncontributory pension plan falls within the purview of the federal securities laws is not advanced by a discussion as to whether the term "certificate of interest in or participation in a profit sharing agreement" can be stretched to include such a plan.

[13] For example, the headings of the SEC's brief assert that "The Commission has Consistently Taken the Position that Interests in Pension Funds Are Securities" and that "Congress Has Taken Action Consistent With the View that Interests in Pension Funds Are Securities" (SEC Br. 53, 58, headings). So stated, those proprositions are not false, but they are materially misleading in the consideration of this case: for what the SEC is attempting to convey by those headings, and to establish is an administrative practice

There is a broad spectrum of pension plans, of which compulsory and noncontributory plans are at the opposite range from those pension plans which are financed in whole or in part by employee purchases of employer stock. It is not necessary in deciding this case to identify at what point between these types of plan a "security" may first be found; to consider for instance whether the SEC was right when it took the position in 1941 that voluntary contributory plans financed by a pool of securities not involving employer stock are "securities". For, as the Chief Justice has written:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." [14]

4. Plaintiff invokes a sentence from Mr. Justice Brennan's concurring opinion in *VALIC*,

> Congress need not go through the initial travail of reenacting its general regulatory scheme every time a new form of enterprise in introduced, if that new form falls within the scheme's coverage.[15]

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and a Congressional understanding consistent with its present position that interests in compulsory noncontributory plans are securities. Since that more precise and germane assertion is insupportable, the brief resorts to the uniformative generality "pension funds".

[14] *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 127, footnote omitted.

[15] *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 93, quoted at Pl. Br. 37.

We fully agree with this proposition, but it does not aid plaintiff even standing alone; morever, by isolating this sentence from its context plaintiff has obscured the real significance for this case of Justice Brennan's observations on the legislative process.[16] For, compulsory noncontributory pension plans, unlike variable annuities and the other "[n]ovel, uncommon, or irregular devices" [17] arrayed at Pl. Br. 35-37, are not a "new form of enterprise" introduced subsequent to the 1933 and 1934 Acts; nor were they created to escape the force of those laws by adopting characteristics which are not material for determining whether "that new form falls within the [statutory] scheme's coverage." (See p. 15, *supra*). Moreover, unlike the situation in *VALIC*, and of paramount significance for present purposes, Congress has twice since the enactment of the securities laws "gon[e] through the travail" of enacting legislation directed specifically to pension plans, the WPPDA and ERISA. See IBT Br. 67-87.

Therefore, it is the sentence immediately following that quoted by plaintiff which bears most directly on the present case: "If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it." (359 U.S. at 93.) The "new developments in the subject matter" of pensions which gave rise to the WPPDA and ERISA were abandonment of the view that

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[16] "Congress regulates by general statutes. The passage of a federal regulatory statute is a delicate balancing of many national legislative interests and political forces. Congress need not go through the initial travail of reenacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage. If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it." (359 U.S. at 93.)

[17] *SEC* v. *C. M. Joiner Leasing Co.*, 320 U.S. 344, 351.

pensions are gratuities and a growing awareness that many individuals have been disappointed in the expectation that they will receive a pension, either because they were misinformed, or because their pension plan was terminated before they achieved eligibility. Since Congress did respond to these developments by legislation tailored to this subject, respect for the authority of Congress to "adjust[] the regulatory scheme" precludes a holding that the securities laws are applicable. This is so even if it be assumed that absent WPPDA and ERISA, the new developments would have justified application of the securities laws, despite the passage of over forty years during which plans have operated without the slightest warning that they were subject to those laws and the SEC has neither asserted nor exercised jurisdiction. See IBT Br. 80-83, 60-62. The lesson which we draw from Mr. Justice Brennan's opinion in *VALIC* for situations in which Congress has enacted intervening legislation is therefore the same as the teaching of his opinion for the Court in *Califano* v. *Sanders*, 430 U.S. 99, discussed at IBT Br. 81-83.

B. *Under Settled Principles of Statutory Construction There Is No Sale*

The SEC fails to deal at all with our argument (IBT Br. 52) that the "disposition" element of sale cannot be found in the transactional context of the type of pension fund with which we are dealing here. Plaintiff passes it by with an *ipse dixit*: "Contrary to petitioner's assertion the plaintiff has acquired some sort of an interest in the Local 705 Pension Fund". (Pl. Br. 85). But see IBT Br. 11-12, 40.[18] Further, the transactions in which

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[18] That an individual does not acquire an interest in a pension fund by accepting or remaining in covered employment is acknowledged, perhaps unwittingly, at SEC Br. 88 where (in order to differentiate this case from *Blue Chip*) it is said, "By contrast, the

an employee accepts a job, goes to work, or votes on a proposed collective bargaining agreement simply do not fit the "commonly accepted meaning" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199) of words the "purchase" or "sale" whether or not those acts require a volitional element. On this, too, our adversaries are silent, although a "sale" and/or "purchase" is mandated by the literal language of the statutes and rules which plaintiff says provide him with a cause of action. On the other hand, when literalness serves his purpose, plaintiff enshrines it.

Plaintiff contends that because the statutory definition of "sale" in Section 2(3) of the 1933 Act does not expressly embrace the volitional act of an investment decision by the purported investor, there is no volitional requirement in order to make out a "sale" in this case (Pl. Br. 84-85). He points to cases in which courts have held that the purposes of the antifraud provisions of the securities acts would be served if the terms "purchase" and "sale" were deemed to include a forced sale where the essence of the fraud was to deprive the plaintiffs there of the opportunity for choice. (Pl. Br. 95) Plaintiff also cites this Court's decision in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, as "impliedly reject[ing] the 'volition argument'." As we have shown by the portion of that decision quoted at pp. 63-64 of our opening brief, the facts in *National Securities* demonstrate that there was a very real investment choice to be made by the individual voting shareholder, and this Court so recognized, 393 U.S. at 467.

Plaintiff seeks to advance his argument by reliance on SEC Rule 145 which rescinded Rule 133, the SEC's "no sale" *rule* with respect to corporate mergers and consoli-

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employee who decides to retain his job makes a decision which results in his continuing to give value in the future to further his acquisition of an interest in the pension fund."

dation. Plaintiff errs in confusing that rule with the Commission's "no sale" *theory*, which is based on the statutory definition of "sale" and which the Commission has also followed with respect to pension plans. (See pp. 38-39 *infra*, where this point is fully discussed.) But as we show at IBT Br. 64-65, when the SEC adopted Rule 145, it recognized the volitional requirement but found that it is satisfied in the circumstance to which this rule is directed. The reasoning is the same as that of this Court in *National Securities*. Rather than meet this point, plaintiff excises from the SEC's statement those portions which refute his position, a tactic which unfortunately succeeded in the court below, see IBT Br. 65, text and note at n.51. To show just how seriously plaintiff has distorted the SEC's statement, we set forth in full in the margin the two paragraphs of the statement from which he quotes.[19]

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[19] "*Based on the Commission's experience in administering the provisions of the Act and Rule 133 thereunder, and having given consideration to the Disclosure Study Report and to the comments received on the Commission's published proposed revision of Rule 133* (*Securities Act Release No. 5012, October 9, 1969*), the Commission is of the view that the 'no-sale' approach embodied in Rule 133 overlooks the substance of the transactions specified therein *and ignores the fundamental nature of the relationship between the stockholders and the corporation and between stockholders.* [The fact] that such relationships are in part controlled by statutory provisions of the state of incorporation does not preclude as a matter of law the application of the broad concept of 'sale' as contained in Section 2(3) of the Act. The concepts of 'sale,' 'offer,' 'offer to sell,' and 'offer for sale' in Section 2(3) are broader than the commercial or common law contractual meanings of such terms.

"*Transactions of the character described in Rule 133 do not in the Commission's opinion occur solely by operation of law and without the element of individual stockholder volition. A stockholder faced with a Rule 133 proposal must decide on his own volition whether or not the proposal is one in his own best interest.* The basis on which the 'no-sale' theory is predicated, *namely, that the exchange or alteration of the stockholder's security occurs not because he consents thereto but because the corporation by authorized corporate action converts his securities*, in the Commission's opinion, is

But even assuming that there are some contexts, where voluntary decisional acts are not essential to "purchase" and "sale",[20] this Court made the point in *National Securities* that the "terms 'purchase' and 'sale' ", like all other terms of the securities laws, can only be fully defined by the context in which they are being employed. And the court took pains in *National Securities* to make it clear that the meaning which it there gave to the terms "purchase" and "sale" was limited to the precise context of that case (*Id.* at 466-467, see also *id.* at 465).

In this case, plaintiff contends that he purchased a "security", to wit, an interest in a pension fund, but was deceived in the making of that purchase by misrepresentations and omissions to state material facts pertaining to that "security." In such a context, an investment decision is an essential element.

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at best only correct in a formalistic sense and overlooks the reality of the transaction. The corporate action, *on which such great emphasis is placed,* is derived from the individual consent given by each stockholder in voting on a proposal to merge, *consolidate or reclassify a security. In voting, each consenting stockholder is expressing his voluntary and individual acceptance of the new security, and generally the disapproving stockholder is deferring his decision as whether to accept the new security or, if he exercises his dissenter's rights, a cash payment.* The corporate action *in these circumstances,* therefore, is not some type of independent fiat but is only the aggregate effect of the voluntary decisions made by the individual stockholders to accept or reject the exchange. Formalism should no longer deprive investors of the disclosure to which they would be entitled, and admittedly should have."

Securities Act Release No. 5246, CCH Federal Securities Law Rep., 1971-1972 Dec., ¶ 78,753, p. 81,567. (Italics indicate the omissions at Pl. Br. 95; the phrase shown by brackets was added by plaintiff without so indicating.)

[20] This Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, may be read as a disapproval of the cases which have so held, but it is not necessary to the outcome of the "sale" question in this case that it be so read.

The Commission also points to instances in which courts have held that there are situations where there can be a "sale" without "voluntary action by the alleged purchaser" (SEC Br. at 85). However, although its position on the need for employee-purchaser volition in order to make out a sale *in the context of this case* is hardly as unambiguous as one would hope for when the agency charged with enforcement of the Act speaks, we believe the Commission accepts that volition is required here (SEC Br. 85-86). However, it urges that a "voluntary decision * * * sufficient to satisfy the 'sale requirement' under the antifraud provisions of the securities law" is found when "representations about a pension affect a person's initial decision to take a job" and "thereafter in his decision whether to retain the job and its accompanying pension or to seek a different job with a different pension or no pension." (SEC Br. 84-85).[21]

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[21] The SEC asserts that the extent of job mobility in this country, makes the "decision whether to change jobs and [hence] pension coverage a matter of continuing importance" (SEC Br. 85). It attempts to demonstrate the importance of this "investment decision" by reference to Bureau of Labor Statistics which show an annual shift of 10% of the labor force from one job to another. The Commission's attempt to link turnover rates with individual pension decisions does not comport with the evidence. Such mobility is not a general characteristic of the labor force but only of young or recently hired employees. "[T]he propensity to move [to another job voluntarily] declines sharply with increasing length of service; it is slight after three years and negligible after ten years of work in the same plant." Reynolds, *The Structure of Labor Markets* (Harper & Row, 1951) p. 21. See also: Bernstein, *The Future of Private Pensions* (New York, N.Y., The Free Press of Glencoe 1964); McGill, *Fundamentals of Private Pensions,* Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 3d ed., 1975), p. 82. The higher rate of mobility among young employees "reflects a period of adjustment to the job market while these young men look for a job which will provide adequate pay and opportunity for advancement." Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 90th Cong., 2d Sess. 249 (1968) Exhibit B to the testimony of Hon. Thomas R. Donahue, Assistant

Similarly, the Commission gives at least weak support (SEC Br. 86, n.75) to the proposition that if volition is required to make out a purchase and sale, it is supplied also in the context of a collectively bargained pension plan where the union's constitution or bylaws require membership ratification and the members vote to ratify (A. 244).

We acknowledge the possibility that an employee might take a job or remain on the job because among other reasons, including wages, vacations, working conditions, promotional opportunities, degree of effort, employer location and existence of union representation, the employee considered the pension plan. We also acknowledge the possibility that in voting approval of a proposed collective bargaining agreement an employee may consider pension provisions among all other terms and conditions of employment. We even would accept the proposition that an employee decision to vote against a union officer or to vote for decertification of a union might possibly be based in part on the employee's attitude toward the

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Secretary of Labor for Labor-Management Services, Department of Labor.

If pension plans had a major impact on the propensity of covered work force to change jobs one would expect this effect to be manifested in two ways: declining quit rates and increasing tenure in highly covered industries, especially among older employees who are close to meeting the requirements for vesting or early retirement. R. Taggart, "The Labor Market Impacts of the Private Retirement System," Studies in Public Welfare, 93 Cong., 1st Sess. 64 (1973). The data shows, however, that during the 1960's there was no increase in the median tenure of the work force, even for workers 45 years and older. (*Id.*) When the job tenure data is broken down by industry, focusing only on males 45 years old and over, "there is no evidence of correlation between pension coverage and tenure changes." (*Id.* at 65). Likewise, "Quit rate data show little evidence of the impact of retirement plans on labor mobility." Indeed, "Looking on an industry-by-industry basis, there is no apparent relationship between changes in quit rates over the sixties and either the incidence of coverage or the extent of contributions to private retirement plans (Table 21)." *Id.* at 65-66.

manner in which the union official or union had discharged their duties of representation with respect to, among other things, the negotiation of pension benefits. But it strains credulity to suggest that any of these acts, be they acceptance or retention of employment or ratification of a collective bargaining agreement, represent investment decisions which Congress intended to be within the purview of the securities laws. Just as an instrument is to be tested by "what character [it] is given in commerce" to determine whether Congress intended to include it under the rubric "security",[22] so should the concept of "purchase and sale" for the purposes of the securities laws, which presupposes an investment decision, be viewed as it would be so characterized in commerce. Taking or retaining a job or voting on a collective bargaining agreement would not be so characterized.[23]

Allowing a determination of the existence of a "sale" to turn on an employee's testimony as to his state of mind at the time he accepted or continued in employment invites even greater hazards than those delineated in *Blue Chip Stamps*. For in a *Blue Chip* context, the claimant's oral testimony would relate solely to the circumstances which led him to make a choice between the two alternatives, purchase or not purchase. In the context of this case, however, resolution of the purchase question would turn on oral testimony as to what relative weight, if any, was given to the decision to "invest in a pension" in the totality of all of the other considerations which went into the decision as to whether to accept a job or continue to work at that job thereafter. The social cost of opening the floodgates to litigation which would turn on such evidence is self-evident, and this too presents

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[22] *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53: *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 847-48.

[23] Cf. *Lino* v. *City Investing Co.*, 487 F.2d 689, 694.

a case *a fortiori* to *Blue Chip*. What the SEC regards as an advantage of the antifraud provisions of the securities laws over ERISA—that they deal with "false or misleading representations [which] are made either orally, or in written materials other than the documents required by ERISA" (SEC Br. 96-97) only aggravates the problem. It is apparently the SEC's view that disappointed pension applicants should be able to bring claims long after the event on the basis of oral statements purportedly made by personnel department employees, hiring foremen, union stewards, and others about the terms of the pension plan or the prospects of an individual obtaining a pension.

Plaintiff's and the SEC's arguments that a "disposition for value" occurs in the context of a noncontributory plan when an employee performs services and an employer makes pension contributions are subject to essentially the same infirmities as the SEC's argument that lurking somewhere in the decision to accept a job there can be an investment decision which subjects the employment transaction to the federal securities laws. At IBT Br. 61-62 we urged that whatever may be the present view of a pension, the generally held view with respect to pensions in 1933 and 1934 is that which should be looked to in ascertaining Congress' intent when it enacted the Securities Acts of 1933 and 1934. Hence, it is proper to construe "disposition for value" as the court below observed the SEC had first done when it "reasoned that there was no sale involved in a noncontributory plan because there was no direct investment of money by the employee, consistent with the then current legal view that employer's contributions were gifts." (A. 245). The SEC characterizes *its* original view as "outdated" and the argument that flows from it "unsound". Here it opts for a literal, bareboned construction of "sale" as if Congress had nothing whatever in mind except what could

be fit into its definition by changing modes of thought and strained but imaginative constructs (SEC Br. 81). Relying on the proposition that "employer's contributions are part of the total compensation paid in exchange for the employee's labor", it urges that the labor is the "value" and the giving of that labor, the employee's contribution (SEC Br. 82).[24] Both it and plaintiff then rely on two distinct court cases, *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass.) and *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Texas) as establishing that "value" for purposes of "sale" can consist of the "performance of service." (SEC Br. 77, n.61 and 86; Pl. Br. 89-90). A reading of the statute that finds "value" in the contexts of *Collins* and *Addison* is hardly free from doubt. But here again, in *this* case we are dealing with a context much removed from the contexts there. Neither case involved pensions, noncontributory or otherwise; both involved securities in rather conventional forms. While *Collins* arose in an employment context, the solicitation to purchase a security was beyond dispute; *Addison* did not deal specifically with an employer-employee relationship but rather with the widespread public sale of $1,000,000 of unregistered securities for a variety of considerations, including cash. To reason from such cases that Congress intended the giving of value element of "purchase" and "sale" to include working for an employer who makes contributions to a pension fund places more

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[24] Plaintiff goes one step further and argues that *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y.), establishes that the consideration for a "purchase" within the meaning of the securities laws need not come directly from the purchaser. Here again plaintiff treats not merely the words of the statute but also the words of cases construing the statute as if they are immutable, universal and applicable in all contexts. It should be sufficient to note that in *Harwyn*, the term "sale" was being construed in a context in which insistence on direct contribution would have permitted "circumvention of registration requirements by devious and sundry means" (*Id.* at 954).

weight on *Collins* and *Addison* than either can reasonably bear. *Cf. United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 127.

II. THE LEGISLATIVE AND ADMINISTRATIVE HISTORY OF THE SECURITIES LAWS SHOWS THAT THEY WERE NOT INTENDED TO COVER COMPULSORY NONCONTRIBUTORY PENSION PLANS.

A. *The 1971 SEC Institutional Investor Study*

We begin this reply to our adversaries' treatment of the historical materials by focusing on what they say in response to Judge Tone's observation:

> As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan might well be an investment contract, the element of sale was lacking (A. 260-261).

The SEC says:

> In this regard, IBT relies * * * upon a statement in the Commission's Institutional Investor Study in an attempt to demonstrate that the Commission's "no sale" rationale applies to the antifraud as well as the registration provisions. But the statement to which IBT refers is only a recital of the fact that, as noted earlier * * * the Commission's staff had adopted the "no sale" rationale. The Institutional Investor Study specifically referred to the 1941 Assistant General Counsel's opinion, which, as we have seen * * * dealt with registration only. The Commission has *never* taken the position that there is no sale for the purposes of the antifraud provisions.[25]

[25] SEC Br. 67, footnote and references to the briefs in this Court omitted, emphasis in original. Plaintiff's brief says nothing on this point.

This description of the Study cannot survive examination of its actual text. The sentence to which the citation of Mr. Davis' opinion [26] is appended reads:

> In the case of plans which are unfunded (pay-as-you-go basis plans) and in the case of plans where contributions to the funding medium consist of either employer money only or employee contributions which are required as a condition of employment, the Commission staff has taken the position that the Securities Act does not apply because there is no "sale" or "offer for sale" of a security.[27]

Moreover, in suggesting that our reliance on the Study is limited to the single "statement" (SEC Br. 67) quoted above, the SEC avoids confronting the other telling textual support of our analysis, for example, the lucidly presented distinction between the legal status of "(a) *Plans not providing for voluntary contributions*", which are governed by the "no-sale" interpretation of the statute, and "(b) *Plans providing for voluntary employee contributions*", which are subject to the "no-action" administrative practice, which was indeed confined to registration. (Study 996-997, see IBT Br. 59-60).

The concluding observation at SEC Br. 67 ("The Commission has *never* taken the position that there is no sale for the purposes of the antifraud provisions.") is at the very best hyperbole. In fact, it is acknowledged just four pages later that in its brief *amicus curiae* in *Leland Stanford* "the Commission stated that its "no sale" rationale for mergers applied to both the antifraud and the registration provisions" (SEC Br. 71, n.54). And the SEC's extravagant denial is further belied by the

[26] While the Commission inadvertently miscites the opinion, it is referring to the second of two opinions by Assistant General Counsel John F. Davis at CCH Fed. Sec. L. Rep., 1941-1944 Dec. ¶ 75,195, p. 75,387; see IBT Br. 104.

[27] 3 SEC Institutional Investor Study 996 (1971).

other expressions of its views in the Study, 1941 Davis opinion, and the Purcell testimony, to refer only to material quoted herein, [illegible] p. 27 *supra* and pp. 38-40, 47-49 *infra*. What, *never?*

The categorical assertions which the historic record *does* support are the following:

1) Until its brief to the Court of Appeals below in this case the Commission has *never* asserted the position that there is a "purchase and sale" for the purposes of the antifraud provisions of the securities laws, or otherwise, when an individual accepts or remains in employment covered by an involuntary noncontributory pension plan, and;

2) The Commission *never* exercised the authority which it first asserted on brief in the court below: it *never* regulated noncontributory involuntary pension plans under the antifraud provisions of the 1933 and 1934 Acts, either by rules, or interpretive guidelines, or enforcement proceedings.

B. *Rejection of the 1934 Hastings Amendment to the Definition of "Public Offering"*

The SEC acknowledges that the 1934 Hastings amendment to the 1933 Act, which was rejected by the Conference Committee, and Congress, "did not expressly refer to the type of pension plan involved in this case * * *" (SEC Br. 59). In fact, it did not refer to *any* "type of pension plan": the word "pension" did not appear in either the amendment itself, or any of the debates, or the Conference Report. That Report makes clear that the type of plan which was deemed to be encompassed by the amendment, and whose participants were needful of securities law protection was "employee stock investment plans" (H.R. Rep. No. 1838, 73rd Cong., 2d Sess. 41, hereinafter "Conference Report").

In straining, nevertheless, to extract some significance from Congress' action, the SEC eliminates all reference to "employee stock investment plans", first, by ending its quotation of the Hastings Amendment immediately before that phrase,[28] and then by beginning its quotation of the Conference Report immediately after that phrase. These truncated quotations are then joined by the words, "such plans" so as to make it appear that the Conference Report was dealing with "bona fide plan[s] for the payment of extra compensation".[29]

It is puzzling that the SEC should go to such lengths to lay the predicate for a claim which adds so little to its argument: "* * * the Conference Report demonstrates that the Congress was aware that compensation for employment may take the form of an investment and that, notwithstanding the special characteristics of the employer-employee relationship, employees as investors are in need of securities law protection." (SEC Br. 59). For even if this statement is accepted at face value, it asserts nothing about what Congress considered to be "an investment" and under what circumstances it considered an employee to be "an investor". That we learn from the Report itself, by its reference to "participants in employee stock-investment plans".

Plaintiff reads more into the Congressional action and likewise takes inexcusable liberties with the documentary record. Plaintiff argues that the Hastings amendment "would apply not only to stock-investment plans—as petitioners would so limit it—but also to employee plans for the payment of *extra compensation*, such as the more common employee pension plan designed to invest em-

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[28] Compare SEC Br. 58 with 78 Cong. Rec. 8708, quoted at IBT Br. 82.

[29] Compare SEC Br. 58-59 with Conference Report quoted at IBT Br. 92 and p. 31, *infra*.

ployee funds in a variety of different types of assets." (Pl. Br. 63, emphasis in original).[30] He follows this by purporting to recite what the Conference Report said; but because he, too, quotes only that portion thereof which follows "participants in employee stock-investment plans", his phrase "such plans" puts plaintiff's own position into the Conference Committee's mouth. (*Id.*)[31]

While plaintiff and the SEC both rely heavily on the phrase "extra compensation" in the amendment, their briefs offer no evidence of what Senator Hastings meant thereby. And while plaintiff stresses that Senator Hastings used the phrase "additional compensation" when he objected to the Conference's disapproval of his amendment (*id.*), the more complete version of what he said on that occasion, quoted at IBT Br. 93, suggests strongly that the Senator contemplated only plans whereby "employees of corporations * * * share in the profits of the corporation". Moreover, if any inconsistency can be perceived between Senator Hastings' statement on the Senate floor and the Conference Committee Report, it is the latter which is entitled to greater weight, as this Court held with respect to this very amendment in *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126 n.13.[32]

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[30] It will be noted that even plaintiff's version, which refers to "employee funds", does not reach noncontributory pension plans, which are involved in this case.

[31] Plaintiff employed the same artifice *in haec verba* in his brief below (p. 34); although we demonstrated to the Court of Appeals how plaintiff had distorted the Report's text and meaning (Reply Br. 31-32, n. 56), the Court suspended disbelief and even adopted plaintiff's partial quotation of the Report. (A. 233)

[32] Indeed in that case, the Court described the 1934 amendment as one "which would have specifically exempted employee stock offerings" (*id.* at 126). Because the Court did not focus on the scope of the amendment, we do not rely on this statement as precedent. But we do think that in assessing the SEC's present position it is not without significance that in its brief in *Ralston Purina* it said:

> The Securities Act was amended in 1934. One proposed exemption, which was rejected, would have exempted participants in employees' stock investment plans. The reasons of the House conferees for rejecting this amendment are clear and unambiguous, as stated in their report of the conference:

It thereupon quoted the language from the Conference Report on that amendment in full. (Br. for Securities and Exchange Commission, No. 512, Oct. Term, 1952, pp. 26-27).

Plaintiff relies on the 1941 testimony of Commissioner Purcell (see IBT Br. 105-112 and pp. 41-49, *infra.*) to support his claim that in rejecting the Hastings Amendment, "Congress thus considered interests in employee pension plans as securities * * * and that the SEC so understood" (Pl. Br. 63). But in attributing this error to Mr. Purcell, the quotation from his testimony at Pl. Br. 63-64 omits (at the spot indicated by elisions) his reference to the Conference Report, and his quotation thereof, including, of course, its reference to "employee stock investment plans". What Mr. Purcell actually said, after quoting the amendment, was the following:

> My recollection, so far as that amendment is concerned, is that it was adopted in the Senate and went to conference. The proposal was eliminated by the conference committee, *and the report of the managers on the part of the House assigned the following reason for its elimination—and I quote from House Report No. 1838, Seventy-third Congress, second session, page 41:*
>
> *The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public.*

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security.[33]

The upshot is, as we asserted at IBT Br. 92-94, that rejection of Hastings Amendment provides no "guidance" whatsoever in determining whether Congress considered private pension plans which do not involve employees' purchase of employer stock to be "securities".

C. *The Investment Company Act of 1940*

Plaintiff argues that the exclusion of employee pension trusts in § 3(c)(13) of the Investment Company Act of 1940 and the provision for discretionary administrative exemption of employees securities companies in § 6(b) of that Act are evidence that Congress there recognized similarities between employee pension plans and ordinary mutual funds. (Pl. Br. 79-81). Plaintiff contends that in the absence of the § 3(c)(13) exclusion, *all* pension plans would be regulated as investment companies under the 1940 Act, but neither of the statements on which he relies refers to "all" pension plans. Rather, they are carefully limited, in the case of Mr. Purcell's testimony, to "many" employee plans, and, in the case of the Assistant General Counsel's opinion, to "certain types" of pension and profit sharing plans. See pp. 38, 40-42, *infra*.

The history of § 3(c)(13) is inconsistent with plaintiff's interpretation. Section 3(c)(13) was not contained in the Wagner-Lea bill originally submitted to Congress in 1940, but was one of a group of exclusion provisions

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[33] 1941 Hearings at 895-896, emphasis added to show the portion omitted at Pl. Br. 64. Plaintiff also substituted, without indication, a period for the comma after the phrase "the conference committee" thereby making it appear that the sentence ended there. (The full citation of the 1941 Hearings is given at IBT Br. 105).

later added to § 3(c) as part of an SEC-industry compromise.[34] The stated purpose of the additional exclusions was "* * * to make certain that there are eliminated those companies whose inclusion under the present bill was neither intended nor desired * * *",[35] as a "precaution to grant an exemption to every type of company which might be construed to be within the purview of the legislation but should not be within the legislation", and as "notice unequivocally to everybody in that category that they are not within the purview of the bill."[36] Thus, 3(c)(13) was designed, not as plaintiff suggests, to exclude what otherwise would have been covered under the Act, but for the opposite purpose of guarding against unintended application of the Act.[37]

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[34] *Cf.* § 3(c) of S. 3580, the Wagner-Lea bill, reprinted in *Hearings before a Subcom. of the Com. on Banking & Currency on S. 3580*, 76th Cong., 3d Sess. 3 (1940) [hereinafter "*1940 Senate Hearings*"], with § 3(c) of the 1940 Act, 54 Stat. 789, 798-799; see also 1940 Senate Hearings, 1105-6.

[35] Framework of Proposed Investment Company Bill, Title I, Embodying Suggestions Resulting from Conferences Between Securities and Exchange Commission and Representatives of Investment Companies, Memorandum dated May 13, 1940, ¶ 2, reprinted in *Investment Trusts and Investment Companies*, Hearings Before a Subcom. of the Com. on Interstate and Foreign Commerce, 76th Congress, 3d Session, on H.R. 10065, p. 96 (the "*1940 House Hearings*").

[36] Testimony of David Schenker, Special Counsel for the Securities and Exchange Commission, 1940 Senate Hearings, 1110, 1111.

[37] This is not the only instance in which Congress specifically excluded or exempted transactions or entities from the federal securities laws even though they would not have been covered in the absence of exclusion or exemption. *See* Mr. Justice Brennan's discussion of the insurance exemption of § 3(a)(8) of the 1933 Act in his concurring opinion in *VALIC*, see 359 U.S. at 74, n. 4, where he pointed out that "Under the Securities Act, it would appear that in the case of the ordinary insurance policy, the exemption would be just confirmatory of the policy's noncoverage under the definition of security."

The addition of § 3(c)(13) may well have been prompted by a perception that *some* employee benefit plans resembled employees securities companies, which are investment companies and are recognized to be such in the SEC's comprehensive Investment Trust Study which was the basis of the 1940 Act.[38] Such a similarity might have been perceived in the case of voluntary contributory plans. But there is nothing to indicate that anyone then thought that compulsory noncontributory pension plans resembled employees securities companies or any other type of investment company. On the contrary, employee pension plans were not even mentioned in the Investment Trust Study. Such a perception would also have been in sharp conflict with the SEC's view in 1941 that the distinction between contributory and noncontributory pension plans was significant for purposes of deciding the desirable scope of regulation under the 1940 Act for an employees securities company which invested funds of a *noncontributory* pension plan. *Electrical Securities Corporation*, 10 SEC Jud. Dec. 648 (1941).[39] And the fact that § 3(c)(13) was

[38] *U.S.* v. *National Assn. Securities Dealers*, 422 U.S. 694, 705-706; see IBT Br. 98.

[39] Plaintiff misses the point of *Electrical Securities Corporation*, in which the SEC itself recognized that an employee pension trust and an employees securities company are different entities under the 1940 Act and that pension trusts are outside the purview of the Act. *Cf.* Pl. Br. 80. Plaintiff's reference to *General Electric S & S Program Mutual Fund* [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,630 adds nothing. That ruling (which plaintiff fails to note was ultimately reversed on other grounds by the SEC, [*id.* 1969-70 Transfer Binder, ¶ 77,750]) did not involve a pension plan but a mutual fund which was concededly an investment company required to register under the 1940 Act and which was one of several alternative media in which employees could direct the investment of their interests under a voluntary contributory thrift plan. This mutual fund, for which certain exemptions were sought under § 6(b), would have been excluded under § 3(c)(13) but for certain distribution provisions which were said to bar its qualification under the Internal Revenue Code. The most that can be drawn from that ruling for present purposes is that a voluntary *contributory* employee *savings* plan may be an investment company and an employees securities company under the 1940 Act unless qualified under the tax law. That proposition provides no support whatever for the plaintiff's contention that the regulation of employees securities companies under the 1940 Act reflects a congressional perception that *all* employee *pension* plans are similar to ordinary mutual funds.

drawn broadly to exclude *all* qualified plans only reflects understandable caution, since an exclusion limited to voluntary contributory plans might have invited the inference that compulsory noncontributory plans were intended to be regulated.

Unlike the plaintiff, the SEC does not defend the inference which the Court of Appeals drew from the 1940 Act. Instead the SEC tries to explain the exclusion of qualified pension plans by suggesting that because such plans had not been required to register under the Securities Act it would have been anomalous to regulate them under the 1940 Act. SEC Br. 62-63. The premise of this argument, that exemption from registration under the 1933 Act was viewed as a reason for exclusion from the 1940 Act, contradicts what the SEC told Congress in 1940 and is inconsistent with the scheme of the 1940 Act.

In explaining the need for the 1940 legislation, SEC Commissioner Healy told Congress that the 1933 Act had proved inadequate to protect the interests of investors in investment companies, in part *because* most investment companies had *not* been required to register their securities under the 1933 or 1934 Acts. He testified:

> Finally, particularly with respect to those companies which have not registered their securities under the Securities Act of 1933 or the Securities and Exchange Act of 1934—*and only a small number have so registered their securities*—the investor has been un-

able to obtain adequate information as to their operations.[40]

Moreover, many of the abuses at which the Act was directed were unrelated to the presence or absence of disclosure. Thus, it was not "anomalous", but entirely understandable, that Congress would subject investment companies to substantive regulation without regard to whether or not they were subject to the registration requirements of the 1933 Act.

> The Securities Act of 1933 and the Securities Exchange Act of 1934 have not acted as deterrents to the continuous occurrence of abuses in the organization and operation of investment companies. Generally these acts provide only for publicity. The record is clear that publicity alone is insufficient to eliminate malpractices in investment companies. *Further, the great majority of investment companies have never come within the purview of these acts.* (Emphasis added.)[41]

The SEC also attacks a straw man in observing that some entities excluded under § 3(c) of the 1940 Act are owned by investors. SEC Br. 62. But we have not suggested that there was any single rationale, such as the absence of an investor interest, for the various exclusions contained in § 3(c). Our argument rather is that the express statement in § 3(c)(13) that employee pension trusts are not investment companies, coupled with the express provision for regulation of employees securities companies, reflects a considered legislative determination that the relationships involved in employee pension plans were not appropriate subjects for the type of regulation provided in the 1940 Act. And this determination

[40] 1940 House Hearings 59 (emphasis added).

[41] H.R. Rep. 2639, 76th Cong., 3d Sess. 10 (1940); *see also* S. Rep. No. 1775, 76th Cong., 3d Sess. 11-12 (1940).

supports our contention that Congress has never regarded employee pension plan participants as investors intended to be protected under the federal securities laws.

Nor is the exception of unqualified plans from § 3(c)(13) inconsistent with our view, as SEC Br. 62 suggests. Since the reason for this limitation is not explained in the legislative history, it is rather futile to speculate what did and did not "make sense" (*id.*) to the 1940 Congress. For aught that appears, Congress simply took the view that since such plans were not entitled to protection under the Internal Revenue Code, they did not merit automatic exclusion from the Investment Company Act if, for other reasons, they satisfied the definition of an investment company in § 3(a). Congress may have thought that the line between plans which were and which were not investment companies was a hazy one, and did not wish to stop to consider the precise characteristics of plans which were not for exclusive benefit of employees and therefore unqualified.[42] In any event, in the absence of any evidence that the exception was given more than passing attention, there is no basis for drawing any inference inconsistent with the recognition, in the enactment of § 3(c)(13), that qualified employee pension trusts are not investment companies and, implicitly that participants are not "investors" intended to be protected by the federal securities laws.

D. *The 1941 Opinions*

Little is said on the other side which calls for amplification of our discussion (IBT Br. 103-105) of SEC Assistant General Counsel Davis' September 1941 opinions. It is argued at Pl. Br. 65 "that the Second Opinion makes it clear that an interest in an employee pension plan is a security". In so far as this assertion is made

[42] Internal Revenue Code of 1939, § 165.

to advance the proposition that interests in all kinds of pension plans involve securities, it simply disregards the qualification "interests in certain types of plans" in the very passage quoted. See also IBT Br. 103, n.93, 104. Thus, what the opinions do make "clear" is that the SEC regarded not all, but only "certain types of plans" to be within the definition of "investment contracts". The SEC does not meet this point at all; nor does it ever face up to this evidence of what its historic position on the scope of the term "security" really has been.

Both plaintiff and the SEC cite the Davis Opinions in support of the argument that the "no-sale" rationale with respect to compulsory plans and noncontributory plans applies only to the registration requirements and not to the antifraud provisions of the Act. (SEC Br. 66, Pl. Br. 64, 91-92). This argument too, depends on ignoring the text of the Opinions. While Mr. Davis referred frequently to the registration requirement, he did so because he was responding to inquires as to whether registration was necessary. But his *reasoning* was based on the statutory definition of the term "sale", see IBT Br. 104.

Referring to the Davis Opinions and to Mr. Purcell's 1941 testimony (see pp. 41-49 *infra*) plaintiff argues that "this no-sale theory was part and parcel of old Rule 133 and was *only* applied in the context of the registration requirements." (Pl. Br. 92, emphasis in original). Here plaintiff commits a not uncommon error against which then SEC Chairman Cohen cautioned in an address given concerning Rule 133. After explaining that the predecessor of Rule 133 was a Note to Form E-1 dealing with corporate reorganization and adopted in 1935, Mr. Cohen continued:

> Before dealing with certain events leading to this decision [to adopt Rule 133 in 1951], it is important to understand the distinction which must be drawn between the so-called "no-sale" *theory* and what is

popularly referred to as the "no-sale" *rule*. The distinction is vital to an understanding of the entire problem.

The Commission's briefs in the *Leland Stanford* case in 1941 and 1943 had urged two propositions upon the court: (1) the "no-sale" *theory*, that is, that the consolidation in that case did not involve a "sale" within the meaning of the definition of that term in Section 2(3) *for any purpose* under the Act; and (2) even though the Court might not agree with this proposition that the "no-sale" *rule* which was then embodied in the Note to Form E-1 was limited by its terms to questions as to the application of the registration provisions of the Act to the transactions of submission and consummation of mergers, consolidations and similar plans and, therefore, could properly be relied upon as making registration unnecessary. It was further expressly stated in these briefs that, while reliance on the "no-sale" registration *rule* in the Note afforded protection from civil liability under Section 12(1) of the Act because of failure to register, if the Court did not agree with the "no-sale" *theory*, the *rule* would provide no protection under Section 19 from the anti-fraud, civil and criminal liability provisions of Sections 12 (2) and 17.

The Court of Appeals decided the case on other grounds and then referred to the Commission's arguments in phraseology which, it is generally urged, suggests that the Court accepted the "no-sale" *theory*. Following this discussion, the distinctions between the *rule* and the *theory*, so ably argued in our briefs, and their implications apparently were not fully appreciated, or were glossed over.[43]

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[43] Cohen, *Rule 133 of the Securities and Exchange Commission*, 14 Record of the City Bar Ass'n. of N.Y., 162, 164-165 (1959) (footnote omitted, emphasis in original).

Assistant General Counsel Davis' opinions on pension and other employee benefit plans, of course, were not applying the "no-sale" *rule*. This is clear not only from his express reliance on the Act, but because the Note, which was the predecessor of Rule 133, dealt only with mergers and consolidations. Thus, his reasoning applied to the antifraud provisions as well."[44]

E. *The 1941 House Hearings*

Our adversaries place heavy reliance throughout their brief on their interpretation of Commissioner Purcell's testimony as the SEC's spokesman at the 1941 House Hearings. They assert that he there took the position that interests in all pension plans were securities, and that involuntary noncontributory pension plans were exempt from the registration requirements of the Securities Act but were subject to its antifraud provisions. They are wrong in both respects.

1. In specifically addressing the statutory definition of "security", Mr. Purcell said that

> any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract." (1941 Hearings 895).

Yet plaintiff argues:

[44] SEC's brief, 71-72, n.54, acknowledges that in its *Leland Stanford* brief it took the position that the definition of "sale" excluded the transaction from the antifraud as well as the registration provisions. That the *Leland Stanford* case involved *mergers* and that the SEC later changed its position with respect to mergers, does not detract from the significance of that brief in demonstrating what the Commission meant in 1941 when it described the consequence of finding that there was "no sale" for the purpose of the Act. Later in the footnote, the Commission attempts to confuse its "no sale" theory with its "no sale" rule, connecting the two only with the word "Indeed"; but the Commission knows full well the difference.

> In making this statement Commissioner Purcell has in no way limited his remarks to any particular type of pension plan. Daniel has been given the opportunity to place his earnings in the Local 705 Pension Fund, to be invested for his benefit and returned to him in the future. The fact that his compensation is placed in the Fund direct by his employer is a quirk of the tax code and is not in derogation of his rights under the federal securities laws. (Pl. Br. 67).

We do not think that the words Mr. Purcell used could have born the meaning plaintiff ascribes to them; for example "returned to them" unmistakably referred to a characteristic unique to contributory plans. But the major error of plaintiff's interpretation is that Mr. Purcell's words can be read to refer to noncontributory or involuntary plans if at all, only by attributing to him views concerning such plans which are demonstrably contrary to Mr. Purcell's actual views when he testified.

Since he considered noncontributory plans to be a "gift" he could not have included them among plans in which employees place "a part of their *earnings*."[45] So, too, he would not have used phrases such as "given the opportunity to place part of their earnings in a fund which is to be invested" (*id.* at 895); "opportunity to inform himself of the essential terms of the plan before he invests in it" (*id.* at 902) and "when he [the employee] is asked to participate in the plan" (*id.* at 903) in describing an involuntary plan. For the SEC believed, in Mr. Purcell's words, that participation in an involuntary plan involved no choice on the employee's part; contrary to our adversaries' present views, Mr. Purcell believed that "as a practical matter, people do not decide, it seems to

[45] See also *e.g.*, *id.* at 896 ("employee's payments"); *id.* at 902 ("his funds"); *id.* ("his contributions"); *id.* at 903 ("the employee's money").

me, to take jobs or leave them because they like or dislike the company's investment plan" (*id.* at 897).

Whatever may be said on the merits of these matters, it is fallacious to interpret Purcell's testimony in the perspective of plaintiff's and the SEC's present position; his words can be correctly understood only if approached on the basis of his own assumptions as there expressed.

2. Our adversaries simply ignore the words of limitation which Mr. Purcell used, such as "Certain" (1941 Hearings at 887) "many" (*id.* at 895), etc., and the other evidence discussed at IBT Br. 106-109, that the only type of employee plan he claimed to be within the statutory definition were voluntary contributory plans, that is, those in which employees were invited to put their money into a fund which would purchase employer stock or other securities. The very language quoted at SEC Br. 55 shows what type of plan Mr. Purcell was talking about.[46]

And, of course, our adversaries can point to no evidence that Mr. Purcell embraced the notion which they

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[46] Likewise misplaced is plaintiff's reliance on the SEC's prior written Report on its proposals, and other proposed amendments to the Act:

> Although the Commission believes that in general employees' plans are highly desirable, it believes also that *there are many plans* as to which employees are entitled to assurance that there will be disclosed to them the essential facts concerning *their payments*, how those payments will be invested, and the conditions upon which they will be returned . . . Pl. Br. 66, (quoting 1941 SEC Report p. 15, our emphasis).

The subsequent reference in the portion of the 1941 Report quoted at Pl. Br. 66 to "employee-investors", when understood in relation to the SEC's view that participations in noncontributory pension plans were "gifts", confirms that the amendment proposals discussed in the 1941 SEC Report related to contributory plans only. So too, the use of that phrase in the Davis opinions relied on at Pl. Br. 24-25, is shown by the context to refer only to employees who put money into voluntary contributory plans.

advance, that a plan where the benefits depend primarily on employer contributions based on the labor of individuals who will never qualify for a pension, constitutes an "investment contract".

With the text unavailing, the SEC resorts to unwarranted inference. It asserts that if "the Commission had regarded interests in noncontributory, compulsory pension plans as not being securities, there would have been no need to address the issue of whether a sale was involved" and that it is therefore "clear" that Commissioner Purcell regarded as securities "not only interests in voluntary, contributory plans but also interest in involuntary, noncontributory plans, like the Local 705 plan." (SEC Br. 57) This argument is untenable. Application of the Act requires the presence of both a security and a sale. It is entirely reasonable for the agency to formulate a position with respect to both statutory elements. But it is not necessary for the Commission to reach the same stage of its thinking with respect to both at the same time, or, having determined that one essential element of statutory coverage is lacking with respect to a particular type of a transaction speculate as to whether the other element is also present. Mr. Purcell's testimony in its entirety shows that the Commission had reached the point where it believed that some pension plans and other employee pension plans involved securities, that it recognized that some were not, and that it had not yet determined just where the line fell.[47] It was

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[47] Mr. Purcell clearly did not make the statement attributed him at Pl. Br. 63 that after Congress rejected the 1934 amendment proposal the SEC considered the federal securities laws applicable to all employee pension plans. We have shown in our discussion of that proposal at pp. 31-32, *supra*, that plaintiff arrives at this invention by omitting in his quotation of Mr. Purcell's testimony the key sentences indicating that the subject of that amendment proposal was employee stock investment plans and by ignoring the fact that nowhere in the history of the rejected 1934 amendment is there any reference to employee pension plans.

unnecessary for the Commission to so determine because it had concluded that there was a "sale" only with respect to voluntary contributory plans. In presenting the SEC's position to Congress Mr. Purcell stated what the agency had already decided, while preserving its options with respect to the precise scope of "security". Moreover, on this occasion Mr. Purcell did feel the "need" to disarm a skeptical committee by stressing the limitations of the SEC's jurisdictional claims under both the key terms, "security" and "sale". That is why he sought "to make as clear as possible at the outset of my remarks * * *" what the SEC was, and was not proposing, and at one point to give assurance that "that is all that is suggested." (1941 Hearings at 887-888, 903 quoted at IBT Br. 107-108)

3. Both plaintiff (Pl. Br. 65-66) and the SEC (SEC Br. 55-56) seek to convey the impression that Mr. Purcell's testimony at pp. 895-897 of the 1941 Hearings was addressed to Congressman Paddock's proposed amendment to the definition of "security" in Section 2(1) of the 1933 Act. For example, after quoting that amendment, the SEC continues (SEC Br. 55):

> Commissioner Purcell, testifying before the Congress concerning this amendment,[41] articulated the Commission's view that interests in pension funds are securities, since a pension fund is simply another investment vehicle through which the funds of individuals are managed.

[41] *Id.* at 887-920.

We submit that Mr. Purcell did not articulate that view, let alone the foregoing explanation thereof, indeed, the very passage quoted does not even mention pension plans. But our immediate point is that the SEC's footnote reference is to Mr. Purcell's entire testimony on this subject (except for his introduction of Mr. Latimer,

1941 Hearings at 865). In fact, however, when Mr. Purcell gave the testimony quoted at SEC Br. 55, (from p. 895 of the Hearings), he was testifying only about the *Commission's* proposal, as the introduction to his testimony on this subject should suffice to make clear. (1941 Hearings at 887-888, quoted at p. 44, *supra*).[48] He did not address the Paddock amendment until page 919 of the Hearings where he said:

> I should like to comment now on the bill H.R. 6065, which is the bill introduced by Congressman Paddock on June 16 of this year.

Thus, it is not "petitioners and supporting *amici*" but our adversaries who "attempt to turn Commissioner Purcell's testimony on its head." (SEC Br. 55).

It is asserted at Pl.Br. 65: "Of course, had Congress never intended pension plans to come within the definition of 'security,' this proposed bill would have been unnecessary." What made the amendment "necessary" in the eyes of Mr. Paddock and others, was that the SEC had begun to press for registration of certain voluntary contributory plans. See IBT Br. 105-106, n.94.[49] The amendment did not indicate that its sponsor entertained, or attributed to the SEC, the view that involuntary plans were within the definition of "security". Once Mr. Paddock determined to prevent that result, it was prudent that he draft the exclusion broadly enough to cover all types of pension plans, including those as to which no jurisdictional claim had been raised lest the agency argue in the future by negative implication (although contrary to good sense) that it was permitted to treat compulsory or noncontributory plans as "securities". In testifying

[48] See also *e.g.*, the succinct statement of the SEC's concerns, *id.* at 901-902, and the description of its proposal, *id.* at 907-908.

[49] See also the testimony of industry witnesses cited at IBT Br. 109, n. 96.

about the SEC's own proposal, Mr. Purcell had made clear to the Committee its position that interests in voluntary contributory plans were "securities" and that the acquisition of interests therein involved a "sale," but that compliance with the registration requirements of the Act should be excused if certain conditions were met (*id.* at 907-908). He opposed the Paddock amendment because the conditions which it would have imposed were inadequate; for instance, he objected that § 165 of the I.R.C. fell short of the protection which the SEC deemed desirable for such plans:

> * * * [It] contains no requirement that the employer contribute anything whatever to the plan. There is no limitation on how the funds may be invested; a plan meeting the requirements of section 165 could involve *employees' savings* in the wildest sort of speculation. Nor is there any guaranty against forfeiture of *employees' contributions*, or any ready provision for making available to them the essential terms of the plan. (1941 Hearings 919-920, emphasis added.)

He also described the even greater inadequacies of § 21 (2) of the Banking Act, compliance with which would have excluded employees' savings account plans from the definition of "security" (*id.* at 920). He concluded his objections to the Paddock amendment with a paragraph that says nothing about what the SEC thought "security" means. What he did say was that if all employee plans were excluded from the definition of "securities", none would be subject to the antifraud provisions of the Act. (*id.*, quoted at SEC Br. 75).[50] He did not assert the proposition attributed to him at Pl. Br. 65-66 and perhaps at SEC Br. 74 that all pension plans are securi-

[50] In the original, the paragraph begins "In the second place" (1941 Hearings 920); as we have seen, what was said in the first place provides the context for the statement quoted by the SEC.

ties.[51] And his prior testimony is inconsistent with our adversaries' thesis that the "no-sale" theory is limited to the registration requirements of the Act, as we next show.

4. Mr. Purcell stated that in order for the Act to apply there must also be a "sale" and he nowhere stated that there would be a "sale" for some purposes and not for others. (1941 Hearings at 896-897 quoted at IBT Br. 108-109)

On the contrary, in explaining that registration was not required "where the employees pay nothing for the securities", he explicitly stated, "a gift is not a sale and the *Securities Act* is concerned only with sales of securities" (1941 Hearings 896, emphasis added). Our adversaries simply fail to do business with the underscored language, which bespeaks reliance on a statutory term on which coverage depends rather than some special characteristic of registration.

Nothing as explicit appears in Mr. Purcell's description of the "no-sale" theory with respect to compulsory plans. But the fact that he there specifically referred to the purposes of registration does not justify the contention that he was there using "sale" in a special sense limited to registration. And while *SEC* v. *National Securities Inc.*, 393 U.S. 453, on which our adversaries rely, held that the term "sale" *may* have different meanings for purposes of the registration and the antifraud

[51] Mr. Purcell plainly did not say anything about "exempting [securities] from the anti-fraud provisions" (SEC Br. 74); his objection was that the amendment "would actually *exclude* the specified types of interests or instruments from the definition of the term "security." (*id.* 1941 Hearings at 920, emphasis added). In fact, at that point in his testimony, he did not discuss the meaning of "sale" at all. The distinction between statutory exclusion, and statutory or administrative exemptions is sometimes important, but is not always scrupulously observed, as we show at IBT Br. 99, text and notes at nn. 91, 92.

provisions (pp. 18-20, *supra*), there is no evidence in Mr. Purcell's testimony that he was ascribing more than one meaning to the statutory term. On the contrary, the contemporaneous Davis opinion and *Leland Stanford* briefs confirm our view that the SEC believed that the volitional element of a "sale" was applicable to the antifraud provisions of the Act. (See IBT Br. 103-105, 110, n.97 and pp. 27, 38-39 *supra*). Indeed, that was still the SEC's view in the 1971 Institutional Investor Study (see p. 27 *supra*).

5. One further observation is called for with respect to Mr. Purcell's testimony and the interpretation placed on it herein by plaintiff and the SEC. Whatever room for debate there may be regarding that testimony, two propositions are incontrovertible:

1) Mr. Purcell never said that all pension plans (or all involuntary noncontributory pension plans) were securities;

2) Mr. Purcell never said that the antifraud provisions of the Securities Act apply to involuntary noncontributory pension plans.

Considering the skepticism and even hostility which several members of the Committee expressed concerning the Commission's assertion of any jurisdiction over pension plans, elementary candor would have called for a clear statement to that effect had the SEC then taken the positions now attributed to it. Far from saying any such thing, Mr. Purcell took pains to emphasize the modesty of the Commission's position, see p. 44 *supra*.[52] Given

[52] See also 1941 Hearings at 904.

Mr. WOLVERTON. Now, assuming that to be the real reason that prompts you in making the suggestion of this change in the law, does it not seem to you that it is a question foreign to the fundamental purpose of the Securities Act?

[Continued on page 49]

these disclaimers, it is unfitting, to say the least, for his successors to invoke his testimony in support of their novel and sweeping jurisdictional pretensions.

F. *The SEC's Post-1941 Administrative Practice*

The briefs on the other side simply ignore the history of the SEC's administrative practice recited at IBT Br. 112-116.

G. *The 1970 Amendment to § 3(a)(2) of the 1933 Act*

In its brief in the Court of Appeals, the SEC placed heavy reliance on its reading of the legislative history of the 1970 amendment to § 3(a)(2) of the 1933 Act, an interpretation which it persuaded the Court of Appeals to adopt. In this Court, however, the SEC concedes that the legislative history of that amendment "is not a model of clarity." SEC Br. 61. We think that even this fully justified retreat from the certitude displayed in the SEC's brief to the Court of Appeals on this point fails adequately to acknowledge the flaws in the court's reasoning, which the SEC's brief simply adopts. But even on its face the SEC's acknowledgement that the legislative history of the 1970 amendment "is not a model of clarity", is an unwitting confession that the Court of Appeals erred in attaching significance to the enactment of that amendment. Our point is simply that the

[52] [Continued]

Commissioner PURCELL. Well, I must remind you again, Congressman, you must keep this clear, our suggestion is for exemption and not for inclusion in the act.

Mr. WOLVERTON. I am perfectly aware of the adroitness that can be readily discerned in the presentation of an exemption which in fact establishes a basis of control as to other cases.

Commissioner PURCELL. May I say, for the Commission, that that is not our intention in submitting this proposal, Mr. Congressman.

fact that Congress amended § 3(a)(2) of the 1933 Act, and specifically that it added to that amendment in the course of its passage the words "single or", provides no support for the conclusion that "Congress has evidenced agreement with the SEC's position that interests in pension funds are securities". (A. 236) No Congressional Committee, no individual Congressman ever espoused such a view or even stated that, as the court below held, the amendment deals with the sale to employees of interests in pension funds. (A. 238) We submit that it is a hazardous, if not desperate undertaking to impute to Congress any views concerning the legal status of employee interests or participations in pension funds on a legislative record which does not reveal with "clarity" even that Congress had consciously considered the subject.

The SEC nevertheless adopts the Court of Appeals' conclusions regarding the 1970 amendment, without any effort to respond to our detailed analysis of its error. (IBT Br. 116-135.) Instead of discussing the language of the amendment and its legislative history, the SEC offers the contention, also advanced by plaintiff, "that [i]n the case of a single pension trust fund maintained by a bank there is only one security—the employee's interest in that fund," a premise from which it leaps to the conclusion that if § 3(a)(2) did not apply to employee interests the addition of "single or" would serve no purpose. (SEC Br. 61, n.48, see also Pl. Br. 75). This line of argument is at best a conjecture which would not justify attributing significance to the House Committee's addiion of the words "single or", even if the legislative record were otherwise silent.[53] Indeed, the SEC's very statement of the argument assumes the ultimate proposition for which our adversaries contend,

[53] "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61

namely that Congress considered an employee's interest or participation in a pension fund to be a security. Moreover, the premise of the argument overlooks the relationship between the bank and the plan administrators whereby the bank agrees to provide investment (and perhaps other) services for the fund. Congress may well have considered that agreement to be an "investment contract", or at least that it might some day be argued to be one. This hypothesis is at least consistent with the thrust of § 27(b), namely to regulate the relationship between banks and insurance companies on the one hand and various types of plans on the other, and does not attribute to Congress an undisclosed shift in focus from that relationship to the one between pension plans and their participants (see A. 238). Alternatively, it may be that the House Committee believed, without considering the matter further, that if no reference to "single" funds were made it might be contended in the future, by a process of negative implication, that only collective bank funds would be exempt from registration, and added the phrase "single or" as a precaution.[54] There is some evidence to support that assumption too, for the Stannard Dunn letter raised this very point.[55] While we be-

[54] Since banks generally offer such services to a multiplicity of offerees, this was not an idle concern. *See SEC* v. *Ralston Purina*, 346 U.S. 119, 125.

[55] This change may have been prompted by the observations in the second paragraph of the Stannard Dunn letter which drew attention to the existence of separate, non-commingled trust funds maintained by banks and the absence of any reference to bank trust funds of that type in the bill approved by the Senate. IBT Br. 127-128, n. 114. However, the addition of "single or" clearly had no relation to the change suggested in the fourth and fifth paragraphs of Mr. Dunn's letter which the Court of Appeals quoted at A. 239. See IBT Br. 127-128, n.114. In response to our showing, it is contended at Pl. Br. 76, n.64 that the Committee's failure to adopt Mr. Dunn's proposed language is "unimportant" and that "single or" had the same "effect" as Dunn's language. But, Mr. Dunn had sought to exempt interests in all tax qualified pension plans while the Springer-Moss

lieve that both of our hypotheses are more plausible than our adversaries' conjecture, for which no evidence at all is proferred, our principal objection to their argument is that any speculation on this subject is wholly unwarranted, first, because, as already noted, significance should not be attributed to Congress' action by conjecture, and second because the language of the amendment and the legislative record provide objective evidence which shows what Congress did intend and refutes the conclusion which our adversaries would merely divine.

The SEC does not agree with the Court of Appeals concerning the circumstances under which interests acquired by employees in pension funds would be exempted from registration. According to the SEC, in the phrase "a single or collective trust fund maintained by a bank", the words "maintained by a bank" modify "collective trust fund" but not "single." (SEC Br. 97, n.81.)[56] Under this reading, which is offered *ex cathedra*, with no sup-

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colloquy demonstrates that the House amendment was limited to plans which were bank-maintained, see p. 53, *infra*, and plaintiff himself elsewhere agrees that it was so limited, Pl. Br. 74-75.

In short, although the evidence of the Dunn episode is entirely consistent with our interpretation of the House Committee's action, the soundest view of the matter is that expressed in the brief tendered by the United States, p. 28, n.12, that this letter, having been received without comment or cross examination, is entitled to little weight, citing *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 and n.20. This observation is all the more apt because there are far more reliable materials, which show what the House Committee did and did not intend by adding "single or".

[56] The SEC's staff has recently taken the position which is consistent with the views it expressed here and to the court below, i.e., that a single trust fund does not have to be maintained by a bank in order to enjoy the exemption from registration afforded by § 3(a)(2). *Gilbert Associates, Inc.*, CCH Fed. Sec. L. Rep. ¶ 81, 406 (October 31, 1977). However, at an earlier time, the staff's position was that a single employer fund was not entitled to the § 3(a)(2) exemption when a bank, albeit a trustee, did not possess sufficient investment discretion. *Monolithic Memories, Inc.*, April 16, 1974 (available 5-16-74).

porting analysis or authority, all single pension trust funds which are qualified under the Internal Revenue Code are exempted from registration by the 1970 amendment, whether or not they are maintained by a bank. The SEC's reading does obvious violence to the language of the amendment. The phrase "maintained by a bank" clearly modifies and limits "single" as well as "collective trust fund." The SEC's reading is also contradicted by the Springer-Moss colloquy explaining the addition of "single or," where the subject of that change is authoritatively described as "interests in a single trust maintained by a bank where the trust assets were not commingled with those of other qualified trusts." [57]

Plaintiff reads the statute differently than the SEC. He asserts that "if an employee pension trust fund is maintained at a bank, the interests in such a fund are securities which are exempt from registration." Plaintiff simply substitutes "at" for the statutory "by", a transparent effort to support his positions that most pension funds would thereby be exempted from registration and that the focus of the amendment is interests in underlying pension trust funds rather than the subject clearly described in the statute, "trust fund[s] maintained by a bank." Further, plaintiff confuses trust funds maintained by banks in connection with qualified pension plans with bank common trust funds and H.R. 10 self-employed retirement funds, each of which is dealt with in other clauses of the 1970 amendment. Pl. Br. 72-73.

Plaintiff next argues that the language of the 1970 amendment itself describes the interests of participants in employee pension plans, Pl. Br. 73, but the argument is supported only by the device of quoting portions of the amendment with the crucial words "maintained by a bank" omitted.

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[57] The entire colloquy is quoted at IBT Br. 126-127.

Plaintiff observes that "Petitioners at great length delve into the legislative history of the insertion of the phrase 'single or' into amended Section 3(a)(2)." Pl. Br. 75. We have done so, of course, because the Court of Appeals, following the argument of the SEC, expressed the view that it was that phrase which "altered the focus of the exemption to encompass interests in the underlying funds" (A. 239) and it is for that reason that we have stressed the Springer-Moss colloquy, which is the only explanation given for that change between the House and the Senate bill, and declared it to affect the provision only "slightly." Neither the Court of Appeals in its decision, nor our adversaries' briefs have attempted to reconcile Mr. Moss' representation on the floor of the House with the theory that the whole "focus" of the bill was thereby altered. Plaintiff argues that "no recourse to colloquy on the floor of the House is needed to confirm [plaintiff's] interpretation of Section 3(a)(2)" because of language at p. 10 of the House Report. Pl. Br. 77. But that language does not purport to explain the change made in § 27(b) of the bill. Indeed, it does not deal with single funds at all, since it is in a paragraph that begins:

> The reported bill also deals with the question of the Federal regulation which should apply to bank collective trust funds and insurance company separate accounts for corporate pension plans and for 'Smathers-Keogh' plans (commonly referred to as H.R. 10 plans).[58]

The discussion appears in the introductory portion of the report under the general heading "BANKING & INSURANCE."[59] The section-by-section analysis appears later,[60]

[58] H.R. Rep., No. 91-1382, 91st Cong., 2nd Sess. 10.

[59] *Id.* at 7.

[60] *Id.* at 43-44.

and with respect to § 27(b) it is identical to the Senate Report before "single or" was added (see IBT Br. 126, text and note at n. 112).

Plaintiff describes the Springer-Moss colloquy inaccurately when he says that it merely restates the § 3(a)(2) exemption for single trusts and confirms that the amendment codified the SEC administrative practice which required registration of contributory employee pension plans where employee contributions were used to purchase securities issued by the employer. Pl. Br. 77, n.67.[61] The first part of the colloquy, which says what the amendment did do, explains the "slight" change with respect to "single trust[s] maintained by a bank." What Congressman Springer actually said in the second part of the colloquy was that in exempting interests in trust funds maintained by banks, the bill "would not prevent the SEC from requiring registration of interests and participations in such trusts", "*where employee money was used to buy securities of the employer*". (Our emphasis). At this point he was explaining what the bill did not do. And in referring to that SEC administrative practice he did not say that the bill would codify it but only that the bill would not interfere with it.

It is not petitioners who have placed great reliance on the 1970 amendment. *Cf.* Pl. Br. 72. It is the plaintiff and the Court of Appeals, supported below by the SEC, who have relied heavily on their interpretation of that amendment and its legislative history which the SEC now dismisses as "not a model of clarity." It is from that interpretation that they draw inferences crucial to their

[61] Plaintiff also cites the second paragraph of the Conference Report as evidence that the amendment codified this administrative practice, Pl. Br. 77, n.66, but he omits the first paragraph of the Conference Report quoted in full at IBT Br. 129 which shows that the subject of the amendment was trust funds maintained by a bank.

conclusions that Congress has recognized that interests in employee pension plans are securities, that most such plans are exempt from registration and that the anti-fraud provisions of the securities laws can therefore be applied without creating widespread liability for the general failure of such plans to register under the 1933 Act. The conclusion is inescapable, however, that the amendment does not support any of these inferences, and we reiterate that the 1970 amendment has nothing to do with this case.

III. IN ENACTING THE WPPDA AND ERISA CONGRESS ACTED ON ITS UNDERSTANDING THAT THE SECURITIES LAWS WERE INAPPLICABLE.

In our opening brief we demonstrated at length (IBT Br. 67-78) that when Congress, in the WPPDA and again in ERISA, enacted legislation which dealt with the precise problem of the nature and timing of disclosure to pension plan participants and beneficiaries; it did so on the clearly expressed understanding that it was filling a regulatory vacuum, and that the SEC and its representatives on both occasions contributed significantly to that understanding. The court below interpreted the SEC's statements on those occasions as merely "advocat[ing] a hands-off approach to the regulation of pension plans with respect to disclosure requirements * * *" (A. 252-254); the evidence shows that that interpretation was inaccurate, see IBT Br. 78-79. Neither the SEC nor plaintiff defends the Court of Appeals' reading. Indeed, in commenting on what Congress understood "in its consideration of labor legislation" (SEC Br. 68)—that is, WPPDA and ERISA, which curiously are not mentioned by name—the SEC's brief does not even acknowledge that its representatives testified, or that it otherwise participated, when this legislation was under consideration. The brief refers only to "certain Congressional materials", a bland generality

which apparently refers to the Committee reports which commented on the legal status of pension plans.[62]

Instead, the SEC asserts first, that if Congress believed that "the anti-fraud provisions of the securities laws were inapplicable to interests in pension funds", it did so on the ground that there was "no sale" rather than on the ground that there was no "security" (SEC Br. 68), and alternatively that, "the Congressional materials do not demonstrate that Congress regarded the antitfraud provisions as being inapplicable" (*id.*). The first of these speculations need not detain us because it is irrelevant;[63] and the second is demonstrably incorrect. Contrary to the SEC's argument, the "Congressional materials" cannot "indicate that Congress was aware of the 'no sale' rationale" because they contain no reference whatsoever to that rationale, let alone to the Commission's present misleading characterization thereof as limited to registration (SEC Br. 68).

The further surmise that it is likely that Congress "never thought about [the antifraud provisions] and was unconcerned about them," (*id.*) is based on a misstatement of both "the nature of those provisions" and the "type of labor-management and pension legislation that

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[62] These are the 1956 Reports (cited in full at IBT Br. 69); the 1972 Interim Report (S. Rep. 92-634, 92d Cong. 2d Sess.), and the 1973 Reports in both houses (cited at IBT Br. 73, n.61) which carried forward the Interim Report's summary of "The Existing Law".

[63] Our point is that "in both instances [the Congressional committees] legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to [the] relationship [between private pension plans and their participants]." (IBT Br. 68). For that purpose it matters not whether they thought that the securities laws (and the countless other inapplicable laws) did not deal with the subject for one reason rather than some other reason. The Congressional committees had more practical and important concerns than to delve into the theory of *why* any or all of the other federal laws were inapplicable.

the Congress was considering at that time" (*id.*). It also disregards what the "Congressional materials" actually said and the purpose of the Committee's investigation and discussion of existing law.

While it is true that ERISA involves, "among other things, detailed and complex regulation of pension funds * * *" (SEC Br. 68-69), the same cannot be said about the WPPDA, which was a *Disclosure* Act, and left substantive regulation of welfare and pension plans almost entirely to the states. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 507, 511-512.[64] And while ERISA federal-

[64] The description of the WPPDA at Pl. Br. 99-100 likewise ignores *Malone*; the characterization of the SEC's comments (Pl. Br. 100) is also wrong. Mr. Woodside, (the Director of the SEC's Division of Corporate Finance) testified that *some* pension plans had *registered*, not, that *all* had been exempted from registration.

> Now there have been a few pension funds which have registered under the Securities Act for the sale of securities to the employees of the company—there are very few of them. More frequently they have registered under the Securities Act plans involving the sale of the securities of the employer to the employee.
>
> Those plans most frequently take the form of either a stock-purchase plan, or perhaps a stock-option plan. The plan has certain pension fund characteristics in the sense that it is set up for the purpose of providing benefits for the employee at a future date, either upon retirement or upon separation from service from the company. The employer makes a contribution, ordinarily either in stock or cash. The employee makes a contribution, and the funds collected from the two are used to buy securities of the employer corporation or its subsidiaries.

(Welfare and Pension Plans Investigation, Hearings Before the Subcommittee on Welfare and Pension Funds of the Committee on Labor and Public Welfare, U.S. Senate, 84th Cong., 1st Sess. (1955), p. 944). In fact, Mr. Woodside engaged in a colloquy with Senator Douglas which shows both that disclosure to plan participants was at the heart of the Senate Committee's investigation, and that the SEC understood the laws which it administers were only remotely related:

> Senator DOUGLAS. The whole theory of the Securities and Exchange Act is primarily that the investor in securities should

ized pension plan regulation, it also revised and significantly enlarged WPPDA's disclosure requirements. Thus, even if "the Congressional committees and their Staffs [who] commented on the absence at that time of adequate federal legislation," had limited themselves to "the absence of the type of legislation that they were contemplating," (SEC Br. 69) their comments would have at the very least meant that there was no "adequate federal legislation" providing for disclosure of information

> be furnished with accurate information about what he is purchasing, isn't that true?
>
> Mr. WOODSIDE. That is right.
>
> Senator DOUGLAS. So you carry the principle of disclosure into the purchase of securities. I wonder if there are any principles of disclosure which you think might be carried over from that field to the management of pension and welfare funds?
>
> Mr. WOODSIDE. Senator, I don't know that I am competent to talk about what should be done with pension or welfare funds, or what disclosures should be or might be required of them. I think perhaps the closest thing we have to that sort of a situation is found under the Investment Company Act, which the Commission administers, where you have large aggregations of capital arising from the sale of redeemable shares to the public, and those funds, which are in effect trust funds, are administered by the management of the investment company, and the act places certain limitations upon what can be done with them and how the fund may be operated with respect to inside dealing. (*id.* at 945).

See also the subsequent colloquy between Senator Allott and Mr. Woodside:

> Senator ALLOTT. It is really an accident you are in it at all since you have no primary concern in it as certain other departments might—for example, the Internal Revenue Service.
>
> Mr. WOODSIDE. I think that is correct. As I understood it, what was really wanted of us was an explanation of how our disclosure provisions operate with respect to certain other areas, and also some discussion of the way in which our acts affect those situations where a security is offered in connection with the plan. (*id.* at 946-947).

This colloquy appears immediately after that between the Senator and Commissioner Goodwin quoted at IBT Br. 69.

of pension plans to plan participants. They would therefore have included among the laws that were *inapplicable* not only those referred to at SEC Br. 69 but also the "securities laws' antifraud provisions" which, far from being "essentially a prohibition of fraudulent activity", (*id.*) frequently compel affirmative disclosures, in securities transactions, see pp. 61-63, *infra*.

The most effective antidote to the SEC's speculations, however, is the text of "Congressional materials" themselves, for these reveal that the Committees' inquiries were into the entire legislative environment of pension plans, in accordance with the Committees' objective to determine what legal protections plan participants then enjoyed, in order to determine what new legislation was necessary and to assure that any legislation which was ultimately enacted would not conflict with, or create unnecessary burdens because of other existing legislation. The Committees thereupon concluded that only § 302 of the Labor Management Relations Act of 1947 and the Internal Revenue Code, and (in the 1972 Report) the WPPDA also, protected the rights of the beneficiaries of welfare and pension plans, see IBT Br. 70, 72, 74. The SEC's argument also cannot be reconciled with the Interim Report's discussion of the SEC's peripheral role, (quoted in full at IBT Br. 73-74, n.63).

Above all, while the Committee Reports themselves refute the SEC's contention, they are far from the only evidence that Congress enacted the WPPDA and ERISA in the belief that the securities laws, including their antifraud provisions, were inapplicable. Of particular importance, of course, is what the legislative history shows about the SEC's own participation in Congress' deliberations. IBT Br. 68-71, 75-77. The SEC does not confront this evidence at all, let alone attempt to reconcile its present assertion of securities laws jurisdiction with the representations of its highest officials when the 1958 and 1974 pension laws were under consideration.

IV. AFFIRMANCE OF THE JUDGMENT BELOW WOULD UNDERMINE THE POLICY JUDGMENTS MADE BY CONGRESS IN ENACTING PENSION LEGISLATION.

A. The Court may be surprised to see the Securities and Exchange Commission ("SEC") argue that for over forty years it has possessed the power to root out "fraud" in pension retirement plans; that it has always understood that it possessed the power; but that it chose to remain silent in both *deed* and *word* with regard to the existence of this power until after Mr. Daniel achieved his initial victory in the district court. And we expect the Court is astonished to find the SEC, which until now has been a vigorous advocate of the proposition that the antifraud provisions of the federal securities laws compel affirmative disclosures,[65] to now assimilate

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[65] See, e.g., Brief for Securities and Exchange Commission in *Affiliated Ute Citizens* v. *United States*, No. 70-78, Oct. Term, 1971:

> "What is required is not that all investors be equally judicious and prudent in their investment decisions, but that all material facts necessary to making of such decisions be placed before investors for evaluation, that no material facts which might reasonably influence those decisions be withheld.
>
> No single provision of the federal securities laws is more important as a safeguard of the investor's right to know than Section 10(b) of the Securities Exchange Act of 1934, as implemented by the Commission's Rule 10b-5 thereunder, * * *". (*Id.* at p. 5).

See also *id.* at 4-5, 62-67; Brief for Securities and Exchange Commission in *SEC* v. *Capital Gains Research Bureau*, No. 42, Oct. Term, 1963, pp. 19-23 and esp. p. 21, n.10; Brief for Securities and Exchange Commission in Opposition to Petition for Writ of Certiorari in *SEC* v. *Texas Gulf Sulphur, cert. denied sub nom, Coates* v. *SEC*, No. 897, Oct. Term, 1968, p. 37; *Ward La France Truck Corp.*, 13 SEC 373 (1943); *Hughes & Treat*, 22 SEC 623, 626 (1946); *Cady, Roberts & Co.*, 40 SEC 907 (1961); SEC Releases Nos. 34-6721 and 33-4445 (1962): Distribution by Broker-Dealers of Unregistered Securities; SEC Releases 33-5092 and 34-8995 (1970): Timely Disclosures of Material Corporate Developments; SEC Releases 34-

those provisions to a "generalized prohibition against fraud" (SEC Br. 5) and take exception to the "suggest[ion of the court below] that the antifraud provisions impose an obligation to make "affirmative disclosures" (SEC Br. 4-5).[66]

9239, 33-5168 and 34-9143 (1971): Offering of Securities as Substitute for Savings Account Deposits, etc.; SEC Releases 33-5226 and 34-9444 (1972): Applicability of Anti-fraud Provisions to Certain Acts and Practices Regarding Non-public Offerings; SEC Releases 33-5447 and 34-10569 (1973): Disclosure of the Impact of Possible Fuel Shortages on the Operation of Issuers; Report of the Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs on Questionable and Illegal Corporate Payments and Practices (May 12, 1976), p. 19, n. 17. Indeed, in the Commission's book, the affirmative disclosure obligations imposed by the antifraud provisions are so much a matter of black letter law that the SEC General Counsel who authored its brief here, could state in an earlier writing without citation or reference other than to the sections of the statute and the Commission's rules:

> The disclosure requirements of the federal securities laws which are applicable to the transactional context are the antifraud strictures contained in several of the statutes administered by the Commission, the registration provisions of the Securities Act, and the tender-offer sections of the Securities Exchange Act. Both the antifraud and registration provisions are directly related to disclosures which must be made in the context of a proposed securities transaction. Each assumes that prior to making an intelligent investment decision an investor must be furnished with certain facts.

Sonde & Pitt, *Utilizing the Federal Securities Laws to Clear the Air! Clean the Sky! Wash the Wind!*, 16 How. L.J. 831 (1971).

[66] Seeking to minimize the impact of the SEC's position in this case, SEC Chairman Williams told the Chairman of the Senate Committee on Human Resources:

> The antifraud provisions of the federal securities laws are essentially a prohibition against fraudulent conduct; they are a direction not to be deceptive or misleading. * * * [T]he antifraud provisions * * * simply cannot be characterized as 'disclosure' requirements."

Letter of January 5, 1978 reproduced in BNA Daily Tax Report, Jan. 12, 1978.

Having diluted the antifraud provisions of the federal securities laws to nothing more than "a generalized prohibition against fraud", the SEC has the temerity to argue to this Court that only the federal securities laws, the statutes which it administers, provide adequate protection to "defrauded participants in pension funds" (SEC Br. pp. 3-4); that unless the antifraud provisions of the federal securities laws are held applicable, pension fund participants will be without protection from fraud; and that if participants are to be denuded of such protection, that choice should be made by Congress not by this Court (SEC Br. 5). In its rhetoric it turns a blind eye on common law fraud and deceit and the legal obligations flowing from well established fiduciary principles.[67]

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[67] Plaintiff, whose complaint contains counts for common law fraud and deceit, breach of common law fiduciary duty, violation of the "exclusively for the benefit" requirements of Section 302(c)(5) of the Taft-Hartley Act, and breach of the duty of fair representation requirement of Section 9(a) of the National Labor Relations Act, does not embrace the federal securities laws as the sole basis for possible relief. However, his brief attempts to deprecate those other claims by ambiguous claims that: "[o]ther federal statutes and state laws are not designed to remedy the type of securities fraud present here" and "provision of a remedy under the federal securities laws is likely to make the most efficient use of limited judicial and legal resources." (Pl. Br. 41). The latter cryptic reference undoubtedly means that since a securities action for omissions to disclose material facts, such as actuarial assumptions, presents an arguably common issue of fact and law supporting a class action on behalf of every person whose work resulted in employer contributions to the pension fund, plaintiff's counsel would prefer to press that cause of action rather than one which narrowly relates to Mr. Daniel's specific allegations.

Daniel's counsel has advised the district court that the fact that plaintiff had a break-in-service (which resulted in the denial of his pension) is irrelevant to the broad based class action security count. (See Local 705 Reply Br. 1, n.1) But if, as Mr. Daniel contends, he was deprived of his pension by reason of the application of a "Draconian", arbitrary and capricious break-in-service rule and particularly one of which he had no knowledge, relief sought under Section 302(c)(5) would break no new ground. *Burroughs* v. *Board*

As this Court has twice recently said, the federal securities laws were not intended to be a universal panacea. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 859-60; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479-80. Moreover, to apply the antifraud provisions of the federal securities law prospectively would superimpose upon the carefully wrought disclosure provisions of ERISA another and different disclosure standard, and to apply those provisions retrospectively would spring a trap for all pension funds that lacked the power to foresee both that the securities laws would be held applicable and that which class action litigants would argue and courts would agree constituted required disclosure.[68]

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of Trustees, 542 F.2d 1128 (C.A. 9). See also *Pete* v. *United Mine Workers*, 517 F.2d 1275 (C.A.D.C.); *Johnson* v. *Botica*, 537 F.2d 930 (C.A. 7); *Norton* v. *I.A.M. Nat. Pension Fund*, 553 F.2d 1352 (C.A.D.C.); *Knauss* v. *Gorman*, —— F.2d ——, BNA Daily Labor Report, Aug. 25, 1978, p. D-1 (C.A. 3). But see *Lugo* v. *Employees Retirement Fund*, 529 F.2d 251, 256, 259 (C.A. 2) *cert. denied*, 429 U.S. 826. Indeed, the common law has found remedies for such conduct without reference to § 302(c)(5). *Mitzner* v. *Jarcho*, 44 N.Y.2d 39, 403 N.Y.S.2d 490, 374 N.E.2d 388.

Daniel's claim, which arises from pre-ERISA conduct, is, of course, governed by the law as it existed pre-ERISA. Accordingly, the complaint asserts only non-ERISA causes of action. If we were dealing with post-ERISA conduct, the prior existing federal cause of action referred to above has not been nullified by ERISA's enactment because Congress was conscious of its co-existence with ERISA (pp. 77-78, *infra*), (§ 514(d)), although state common law remedies have been nullified (§ 514(a),(b)(1),(c)). In place of state common law standards and remedies, Congress opted in ERISA to deal with violations, including violations of the specific disclosure obligations imposed by Title I, by requiring that disclosure documents be filed with the Department of Labor (§ 104); by imposing federal criminal sanctions for wilful violations (§ 501); and by authorizing Labor Department as well as participant suits for injunctions and to obtain "appropriate equitable relief * * * to redress such violations." (§ 502(a)).

[68] "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739.

When it suits its purpose the SEC argues here and to the Congress that the antifraud provisions merely require one to refrain from being dishonest. At other times when speaking in this case the Commission weasels as to whether and what disclosures are required, *e.g.*, the antifraud provisions do not establish a system of *detailed specific affirmative* disclosures (SEC Br. at 26); "there is no '*specific* rule' as to what facts are material and that determination must be made 'on a case-by-case basis * * *.'" (SEC CA Br. 51, n.73); "[i]f a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures [b]ut, the antifraud provisions do not constitute a *general* requirement of *detailed affirmative* disclosure * * *." (SEC Br. CA 58) (our emphasis). We submit that it is the very absence of detailed, specific disclosure requirements under the antifraud provisions which make it manifest that, unlike ERISA's specific "safe harbor" disclosure requirements, application of the antifraud provisions would leave the door wide open to contentions of material omissions which could subject even the most careful plan administrators to suit.

B. As we pointed out in our opening brief, in ERISA Congress addressed the substance of required pension plan disclosures in very precise terms. (IBT Br. 84.) Not only the mode of disclosure (§ 101) but its content as well was expressly delineated (§§ 102, 103). Thus, the summary plan description, the key disclosure document, is required to cover eleven specified categories of information, including "the plan's requirements respecting eligibility for participation and benefits"; the "provisions providing for nonforfeitable pension benefits"; the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits", and "the source of financing

of the plan."[69] Another important disclosure document, the annual report, must contain a financial statement with specifically describes items and schedules catalogued in § 103(b). A reading of Title I of ERISA and its pertinent legislative history shows that Congress made very deliberate choices as to what would be disclosed, and how, and when.[70]

By contrast, no one can list, let alone comply with, what would be required under an antifraud regime. The Court of Appeals in this case has said that plans should disclose their actuarial assumptions (A. 255).[71] The court also suggested that mere disclosure of the circumstances which result in denial of benefit (as ERISA requires) may inadequately describe the "risk of loss".

The complaint alleges, *inter alia*, omissions of actuarial information (A. 33). Although plaintiff has somewhat tempered his position in this Court with respect to *required* disclosures, his brief to the court below listed risks of nonparticipation for a period sufficient to vest, including risk of layoff. (Pl. CA Br. 56-58.) His brief

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[69] ERISA § 102(a)(1) requires that the summary plan description be written in a manner calculated to be understood by the average plan participant. Department of Labor Regulation § 2520.102-1 states that "The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries."

[70] Although less demanding, the WPPDA likewise provided for specific disclosures. That Act set forth explicit disclosure requirements for the description of the plan (§ 6) and for the annual financial report (§ 7). These documents were to be available for examination in the principal office of the plan and upon request were to be mailed, along with "an adequate summary" of the latest annual report to any participant and beneficiary upon request (§ 8(a)). The WPPDA provided specific times for both publication and filing. (§ 6(a), 6(b), 47(a)).

[71] ERISA requires actuarial reports as part of the annual report required to be filed and to be made available to participants in accordance with §§ 103 and 104.

here summarizes the scope of required disclosures by reference to the standard of *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450: "all facts which a reasonable investor would consider important in the making of an investment decision" (Pl. Br. 105). But plaintiff's inventiveness has not come to an end. He includes here for the first time the claim that "the Teamster union" has committed "securities fraud" by "establish[ing] a scheme of approximately 230 pension funds with (until recently) few rights of portability between different Teamster funds * * *" (Pl. Br. 15).[72] *Amici*

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[72] This accusation is unsupported and unsupportable. The plans are the result of bargaining by local unions for their respective members. Local 705 is one such local union and it is its pension plan which is at issue here. (See Local 705 Reply Br. 2, n.3). In truth the Teamster pension plans have led the way on the portability issue. In his study of reciprocity among private multiemployer pension plans, Professor Maurice E. McDonald found, "the earliest formal pension reciprocity agreement documented during the course of this study was effectuated on August 1, 1952, by Teamsters' Locals 707 and 807 in New York. In 1954 these locals were joined in a reciprocity arrangement with the Northern New Jersey Truckers." McDonald, *Reciprocity Among Private Multiemployer Pension Plans*, Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 1975) at 23 n.1.

A recent study of reciprocity among private multiemployer pension plans found that 33.4% of all Teamsters are covered by plans having reciprocity. This compares favorably with employee coverage in other occupational categories surveyed: 36.5 percent for employees in construction, 21.2 percent for employees in manufacturing and 8.9 percent for employees in service occupations. (*Id.* at 51). In sum, "there are relatively few remaining Teamsters plans which do not have, or have access to, relatively broad pension reciprocity." (*Id.* at 60.)

Plaintiff gives no thought to the mechanics for creating or carrying out a system of pension portability. Portability requires the agreement of both the employer where the employee accrued the credits to transfer and the employee's new employer. No union can unilaterally provide for portability.

While multiemployer bargaining might facilitate portability, it would be a violation of the labor laws for a union to coerce an employer into such an organization. *Florida Power & Light Co.* v

International Brotherhood of Electrical Workers, Local 641, 417 U.S. 790; *NLRB* v. *Local 264, Laborers' International Union of North America*, 529 F.2d 778 (C.A. 8); *NLRB* v. *Local 964, United Brotherhood of Carpenters & Joiners*, 447 F.2d 643 (C.A. 7); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 N.L.R.B. 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 N.L.R.B. 172 (1960). Even insisting that multiple employers agree to a uniform contract has been held to be *de facto* coercion of multiemployer bargaining. *Frito-Lay, Inc.* v. *International Brotherhood of Teamsters*, 401 F.Supp. 370, 376 (N.D.Calif.). Plaintiff's assumption that less than unified pension coverage for all members of all Teamster unions constitutes securities fraud is at odds with his equally vociferous argument that such an expansive interpretation of the securities laws "Will Not Distort the National Collective Bargaining System" (Pl. Br. 108).

The difficulties of negotiating portability are compounded by the fact that the pension plans of the various Teamsters locals which are negotiated separately, differ in eligibility requirements, contributions, benefits and a myriad of other ways. Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 1st Sess. (1977), Testimony of Daniel J. Shannon, Executive Director, Central States, Southeast and Southwest Areas Pension Fund p. 356; Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, 93d Cong., 1st Sess. (1973), testimony of Stetson B. Harman, President, Trust Division, The American Bankers Association at 166-167. "I think it is very unfortunate that the bill introduced in the Senate lays such emphasis on portability. I think portability is presently a total impracticability. There is practically no method for implementing this concept or adopting it to the many plans available, each with many different assumptions, many different benefits. I think it would lead to absolute chaos in the whole field and would provide no gains specifically for the employees" Id. at 183. As an authority cited by the SEC has noted, "Portability is difficult if not impossible to achieve with partially funded pensions." Hearings before the Subcommittee on Fiscal Policy, U.S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 14. The testimony of Professor William L. White of the Graduate School of Business Administration, Harvard University is cited at SEC Br. 16.

It ought to be remembered that Congress declined to create a system of mandatory portability even though its concern with its general unavailability permeates the legislative history. I ERISA Leg. Hist. 91, 190, 196-7, 203, 209, 221, 588, 596-7, 609-10, 628-9, 1074-5, 1098-9, 1139-46; II ERISA Leg. Hist. 1613-14, 1620, 1627-28, 1839-47, 2618-19. Instead Congress provided for "advice and assistance" to those who voluntarily choose "to evaluat[e] the desirability" of portability. ERISA § 1309, 29 U.S.C. § 4009. This is far less than various Teamster pension plans have accomplished.

suggest, among other things, that the fund should be required to disclose "both the risks arising out of a fund's participating in the capital markets and the risks that may preclude the [employee] investor from benefiting from the fund's participation in the capital markets" (PROD Br. 16.)

Thus, the proponents of securities law coverage in this case are unable to agree as to what must and what need not be disclosed to employees under the regime which they advocate. This provides a small foretaste of the uncertainties with which pension plan administrators and sponsors would have to contend if plaintiff prevails. When such major uncertainties are compared with Congress' careful delineation of what must be disclosed, two things become apparent. First, that Congress did not intend to permit pension funds to be beset by such a state of chaos. Second, that Congress has made a judgment of the extent of the disclosure burden that should be imposed upon pension plan sponsors. The real danger to Congressional policy which this case presents, is that it intrudes the securities laws into the elaborately detailed structure which Congress has established in ERISA, and it creates retroactive liability in the teeth of Congress' judgment in that statute that pension plans should not be burdened by unforeseen liabilities.

Whatever the SEC may say by way of minimization of the impact of application of the antifraud provisions of the federal securities laws, litigants will argue, as Daniel and his supporting *amici* did here, that specific disclosures were and are required to avoid pension fund liability under those laws (Pl. Br. 105, Gray P. Br. 15-21, PROD Br. 10-11, 16-17, 22-23). Moreover, as the decision below illustrates (A. 254-255), courts may find those arguments very attractive. The SEC may denigrate as mere "dictum" (SEC Br. 25), that discussion of disclosures which that court regarded as appropriate under a securities law standard, but it represents the unanimous view of the panel which heard the case and is indi-

cative of the kinds of conclusions that may well be reached by other lower courts were this Court to subject these pension plans to the regime of the securities laws.

This Court said in *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, that a "fundamental purpose, common to [the federal securities] statutes was to substitute a philosophy of full disclosure for the philosophy of caveat emptor * * *" (*Id.* at 186) and emphasized the obligations of affirmative disclosure by quotation of Dean Shulman's observation with respect to the impact of the federal securities laws on securities transactions that: "what is required is 'a picture not simply of the show window, but of the entire store * * * not simply truth in the statements volunteered, but disclosure.'" (*Id.* at 201). The point was further driven home in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, where in a suit arising under § 10(b) and Rule 10b-5, the Court had occasion to reemphasize that "full disclosure" is a "fundamental purpose" of the 1934 Act and to find liability for nondisclosures notwithstanding the circumstance that the defendants "may have made no positive representation or recommendation." (*Id.* at 151 and 153). Moreover, until the SEC chose to lower the banner of full disclosure in an effort to avoid recognition of the full implication of the position which it espouses in this case, the Commission, as has already been shown (see n. 65, *supra*), has been both a forceful advocate and promulgator of the position that the antifraud provisions compel affirmative disclosures.[73]

In Nader and Blackwell, *You and Your Pension*,[74] the observation is made: "[M]illions of the people—possibly many more than half—who expect pensions never get

[73] Even in this case, as we have also shown (*supra* at pp. 3-5), the articulations of its position on affirmative disclosures are carefully wrought to allow maximum freedom in its future positions.

[74] Nader and Blackwell, *You and Your Pension*, (New York, N.Y., Grossman Publishers, 1973).

them." Although this fact is said to have "long been recognized by [among others] employers, union leaders [and] pension managers", it is maintained that few "expectant pensioners" realize this. (*Id.* at p. 1). Professor Dan M. McGill of the University of Pennsylvania, testifying in 1972 before the House Subcommittee on Labor with respect to pension plans stated: "Unfortunately, the promises have not always been clearly communicated to the participants, leading to pension expectations that may not be fulfilled.[75] A case in point is failure to indicate the circumstances under which the expected benefits would not be paid." The SEC cites additional pre-ERISA testimony establishing that the "tendency [of employers] ha[d] been to present the [pension] plan in the most positive terms possible * * *. This leads to over simplification [76] and an advertising sales approach." (SEC Br. at 73 quoting testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 765 (1973)).

These observations led the Congress to enact ERISA with its carefully prescribed disclosure obligations, but they also demonstrate how widespread liability exposure

[75] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 3598, 92d Cong., 2d Sess. 207 (1972).

[76] In this connection, it is to be noted that aside from the novel contentions with respect to nondisclosure of actuarial assumptions and plan performance, the principal thrust of plaintiff Daniel's claim of misrepresentation will necessarily be that the language of the Local 705 Pension Plan booklet, which referred to the requirements of "twenty consecutive years" of employment with a covered employer under contract with Local 705 and payment "continuously [of] the required weekly payments beginning with January 1, 1955", failed to adequately apprise plaintiff of this requirement. (1958 Local 705 Health and Welfare and Pension Fund Booklet A. 68 at 2).

would be if the antifraud provisions of the federal securities laws are held to have been applicable to the typical noncontributory compulsory pension plan. Indeed, every employer and every pension administrator whose pension plan complied with the requirements of the Welfare and Pension Plans Disclosure Act of 1958 will be exposed to liability. If one gives sway to one of the SEC's articulations of the requirements of the antifraud provisions in its *amicus* brief below: "If a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures" (SEC CA Br. 58), it is not difficult to postulate a violation when a personnel interviewer advised a prospective employee that, in addition to other fringe benefits, the company has a pension plan which pays $300 a month on retirement at age 65 and did not then and there explain, at the very least, *all* of the plan provisions with respect to vesting and eligibility. Even meticulous compliance with the disclosure obligations of ERISA will not have served nor will they serve to insulate from liability. For example, while ERISA requires disclosure of the length of time one must be employed for vesting and for a full pension, it does not provide for disclosures with respect to matters which can vitally affect the employee's retention of employment. Thus, for example, an employer who has determined that it will eventually close a plant with the inevitable consequence of employee termination, but failed to advise employees of that fact while they were making "continuing investmentments" in a noncontributory pension plan by coming to work each day, could be found to have violated its obligation to make a "further disclosure" beyond that mandated by ERISA.

The potential "social cost" of these exposures to litigation and liability, and of noninstitution of new pension plans and termination of existing ones, argue forcefully

that especially after 40 years of quiescence, the securities laws should not be held applicable to employee coverage under an employer funded, compulsory pension plan. They also argue that even if the securities laws are now held to be applicable, this entails disclosure obligations not heretofore anticipated, and the considerations of *Los Angeles Dept. of Water and Power* v. *Manhart*, —— U.S. ——, 98 S.Ct. 1370, mandate prospective application only.

C. The statute of limitations and the requirement of scienter under § 10(b) of the 1934 Act, to which plaintiff and the SEC point as reducing potential exposure, are unlikely to provide comfort to pension funds. The District Court has already held in this case that because of the tolling principle applicable to claims of "fraud" there is a question of fact as to when the statute of limitations begins to run.[77] (A. 111) Such a question of fact not only preserves the pension funds' exposure for "securities law fraud" but exacerbates the problem of defending such actions by permitting liability to rest on conflicting versions of what the disappointed pension applicant was or was not told when he first obtained his job, perhaps twenty or more years earlier, or at any other time during his covered employment. The problems of proof which concerned the Court in *Blue Chip* (IBT Br. 53-57, 139) would thereby be presented in aggravated form. Plaintiff's contrary contention that his "purchase of an interest in the Local 705 Pension Fund is subject to independent documentary verification" (Pl. Br. 122), aside from again begging the legal issue of whether his working constituted a "purchase of an interest * * *," conveniently overlooks the real factual issues which would arise

[77] While IBT disagrees with plaintiff's position below that the statute of limitations did not begin to run until plaintiff discovered that he would not receive a pension, the Court's invocation of the tolling principle is supported by precedent, *see*, Jacobs, *The Impact of Rule 10b-5*, (New York, N.Y., Clark Boardman Company, Ltd., 1972) at ¶ 235.03.

if his legal theory were accepted, such as what the plaintiff was and was not told by the plan trustees or their agents, what he knew from other sources and whether those representations actually caused him to take or keep his job.

It is also very much an open question whether the absence of scienter would limit pension funds' actual exposure. "Scienter" is a state of mind which it will be argued can be inferred from knowing nondisclosure coupled with a possible financial motivation, such as an employer's desire to recruit or retain employees but ultimately save pension fund contributions. The example given earlier makes the point, for could not a jury permissibly infer that the employer had an intent to deceive his employees from (a) the nondisclosure of the contemplated plant closing and (b) the pension cost savings ultimately resulting from employee layoffs? Similarly, an employer's normal desire to recruit employees could be said to support motive for deceit when employes were advised of the existence of a pension plan, but were not informed that the plan operates on the assumption that half the employees will quit before achieving vesting.

Moreover, the SEC's position on this point is somewhat disingenuous. For while it points out, after listing four elements that "a private plaintiff [must] demonstrate" to establish "violation(s) of the antifraud provisions" as limiting "any retroactive liability" (SEC Br. 27-28), it adds that "To establish a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, a private plaintiff must also establish that the defendant acted with *scienter*." (SEC Br. 28, n.22.) But it fails to note that since *Ernst & Ernst* the SEC has maintained that "reckless disregard" is sufficient to satisfy the scienter requirement and that *Ernst & Ernst* is inapplicable to actions brought by the SEC itself to enjoin violations of § 10(b) and Rule 10b-5.

In such actions the SEC has on occasion sought and obtained court orders requiring the defendant to make substantial monetary payments by way of restitution.[78] Moreover, while the SEC correctly points out that it is an open question whether scienter is required under § 17(a) of the 1933 Act, there is no basis for its assertion that the Court of Appeals held that it is required; nor does the SEC mention that its position has been that there is no such requirement even in private actions, nor does the SEC observe that it has for some years urged, contrary to its original position, that § 17(a) does give rise to an implied private cause of action.[79] If those SEC positions should ultimately be sustained, the absence of scienter would of course provide no protection against liability; the SEC therefore cannot consistently adhere to its views on § 17(a) and the limited reach of *Ernst & Ernst*, and suggest that *Ernst & Ernst* meaningfully limits the pension funds' exposure. Perhaps to submerge the mutual inconsistency of its various contentions or recognizing the vulnerability of its position, the SEC says that this Court need not decide whether § 17(a) gives rise to an implied private cause of action.[80] But that issue must be reached if, contrary to our view, but in accord with that of the SEC, the antifraud provisions of the securities laws extend to plaintiff's claim, and the presence or absence of the scienter

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[78] See the cases and briefs cited in NCCMP Br. 20-21, n.18; Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After Ernst & Ernst* v. *Hochfelder*, 77 Colum. L. Rev. 419, 442-43, n.126 (1977).

[79] Brief of Securities and Exchange Commission as *amicus curiae* in *Blue Chip*, No. 74-124 p. 12, n.10. But see, pp. 76-77, *infra* and Local 705 Br. 62-3 where the SEC's original position is set forth.

[80] SEC Br. 28, n.22. Contrast the SEC's 194 page brief in *Piper* v. *Chris-Craft*, Nos. 75-353, 75-354 and 75-355, urging that such causes of action lie under SEC Rule 10b-6 of the 1934 Act and § 13(d) of the Williams Act.

requirement is to be considered in determining whether retroactive liability may be imposed, notwithstanding *Manhart*.

On the merits of the implied liability issue we need add only the following:[51]

1) Pl. Br. 28-29, n.35 misquotes Prof. Loss' treatise and thereby totally distorts its position. What appears, in plaintiff's brief, to be a complete sentence actually omits (without indication) the beginning: "Although this was said many years before the *Kardon* case, there is nothing * * *", 3 Loss, *Securities Regulation* 1785 (2d ed., 1961). By "this", Prof. Loss referred to Commissioner Landis' *denial* that there is civil liability under § 17(a) (quoted at Local 705 Br. 60-61). And immediately following the passage quoted by plaintiff, the following appears (*id.*, emphasis in original):

> The question is simply whether there is the same justification for implying such liability under the 1933 act as there is under the 1934 act. It is one thing to imply a private right of action under § 10 (b) or the other provisions of the 1934 act, because the specific liabilities created by §§ 9(e), 16(b) and 18 do not cover all the variegated activities with which that act is concerned. But it is quite another thing to add an implied remedy under § 17(a) of the 1933 act to the detailed remedies specifically created by §§ 11 and 12. The 1933 act is a much narrower statute. It deals only with disclosure and fraud *in the sale of securities*. It has but two important substantive provisions, §§ 5 and 17(a). Noncompliance with § 5 results in civil liability under § 12(1). Faulty compliance results in liability under § 11. And § 17(a) has its counterpart in § 12(2). It all makes a rather neat pattern.

[51] Petitioner IBT *does* raise the issue of whether section 17(a) gives rise to an implied private cause of action. See IBT Br. 36, n.22 (continued) adopting Local 705's Brief on this issue. The contention that the issue is not properly here (Pl. Br. 28, n.35, referring to *respondent's* rephrasing of the question presented) is likewise without merit. The issue is within the precise terms of the second question presented by the Petitions for Certiorari and was discussed as a reason for granting the writ. (See IBT Pet. 2, 30, n.39 and Local 705 Pet. 2, 42-44) Petitioner's briefs have not rephrased the question (See IBT Br. 2; Local 705 Br. 2).

2) In the course of his testimony at the 1941 Hearings, SEC Commissioner Purcell said, referring to "the fraud provisions of § 17(a): "Any person who fraudulently sells securities, whether or not exempted, can be enjoined by the courts at the suit of the Commission or can be criminally prosecuted in case of willful violations by the Department of Justice." (1941 Hearings 920. This is the passage represented by asterisks at SEC Br. 75). See also 1941 Hearings at 806 quoted at Local 705 Br. 62. In the SEC's 1941 Report (cited at SEC Br. 75-76, n.59), the following appears at p. 13:

> Sections 11 and 12 of the Securities Act contain the provisions imposing civil liabilities and section 13 specifies the limitations of time within which actions may be brought.

D. Our adversaries' reliance on § 514(d) of ERISA, 29 U.S.C. § 1144(d), (Pl. Br. 98-99 and SEC Br. 91-92) is misplaced. By that provision Congress undoubtedly preserved § 302(c)(5) of the Taft Hartley Act, and all other federal legislation affecting pension plans which Congress was aware of on the basis of its intensive study. Thus, we have no doubt that voluntary contributory pension plans which invest in the securities of the employer company in an amount greater than that paid into the plan by the employer "remain subject to the registration requirements of the 1933 Act, for that duty was spelled out in the Interim Report (See IBT Br. 73-74, n.62). Had § 514(d) not been contained in the Bill, the survival of that duty would have been put in question. § 514(d) also preserved the federal securities

laws insofar as they affect private pension funds in their capacity as purchasers and sellers of securities in the funds' investment portfolios. This is but one example of the ways in which § 514(d) pretermits doubt, which would otherwise have been invited by the very comprehensiveness of ERISA, that general legislation would remain applicable with respect to subjects not dealt with in ERISA.

However, Congress did not, by enacting § 514(d) (or its predecessor § 10(a) of the WPPDA) intend that courts would so construe earlier federal laws that they would appear, like a *deus ex machina*, to disrupt the carefully wrought design in establishing disclosure, fiduciary and other standards for pension plans. Congress knew, or thought it knew, that with respect to these subjects it was occupying the field and establishing a unitary scheme of administration. That is made clear by § 3004 of ERISA which admonishes against duplicative and conflicting regulations and administration. While § 3004 was discussed at IBT Br. 78-79, it is totally ignored by our adversaries. If settled principles of statutory construction are to be followed, then § 514(d) must be read not only against the background of Congress' understanding of what federal laws were thereby being preserved, but also in harmony with § 3004 in which Congress expressly confronted "the question of arranging a workable administrative and enforcement structure". See *id.* 78, n.69 (quoting Sen. Williams). The policies of § 3004 were reaffirmed and further implemented by Reorganization Plan, No. 4 of 1978, which has been approved by both houses of Congress.[33] As the President observed, that plan "will reduce jurisdictional overlap and duplication by clearly dividing responsibility for ERISA regulation between the Departments of Labor and Treasury[, and] reduce substantially ERISA's ad-

[33] 43 F.R. 47,713 (Oct. 17, 1978).

ministrative burden on both businesses and labor unions by reducing the time required to process applications for exemptions from prohibited transactions and accelerating the issuance of the remaining regulations."[34] The national policy thus reaffirmed and perfected should not be nullified by accepting the misguided notion that it would "impliedly repeal" the securities laws by confining their necessarily general jurisdictional language within the context of "the capital market of the enterprise system" which is their "focus."

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with direction to the District Court to dismiss Counts I and II of the complaint.

Respectfully submitted,

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[34] 14 Weekly Compilation of Presidential Documents, No. 42.

FOR ARGUMENT

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Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

This case presents the question whether the antifraud provisions of the federal securities laws are applicable to the acquisition by employees of interests in certain types of pension funds—a question which turns on whether such an acquisition involves the "sale" to the employee of a "security." The Commission believes that, under the proper interpretation of those terms in the securities laws—and on the basis of principles long established and consistently applied in numerous decisions of this Court construing the term "investment contract" (one of the terms included in the statutory definition of security)—the respondent's allegations, if proved, would establish that his acquisition of an interest in a pension fund was a sale of a security and, hence, was subject to the antifraud provisions.

Although the Commission believes that persons who acquire interests in pension funds should not be deprived of antifraud protection by an erroneous interpretation of the laws which the Commission administers, the Commission's primary concern is that the terms "security" and "sale"—terms which are basic to the coverage of the antifraud provisions—not be construed in a way which would jeopardize the applicability of the antifraud provisions to the countless schemes through which fraud is perpetrated on investors generally.

The Commission has particular concern that the definition of the term "investment contract" not be constricted, because its experience in administering the federal securities laws has shown that unscrupulous persons who seek to defraud others through promises of profits are constantly devising new schemes involving novel investment vehicles to effectuate their goals. The Congress, in enacting the securities laws, could not anticipate every potential investment vehicle which could be utilized to commit fraud, the number of which is limited only by the minds of dishonest promoters. The traditionally broad construction given by this Court and other federal courts to the term "investment contract," however, has precluded promoters from circumventing the important protections of the securities laws, even when using investment vehicles that do not bear the characteristics usually associated with more conventional securities.

In an effort to avoid liability for misrepresentations with respect to interests in pension funds, however, the petitioners urge an interpretation of the term "investment contract" which would undermine the principles that have been developed by this Court and the lower federal courts over a period of more than 40 years to protect investors. Essentially, the petitioners, and the *amici* who support them, believe that, *as a matter of policy*, it is unwise and undesirable that defrauded participants

in pension funds be afforded the type of protection granted investors by the antifraud provisions of the securities laws. To bolster their views, they rely on the fact that Congress, many years after the conduct complained of in this case, enacted labor legislation protecting pension fund participants from certain abuses (although not from fraud). But, even if that labor legislation had existed at the time of the misrepresentations complained of, Congress refrained, in that legislation, from preempting the securities laws, and according the petitioners and supporting *amici* are forced to urge this Court to effectuate their policy concerns through a distorted construction of the securities laws which conflicts with well-established principles that are vital to investor protection.

Pension plans, of course, are now subject to extensive regulation administered by the Department of Labor under the Employee Retirement Income Security Act of 1974 ("ERISA"), and the Commission neither seeks nor desires to intrude upon or disrupt that regulatory system. But, the limited applicability of the securities laws' antifraud provisions to interests in pension funds would not result in any such intrusion or disruption. The petitioners and their supporting *amici* disagree with us. While their views might be supportable if, as the court of appeals suggested, the antifraud provisions imposed an across-the-board requirement of detailed specific affirmative disclosures, such as actuarial probabilities, we believe that the court of appeals erred in suggesting that the antifraud provisions impose such a requirement. Unlike ERISA, which imposes substantive regulatory controls over the operations of pension plans and requires the filing and distribution of detailed disclosure documents, the antifraud provisions of the securities laws are essentially a prohibition upon fraudulent activity, including the making of false or misleading representations. Their applicability to interests in pension funds does *not* constitute the imposition of an additional set of regulatory controls on pension plans, and refraining from violation of the antifraud provisions is not a burdensome task.

If the petitioners or *amici* believe that public policy with respect to pension funds would better be served without a generalized prohibition against fraud, the Congress is the appropriate forum in which all views relating to this matter may fully be aired. A determination of the appropriate interplay between the different federal statutes imposing rights and obligations upon persons with respect to pension plans involves a consideration of many broad issues that cannot be adequately explored and resolved in this litigation, which only involves a motion to dismiss the securities laws counts based on a specific set of facts alleged in a complaint in a private action. Congress, on the other hand, can deal with such issues. Indeed, the Congress is currently considering, and holding hearings on, a bill which would

amend ERISA to provide that the federal securities laws would not apply to interests in pension funds (S. 3017; *see* 124 Cong. Rec. 61 (May 1, 1978)).

We submit that, if policy goals related solely to pensions justify denial of antifraud protections to investors in pension funds, that determination should be made directly by the Congress instead of by a dilution of long-established principles of statutory construction of terms in the securities laws, which could deprive many investors, in future schemes totally unrelated to pensions or the labor milieu, of protection from fraud. For these reasons, the Commission respectfully submits this brief, *amicus curiae*.

STATEMENT

A. Proceedings Below

The respondent (plaintiff below), John Daniel, was a member of Local 705, International Brotherhood of Teamsters ("Local 705") from 1950 until his retirement in 1973. During that period, he worked as a truck driver for employers who were covered under collective bargaining agreements executed with Local 705 (App. 31a).[1] Pursuant to these agreements, each employer paid to a pension fund, on

[1] "App. ——" refers to pages of the appendix. "IBT Br. ——" refers to the brief of petitioner International Brotherhood of Teamsters; "Local Br. ——" refers to the brief of petitioners Local 705 and Louis F. Peick; "ERIC Br. ——" refers to the *amicus curiae* brief of the ERISA Regulations Industry Committee; "NCCMP Br. ——" refers to the *amicus curiae* brief of the National Coordinating Committee for Multiemployer Plans; "Bankers Br. ——" refers to the *amicus curiae* brief of the American Bankers Association; "AFL-CIO Br. ——" refers to the *amicus curiae* brief of the American Federation of Labor and Congress of Industrial Organizations; and "SG Br. ——" refers to the *amicus curiae* brief submitted by the Solicitor General.

behalf of Mr. Daniel, a sum specified in the collective bargaining agreement for each week in which he performed any services (App. 72a-21). The pension fund, a trust, was jointly administered by the union and the employers (App. 62a-2). Under the terms of the pension fund trust agreement, an employee was eligible for a pension if he was employed "for at least 20 consecutive, continuous and uninterrupted years immediately preceding retirement" (App. 72a-8).

The basis of counts I and II of the complaint—the counts which are in issue on *certiorari*—is the respondent's claim that the petitioners (defendants below) were responsible for misrepresentations and omissions relating, among other things, to the abovementioned length and continuity requirements of the pension plan. Mr. Daniel brought this suit in the District Court for the Northern District of Illinois against the trustees of the Local 705 pension plan, Local 705, certain Local 705 officers and the International Brotherhood of Teamsters ("IBT") (App. 27a-28a). He alleged that the defendants had violated the antifraud provisions of the federal securities

laws—Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5—in the offer and sale of interests in the Local 705 pension fund. Among other things, the defendants were alleged to have misrepresented the length and continuity requirements for pension eligibility (App. 32a-33a). Mr. Daniel further alleged that, as a result of those misrepresentations, he "purchased and acquired an interest in [the] local Teamster affiliate * * * pension fund by agreeing to provide * * * labor services to employers who [had] labor contracts" with Local 705 (App. 34a). As the court of appeals noted (App. 214a), Mr. Daniel stated in an affidavit filed in this case that, if he had known the true eligibility requirements for the Local 705 plan, he would have sought other employment that would have provided him with retirement benefits of the type that he had been led to understand he would receive from the Local 705 plan.

Although Mr. Daniel had worked for Local 705 employers for 22½ years—2½ years in excess of the twenty years required for pension eligibility—he was thereafter denied his pension on the basis of the pension fund's continuity requirements because of an involuntary three-month lay-off in 1960 and 1961 (App. 31a). Thus, contrary to his expectations, Mr. Daniel ultimately received no value at all for the money that was paid into the pension fund on his

behalf and in compensation for his labor over a 22½ year period.[2]

The petitioners moved to dismiss the counts of the complaint based on the securities laws on the ground that the court lacked subject matter jurisdiction of those counts. They argued that interests in pension funds are not "securities" within the definition of that term in the securities laws; that these interests are not "sold" to employees as that term is defined in the securities laws; and that the enactment of specialized legislation dealing with pensions discloses Congress' intention that the securities laws not apply to interests in pension funds.

The district court denied the petitioners' motion to dismiss the securities counts.[3] That court reasoned that an interest in a pension fund possesses all of the characteristics that have been identified by the courts as constituting a "security"; that there had been a "sale" of this security within the meaning of the securities laws when the union membership voted on a collective bargaining agreement that in-

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[2] Mr. Daniel also seeks relief for the defendants' alleged breach of their duty of fair representation under Section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 159(a), and for the failure to the pension fund to be established for the "sole and exclusive benefit of the employees," as required by Section 302(c)(5) of the NLRA, 29 U.S.C. 186(c)(5). Finally, the plaintiff seeks to recover under common law theories of breach of fiduciary duty, fraud and deceit. These claims are not in issue on *certiorari*, and the Commission intimates no view with respect to any of them.

[3] The opinion of the district court is reported at 410 F. Supp. 541 and is reproduced at App. 105a-134a.

cluded a provision that the employers contribute to the pension fund on behalf of the employees in exchange for their labor or, alternatively, from the continuation of the employee in the employment relationship which required periodic payments by the employer to the pension fund; and that the antifraud provisions of the securities laws were complementary to the specialized pension legislation and therefore there was no indication from the enactment of that specialized legislation that Congress did not intend the antifraud provisions of the securities laws to apply to interests in pension funds.

On interlocutory appeals certified pursuant to 28 U.S.C. 1292(b) (App. 162a-163a, 199a-200a), the Court of Appeals for the Seventh Circuit affirmed.[4]

The court of appeals held that an interest in the Local 705 pension fund is an "investment contract," the type of security defined by this Court as "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party * * *."[5] First, the court held (App. 222a-225a) that an employee on whose behalf contributions are made to a pension fund is an investor; that is, that he invests money in the form of his services for which he receives, along with other compensation, the interest in the pension fund. Second,

[4] The opinion of the court of appeals is reported at 561 F.2d 1223 and is reproduced at App. 209a-262a.

[5] App. 221a, *quoting from Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298-299.

the court held that the pension fund constituted a common enterprise (App. 225a). Finally, the court concluded that the "profits from the efforts of others" test was met, rejecting as irrelevant the petitioners' argument that, although the pension payment exceeds the employer's contribution on behalf of the employee and the employee has no control over the generation of the profit, part of the gain was not attributable to the investment expertise of the pension fund trustees but rather was attributable to the forefeitures of employees whose pension rights do not vest. The court held (App. 226a), relying in part upon this Court's decision in *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.* (*"VALIC"*), 359 U.S. 65, that "gain relative to a security can derive from sources other than the direct efforts of the managers of the common enterprise."

The court then determined that the acquisition of an interest in a pension fund constitutes a "sale" because an employee gives "value" in the form of his services for which the employer makes a money contribution to the fund (App. 244a). In so holding, it noted that "the definitions of 'sale' in the 1933 and 1934 Acts do not require volition" (App. 244a), but in any event found volition in the employee's vote on the ratification of the union contract and in his decision to take or retain the job (App. 244a, 245a).

The court analyzed (App. 250a-258a) the relationship between the antifraud provisions of the securities laws and national labor law and policy, including the Employee Retirement Income Security Act

of 1974 ("ERISA"). The court rejected the proposition that ERISA had preempted the securities laws (App. 250a) and reasoned that the availability of disclosure documents pursuant to ERISA does not obviate the need for the protection of the antifraud provisions.

Finally, the court identified the factors which govern recovery by private plaintiffs, in order to rebut the argument that the application of the antifraud provisions would result in extensive burdens and liabilities for pension plans, stating (App. 259a) that "[p]articular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing him injury."

B. Background

Some background information concerning the nature of pension funds and their growth as an alternate form of investment medium is useful to an understanding of the issues involved in this case.

1. *The Nature of Pension Funds Generally and of the Local 705 Pension Fund*

A pension, broadly defined, is a regular payment, normally for life, to provide retirement income to the recipient upon completion of his working years.[6] Pension plans are generally referred to as "defined contribution" plans or "defined benefit" plans. In a defined contribution plan, an individual account is

[6] R. Murray, *Economic Aspects of Pensions: A Summary Report* 13 (1968 ed.).

established for each participant and he receives retirement benefits based upon the amount contributed to his account and any income, expenses, gains and losses thereon as well as any forfeitures of accounts of other participants which may be allocated to his account.[7] For defined benefit plans, the employer promises to pay the employee, upon retirement, a fixed monthly amount.[8]

Multiemployer plans, such as the Local 705 plan, are not, strictly speaking, either defined benefit or defined contribution plans. Although each employer commits to pay a particular amount of money to the pension fund each year, the employer does not commit to pay an employee a fixed monthly amount upon retirement. Instead, the plan ultimately pays to retired employees a fixed monthly amount, but the size of the monthly payment is changed from time to time depending, among other things, upon the amount of money in the fund. *See* pages 39-40, *infra*.

A pension fund generally is operated in the form of a trust. The reason is that Section 401 of the Internal Revenue Code, 26 U.S.C. 401, requires that an employer must divorce himself completely from the administration of the pension fund in order to

[7] R. Pozen, *Financial Institutions: Cases, Materials and Problems on Investment Management* 598 (1978). ERISA refers to this type of plan as both a defined contribution and an "individual account" plan. Section 3(34), 29 U.S.C. 1002(34).

[8] R. Pozen, *Financial Institutions: Cases, Materials and Problems on Investment Management* 598 (1978).

receive favorable tax treatment for payments made to the fund.[9] The Local 705 pension fund has a board of trustees composed equally of employer and union representatives (App. 62a-2). These trustees have general supervision of the operation of the trust, including the investment of the contributions made on behalf of employees (App. 62a-3).

The trustees of a pension fund are also responsible for assuring that the fund is actuarially sound so that it will be able to make pension payments to those eligible for them. Although there are many factors which go into the actuarial calculations,[10] one of the most important is the investment performance of the fund. Thus, it has been estimated that for each 1 per cent of investment earnings, benefits can be raised 20 per cent.[11] Indeed, the Local 705 plan has raised the amount of its fixed benefit several times since the inception of the plan (App. 72a-1).

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[9] The Local 705 plan is set up to assure that this separation of the employer and the trust is strictly maintained. Article 14 of the Trust Agreement provides that "[n]o employee shall have any individual right, title, interest, or claim against any employer * * *" (App. 62a-7).

Under Section 403(a) of ERISA, 29 U.S.C. 1103(a), the assets of pension plans must be held in trust by one or more trustees. Section 403(b), 29 U.S.C. 1103(b), however, provides that assets in certain enumerated plans need not be held in trust.

[10] *See generally*, J. Melone, *Collectively Bargained Multi-Employer Pension Plans* 77-85 (1963 ed.).

[11] M. Bernstein, *The Future of Private Pensions* 41 (1964 ed.). *See also, Employee Benefit Plan Review* (No. 4) 50 (1954).

As Local 705 explained to its members in 1969 in one of its informational booklets (App. 70a-14):

> "Another advantage [of the Local 705 plan] is that the contributions earn income by being invested. Consequently, the money originally contributed grows. Without this income growth the fund could not accumulate enough money to pay the $250.00 monthly pensions provided by the Plan."

There are two basic methods of collecting money for a pension fund. In "contributory" plans, the employee himself contributes his money directly to the pension fund. In so-called "noncontributory" plans, the employee contributes indirectly through his labor in return for which his employer makes the monetary contribution to the fund.

Pension funds also may be denominated either "compulsory" or "voluntary." In a so-called "compulsory" plan the employee chooses to invest in the fund by becoming and remaining an employee, since contributions to the fund in such a plan are made automatically as part of the compensation an employee receives in return for his labor. In a "voluntary" plan, on the other hand, the employee makes a separate decision (independent of his decision to be an employee) whether to participate in the pension plan.

The Local 705 plan is the type which is characterized as "noncontributory" and "compulsory." Thus, the rules governing the pension plan provide that the employer shall make a contribution "for

each employee* * * for any week in which such employee performs any service for the employer" (App. 77a-21).

2. *The Rise of the Private Pension System as an Alternate Form of Investment Medium*

Within the last thirty years, there has been a dramatic rise in the importance of pension funds as a medium of investment. Investments can be characterized as either direct investment (*e.g.*, purchase of stock in industrial corporations or purchase of real estate) or indirect investment (*e.g.*, placing money in a financial institution such as a bank, mutual fund or pension fund, which in turn makes the direct investment). In the early part of this century, approximately 62 per cent of the money used for investment was invested directly, while 38 per cent was invested indirectly, thus reflecting nearly a 2-1 margin in favor of direct investment. Furthermore, within the category of indirect investment, most of the money went into commercial bank deposits, life insurance and mutual funds, while a negligible amount (1/10 of one per cent) was invested in pension funds.[12]

By the end of the 1950's, however, a significant change had occurred in individuals' investment preferences. Thus, in the period from 1953 to 1962, direct investment had fallen to 17 per cent while

[12] These statistics are discussed in *Hearings before the Subcommtitee on Fiscal Policy, U.S. Cong. Joint Economic Committee*, 91st Cong., 2d Sess. 17-18, 22 (1970).

indirect had jumped to about 83 per cent. Within indirect investment, another major change had occurred. Commercial bank deposits lost ground, life insurance reserves grew slightly, mutual funds grew somewhat more substantially, and pension funds increased from the earlier 1/10 of one per cent to 27 per cent."[13]

This phenomenon is also apparent in statistics discussed by Congress in its consideration of ERISA. As reflected in the House Report, estimates of the number of employees covered by pension plans in 1972 ranged from 23 million to 30 million, compared with coverage of only 4 million in 1940 and 9.8 million in 1950. Between 1950 and 1970, total annual contributions made to pension plans by employees, and by employers on behalf of employees, rose from about $2.1 billion to about $14 billion. In 1950, 450,000 retired employees received $370 million from retirement plans; in 1970, 4,700,000 retired employees received $7.4 billion in pension payments."[14]

Not surprisingly, there has been a corresponding evolution in the legal concepts applicable to pensions. At one time, pensions were legally considered to be mere gratuities given by the employer to the employee and subject to the former's decision to withdraw the benefit at any time."[15] In 1948, the landmark decision in *Inland Steel Co.* v. *National Labor Re-*

[13] *Id.*

[14] See H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 9-11 (1974).

[15] *See* B. Aaron, *Legal Status of Employee Benefit Rights under Private Pension Plans* 7 (1960).

lations Board, 170 F.2d 247 (C.A. 7), *certiorari denied*, 336 U.S. 960, signaled the end of this theory by holding that pension funds are a mandatory subject of collective bargaining on the ground that the employee's daily work or longevity constituted legal consideration for the pension interest. Since that time, the employee's interest in the pension fund has been recognized as being more than a mere gift.

SUMMARY OF ARGUMENT

1. An employee's interest in a pension fund is an "investment contract," a term expressly included by the Congress when it set forth a definition of "security" in the Securities Act and in the Securities Exchange Act. This Court has held that the touchstone of the existence of an investment contract is whether an interest, in light of "economic reality," constitutes "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *United Housing Foundation, Inc.* v. *Forman*, 411 U.S. 837, 852.

In the case of a pension fund, the "economic reality" is that the employee, through his labor, acquires an interest, together with other employees, in a common fund over which he and his fellow employees exercise no direct managerial control. The amount of money that the employee has a "reasonable expectation" will be returned to him, in the form of a pension, exceeds the contributions made to the fund because of the managerial efforts of the fund's

trustees—efforts which consist, *inter alia*, of collecting pension contributions, making calculations concerning life expectancies, and investing the fund's monies. Thus, an interest in a pension fund falls squarely within the definition of "investment contract" that this Court has applied in a long line of cases, beginning in 1943 with *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, and continuing through the decision in *Forman*, *supra*.

In *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 301, this Court cautioned against obscuring the fundamental economic reality of transactions through the use of "unrealistic and irrelevant formulae." Nonetheless, the petitioners base their argument that an interest in a pension fund is not an investment contract upon such unrealistic formulae. In doing so, they place their heaviest reliance upon *Forman*, in which this Court held that interests in a cooperative housing association were not securities. In *Forman*, however, this Court did not disavow, and indeed expressly followed, the earlier cases in which it had found the presence of investment contracts. The basis for the holding in *Forman* that there was no investment contract was the fact that there was no expectation of profits by the purchasers in that case, who were acquiring *solely* a place to live. By contrast, employees who acquire interests in pension funds receive as compensation for their labor *both* wages and the promise of a pension upon retirement. In an analogous situa-

tion, this Court has previously found an investment contract in a case where "[t]wo entirely distinct promises"—one involving an insurance annuity and the other an interest in an investment fund—were "included in the contract and their operation [was] separated at a fixed point in time." *Securities and Exchange Commission* v. *United Benefit Life Insurance Co.*, 387 U.S. 202, 207. As to the expectation of profits from the pension fund interest in the present case, the petitioner Local 705 itself has stated, in describing its pension plan to employees, that "[y]our employer is contributing to the Fund now so that the money needed to pay your pension will be there when you retire" (App. 70a). Also, Local 705 informed employees (App. 72a-1):

> "Another advantage [of the Local 705 plan] is that the contributions earn income by being invested. Consequently the money originally contributed to the plan grows."

Such representations could lead only to the "reasonable expectation of profits."

2. An employee's acquisition of an interest in an involuntary, noncontributory, pension plan—the type of plan involved in this case—constitutes a "sale" for the purposes of the antifraud provisions of the federal securities laws, in that the employee voluntarily provides value for his interest in the pension fund in the form of his labor. Although the Commission has consistently taken the position that the acquisition of an interest in this type of pension fund does not involve a sale for the purposes of the *registration*

provisions of the Securities Act, it has not applied this "no sale" rationale for the purposes of the *antifraud* provisions. And, the appropriateness of treating a transaction as a sale for the purposes of the antifraud provisions but not for the purposes of registration was recognized by this Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453.

The historical justification for the "no sale" doctrine as applied to registration was based on the theories that (1) pensions were gifts and (2) the employee in a so-called involuntary pension plan has no choice whether or not to invest in the pension plan since, it was thought, an employee's decision to take or retain a job could never be affected by representations concerning the pension plan.

It has now been recognized by this Court and by other courts, however, and has been emphasized in the legislative history of ERISA, that pensions are not gratuities, but instead are compensation for the employee's labor that "may be traded off against current compensation" *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593. Similarly, the notion that the element of choice is absent in the acquisition of an interest in the type of pension fund involved in this case has no currency in modern times, in light of the recognition that an employee's decision to take or retain a job may well be affected by the pension plan. Today, pensions represent a major element in the compensation package provided by employers to employees. As the Secretary of Labor stated to the

Senate committee considering the bill which became ERISA, "the variety of [pension] plan types is a significant element in the competition among employers for the workforce" (*see* page 84 *infra*). Indeed, in the present case the respondent's allegations, which must be accepted as true for the purposes of the motion to dismiss, included the statement that he would have sought other employment had he known he would not be eligible for a pension under the Local 705 plan.

In sum, the reasoning behind the "no-sale" rationale has been undermined by the evolution of the economic significance and legal understanding of pensions. Accordingly, that rationale, developed only in the context of registration, should not now be held applicable to the antifraud provisions.

3. Although the enactment of ERISA now provides some important protections to participants in pension plans, it does not provide the same type of protections as the antifraud provisions of the securities laws, and nothing in ERISA conflicts with the antifraud provisions. ERISA did not preempt the federal securities laws but, instead, expressly preserved all federal laws; and the standards for implied preemption—that "the earlier and later statutes are irreconcilable"—also are not met. *Tennessee Valley Authority* v. *Hill*, 46 U.S.L.W. 4673, 4683. In any event, the conduct complained of in this case occurred long before the enactment of ERISA.

Although the petitioners believe that the application of the antifraud provisions to the acquisition of interests in pension funds is undesirable as a matter of national labor policy, this Court has refused to consider policy issues not related to the securities laws in determining the question of whether an interest is a security. *See Tcherepnin* v. *Knight*, 389 U.S. 332, 346. And, the policy concerns embodied in the antifraud provisions of the securities laws—including the policy of prohibiting fraud by those who manage other people's money—require that those provisions be held applicable to interests in pension funds. Even if the petitioners were correct that labor law policies would be better served if defrauded employee-investors in pension funds were left with no remedy against those who have made misrepresentations upon which the employee has relied to his detriment, it is, in the words of this Court, "the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation." *Tennessee Valley Authority* v. *Hill*, *supra*, 46 U.S.L.W. at 4684.

ARGUMENT

Introduction: The Nature of the Antifraud Provisions Has Been Misunderstood by the Petitioners and This Misunderstanding Has Caused Exaggerated Fears of Retroactive Liability.

The sole issue presented by this case, on an interlocutory appeal from an order refusing to dismiss the securities laws counts of the complaint, is the issue of whether the complaint in this private action, as construed most favorably on behalf of Mr. Daniel,[16] sets forth the threshold requirements for imposition of liability pursuant to the antifraud provisions of the securities laws—the existence of a "security" and the occurrence of a "sale."

The petitioners, and the *amici* who support them, have attempted to obscure that issue, however, with an argument which is not only irrelevant to the threshold questions presented, but also is based upon a misunderstanding of the nature of the antifraud provisions of the securities laws. They argue that the applicability of the antifraud provisions to pension plans would subject pension plans to massive retroactive liability.[17] This fear, however, is founded on two basic errors.

First, the petitioners' fears of liability are not based on any assertion that there has been significant fraudulent behavior in the past, but instead on their

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[16] *See Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 172.

[17] *See, e.g.*, IBT Br. 135-136; Local Br. 35-37; NCCMP Br. 27-32; ERIC Br. 23-24.

belief that the antifraud provisions impose an across-the-board requirement of extensive, specific affirmative disclosures of various pension terms including actuarial probabilities. The petitioners and *amici* have fashioned their overbroad view of the scope of the antifraud provisions by seizing upon *dictum* in the court of appeals' decision which suggests (App. 255a), incorrectly in our view, that the antifraud provisions impose such a requirement.[18]

In this regard, the *antifraud* provisions, which are involved in this case, should be contrasted with the Securities Act's *registration* provisions (which are not). The registration provisions, which are commonly referred to as the Securities Act's "disclosure" provisions, are designed to assure that investors will be furnished all material information needed to make an informed investment decision. The mechanism for meeting that objective is the filing with the Commission of a registration statement, and the delivery to investors of a prospectus, containing detailed financial and other information about the security and its issuer. The Commission, however, has never asserted that the registration provisions apply to the type of pension fund involved in this case. Indeed, Congress, in a 1970 amendment to the Securities Act, has specifically exempted interests in most pension plans

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[18] This language in the opinion is *dictum*, because the only issue before that court was the threshold issue of whether there was a security and a sale. The issue of whether the antifraud provisions require specific disclosures was neither before the court nor fully briefed by the parties.

from the requirement of registration;[19] and, even apart from that exemption, the Commission has long and consistently interpreted the Securities Act as not requiring registration of interests in so-called involuntary or noncontributory pension funds like the Local 705 plan involved here.[20]

The *antifraud* provisions, by contrast, do not establish a system of detailed specific affirmative disclosures to investors, but rather are a prohibition of fraudulent conduct, including the making of false or misleading representations.

Thus, any estimate of potential retroactive liability for pension funds that is based upon an assumption that all pension funds must make specific actuarial disclosures is inaccurate and exaggerated. Indeed, the *amicus* AFL-CIO has conceded that if the antifraud provisions, instead of requiring disclosure of actuarial probabilities, were held to be violated only because of the failure to disclose the Local 705 break-in-service rule, little liability would result. The AFL-CIO stated in its brief in support of the petitions for *certiorari*, at 3:

> "A holding so limited would have precluded claims by the vast majority of individuals who receive no benefit because the basic plan of eligibility rules have almost universally been made known to participants, and, indeed, under ERISA *must* be disclosed."

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[19] Section 3(a)(2) of the Securities Act, 15 U.S.C. 77c (a)(2). *See* pages 59-61, *infra*.

[20] See pages 64-67, *infra*.

Similarly, an actuarial study commissioned by the Department of Labor concerning the possible effect upon pension plans of the decision below conceded (II-3):

> "Most terminated non-vested participants in pension plans have not been led to expect that they were entitled to a pension. If liability exists only with respect to terminating participants who received information leading them to expect a pension, it does not apply to most terminated participants." [21]

Second, any retroactive liability to employees for violations of the antifraud provisions in connection with a noncontributory, involuntary pension plan is limited by the requirements that the private plaintiff demonstrate:

(1) that he made an investment decision, in that his decision to take or retain a job was materially influenced by the pension;
(2) that a fraud occurred;
(3) that he was injured; and

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[21] Grubbs, Report to the Secretary of Labor, Potential Effects of *Daniel*, Mar. 20, 1978. The Grubbs study, cited in NCCMP Br. 19, 28, 29; ERIC Br. 23-24, and Local Br. 36-37, is of no practical use in determining what, if any, liabilities would result from affirmance of the holding below, because the estimate of liability in that study is based upon a presumption that actuarial probabilities always must be disclosed. No effort was made, in the study, to estimate what liabilities would ensue if the antifraud provisions, as we submit, do not impose an across-the-board requirement to make the disclosures suggested in the court of appeals' opinion.

(4) that his injury was causally related to the fraud.[22]

The problems inherent in establishing these requisites for relief would limit the number of persons who would be able to establish a violation of the antifraud provisions.[23]

On the basis of the petitioners' exaggerated predictions of the amount of liability which would result from affirming the court below, they mistakenly rely upon this Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, 98 S. Ct. 1371, to support their contention (IBT Br. 135-141) that the application of the antifraud provisions of the securities laws to pension plans should be prospective only.

This Court in *Manhart*, a case not involving the federal securities laws, was concerned that retro-

[22] To establish a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, a private plaintiff must also establish that the defendant acted with *scienter*. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185. It has not yet been decided by this Court whether *scienter* is also required under Section 17(a) of the Securities Act, although the court of appeals held that such a requirement exists under the circumstances of this case. It is not necessary for this Court to reach that question, or the question raised by Local 705 of whether Section 17(a) gives rise to an implied private right of action, since violations of Section 10(b), as alleged by the respondent, provide a jurisdictional predicate for the determination of the threshold issue of whether the complaint establishes the existence of a security and a sale.

[23] The Grubbs study (*see* n. 21, *supra*) is of no utility not only for the reasons set forth in n. 21, *supra*, but also because it completely ignores the elements of securities fraud which a private plaintiff must establish.

active liability with respect to a plan that it had held discriminated on the basis of sex could be "devastating" for a pension fund, and that "[t]he harm would fall in large part on innocent third parties." *Id.* at 1382-1383. The Commission recognizes the importance of maintaining the solvency of pension funds. *Manhart*, however, differs critically from the present case in that this Court there refused to apply its holding retroactively in part because "conscientious and intelligent administrators of pension funds * * * may well have assumed that a program like the Department's was entirely lawful." *Id.* at 1381. While it may very well be that the petitioners in this case did not anticipate that the securities laws were applicable to pension plans, "conscientious and intelligent administrators of pension funds" would not commit the type of fraud alleged here, which included misrepresentations. A different situation, however, might be presented if, as the court of appeals erroneously suggested, the antifraud provisions imposed a specific affirmative disclosure requirement, applicable to all pension funds, relating to actuarial probabilities. In such a case, unlike the present case, perhaps the rationale articulated in *Manhart* would preclude an imposition of retroactive liability upon persons who have, in good faith, failed to make such disclosures.

I. AN INTEREST IN A PENSION FUND IS A "SECURITY" WITHIN THE MEANING OF THE FEDERAL SECURITIES LAWS.

A. An Interest in a Pension Fund Is an "Investment Contract" as That Term Has Been Interpreted in Numerous Decisions of this Court.

The term "security" as defined in Section 2(1) of the Securities Act, 15 U.S.C. 77b(1), and Section 3 (a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10), includes any "investment contract." Although the term "investment contract" was not expressly defined in the securities laws or their legislative history, the meaning of the term had been "crystallized by * * * prior judicial interpretation" [24] to represent "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." [25] Unlike a tangible commodity, which a prospective purchaser can observe and evaluate, a security derives value from, and subjects the purchaser to the risks of, the unseen future ability of those who manage his investment. For this reason, securities investors have been accorded special status and protections.

In determining whether an investment vehicle constitutes a security, this Court has repeatedly emphasized the guiding principle

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[24] *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298.

[25] *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852.

> "that, in searching for the meaning and scope of the word 'security' in the [Securities Exchange] Act [of 1934], form should be disregarded for substance and the emphasis should be on economic reality."

Tcherepnin v. *Knight*, 389 U.S. 332, 336; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975).

In the case of a pension fund, the "economic reality" is that the employee, through his labor, acquires an interest, together with other employees, in a common fund over which he and his fellow employees exercise no direct managerial control, with the hope and expectation that payments made on his behalf into that fund with profits thereon will be returned to him at a later date in the form of a pension.

This emphasis on economic reality must govern, regardless of "the name appended" to the interest (*Forman, supra*, 421 U.S. at 849) or the particular legal form the interest takes. Thus, in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, the first case in which this Court defined the scope of the term "security," an oil promoter had formed a corporation which acquired oil and gas leaseholds. These leaseholds were then sold to investors by the use of literature emphasizing the future return of a profit. The lower courts had refused to enjoin this activity under the federal securities laws on the ground that, in the words of the court of appeals, it could only "find * * * sales

and assignments of legal and legitimate oil and gas leases, *i.e.*, sales of interests in land." *Id.* at 348. Mr. Justice Jackson, writing for the majority, rejected this conclusion that only property rights were involved and held that the interests were investment contracts. He stated (*id.* at 352, citations omitted):

> "Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate. In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering."

Similarly, in *Securities and Exchange Commission* v. *W. J. Howey Co.*, *supra*, where purchasers were offered small amounts of citrus acreage accompanied by a management contract with a subsidiary of the seller, the lower courts had placed undue reliance on the formal context and had thus failed to appreciate the underlying character of the offer, treating the transaction as no more than an ordinary real estate sale with an agreement by the seller to manage the property for the buyer. This Court, however, recognized that the purchasers in *Howey* were basically "laying out [their] money in a way intended to secure income or profit from its employment," 328 U.S. at 298, and that it was "immaterial" that the transaction took the form of a sale of "property." *Id.* at 301.

In subsequent cases, this Court has found securities to exist in situations where the interests not only bore labels foreign to those traditionally associated with securities, but also were subject to regulation under other statutory schemes. Thus, in *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co. ("VALIC")*, 359 U.S. 65, the Court was confronted with the question whether variable annuity contracts sold by insurance companies were securities. Under a variable annuity contract, the benefit payments made to the purchaser vary with the success of the company's investments. The defendants claimed that the contracts were solely "insurance" contracts, and that it would be inconsistent with applicable state insurance regulations and thus with the McCarran-Ferguson Act,[26] to hold that sellers of these contracts must also comply with the requirements of the securities laws. Notwithstanding the fact that the contracts had elements of insurance since the benefit payments were made periodically from both principal and income on the basis of actuarial assumptions about the risk of mortality, the Court concluded that the protections of the securities laws were needed because the variable annuity "place[d] all the investment risks on the annuitant" (*id.* at 71); that is, his return was dependent upon

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[26] That Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *." 15 U.S.C. 1012(b).

the investment experience of the variable annuity fund.

In *Securities and Exchange Commission* v. *United Benefit Life Insurance Co.*, 387 U.S. 202, this Court again considered the question of whether a certain type of annuity contract offered by an insurance company was a security. In that case, the purchaser agreed to make a fixed monthly payment for a number of years before a specified maturity date. The seller of the contract undertook to invest the payments. At maturity, the purchaser could elect to take the cash value of his contract, or he could convert his interest into a fixed annuity. The Court held that the pre-maturity portion of the contract was an investment contract even though the purchaser also received an insurance annuity.

In *Tcherepnin* v. *Knight*, *supra*, the Court considered an interest which was subject to regulation under statutes other than the securities laws, and specifically declined to hold that the absence of features traditionally associated with securities precluded the interests there involved from being securities. The case involved withdrawable capital shares in a state-regulated savings and loan association. In holding that the shares were "investment contracts" under the *Howey* formulation, the Court declined to hold, as urged by *amicus* ERIC in this case (ERIC Br. 33), that an interest must be "commonly known as a security"—another term in the definition of security—before it can be considered to be a security, stating (389 U.S. at 343):

> "This, of course, is contrary to our decision in *Joiner* where we rejected the respondents' invitation to 'constrict the more general terms substantially to the specific terms which they follow.'"

The defendants in that case also stressed that the capital shares differed from other securities in that their holders had no preemptive rights, they were nonnegotiable, and they carried no rights to inspect the association's books and records. This Court responded (*id.* at 343-44):

> "The same can be said for the types of interests which we found to be securities in *Howey* and *Joiner* * * *. In short, the various factors * * * serve only to distinguish among different types of securities. They do not, standing alone, govern whether a particular instrument is a security under the federal securities laws."

In short, this Court consistently has refused to allow the form or label of an interest to obscure its underlying economic reality; and, even though the interest is subject to regulation under other laws, it is a security if the purchaser is investing in a common enterprise with the expectation of profits to be derived from the managerial efforts of others. Under that test, the pension fund interests in the present case, like the various interests held to be securities in the past, unquestionably are securities.

In urging that interests in pension funds are not securities, the petitioners and *amici* set forth a number of factors which, in their view, distinguish an

interest in a pension fund from other types of investments that are securities. We submit, however, that none of those factors are included in the test for determining the existence of an investment contract which has been set forth by this Court. Moreover, relying upon such factors as a basis for finding that an interest in a pension fund is not a security not only ignores the "economic realities" underlying participation in a pension plan but also would result in a diminution of the protections afforded by the securities laws to investors generally.

IBT argues that the participant in the Local 705 pension plan has no "interest" in the plan or fund, but merely a "contingent expectancy of future pension payments," in that "[a]lthough contributions are made for each week of work by each employee in the covered group, no employee receives anything of present economic value by reason of any such contributions" (IBT Br. 40). But, nothing in the definition of investment contract that has been consistently applied by this Court requires that an investor be immediately entitled to the profits he hopes will result from his investment. This Court has never held that the existence of an investment contract requires a certainty of profits, but only a "reasonable expectation." *Forman, supra*, 421 U.S. at 852. And, in this case, the court of appeals, in summarizing Mr. Daniel's affidavit, noted (App. 215a):

> "One of Local 705's booklets advised him that the purpose of the pension fund was to take care of him and his family in the case of retirement and that the funds afforded protection to him, his wife, and unmarried children under 18 years of age."

Similarly, Local 705's 1969 booklet stated, "[y]our employer is contributing to the Fund now so that the money needed to pay your pension will be there when you retire" (App. 70a-14). Such representations could only lead to a "reasonable expectation" that profits from the investment made on his behalf would be forthcoming.

The fact that an employee may never realize the profits of his investment, through either voluntary or involuntary cessation of employment, is germane to the relative merits, as an investment, of participation in a pension fund in comparison to other forms of investment, but completely irrelevant to the fact that a portion of the employee's total compensation package is being invested in a common enterprise with the "reasonable expectation"—not promise—of profits.[27] It is true, of course, as IBT states (IBT Br. 42), that the employer who makes contributions to a multi-employer plan on an employee's behalf may go out of business. But the same could be said with respect to any investment—the issuer of a security may always go out of business and any security may become worthless. Moreover, in the case

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[27] The fact that an interest is contingent does not mean it is not legally cognizable. For example, contingent remainders are a recognized interest in real property, and contracts may be subject to a condition precedent. *See* Restatement, Contracts § 250(a).

of a multiemployer plan such as the Local 705 plan, even if one employer decides to cease operations an employee may retain his pension rights by obtaining employment with another employer who participates in the plan. And although, as IBT points out (IBT Br. 42), the union, as the employee's agent, may agree with the employer to terminate a pension plan, under agency principles this is no different than if the employee himself had agreed to forego his pension rights in order to receive other benefits. Finally, the petitioners do not dispute that other types of investment vehicles not involving present rights but instead involving contingent expectancies are securities. For example, in employee stock option plans, the right to exercise the option may be dependent upon, for example, the employee's remaining in the job for a certain length of time.

Similarly, IBT seems to assume that a requisite element of an investment contract is that there be a direct correlation between the increase in the value of the fund through investments in securities and the benefits received by the participant, stating that "[p]erhaps the most fundamental objection to the [Court of Appeals'] 'profit' theory is that the investment gain of the fund does not necessarily redound to the advantage of the ultimate pension beneficiary" (IBT Br. 44). As the court below noted, however (App. 227a n. 23):

> "That th[e] profit element is fixed because pension payments are set at specific levels from time to time is wholly immaterial to gain being profit

> in the *Forman* sense. A number of instruments which all would concede to be securities (bonds, debentures, etc.) are fixed return."

Moreover, the managerial efforts which are an essential element of an investment contract need not, as the petitioners' arguments assume, consist solely of managing other investments, nor must those profits result from investments in the capital markets at all. The profits returned to the investor can result from management of any type of enterprise, including, as this Court has recognized, citrus acreage and oil and gas properties. See *Howey* and *Joiner*, *supra*. In the case of a pension fund, the managerial efforts include making actuarial assumptions and collecting the pension contributions from the employer. In any event, it is clear that the amount available for the payment of Local 705 pension benefits is affected by the efforts of the fund's trustees in managing the fund's investments and by the resulting investment performance of the fund. Indeed, IBT concedes that about 9 percent of the actuarial value of the pension benefits is attributable to "investment gain" (IBT Br. 74),[28] and Local 705 has itself expressly acknowl-

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[28] The affidavit for the Local 705 pension fund, appended to Local 705's brief, states that "[i]t has been the policy of the fund, since its inception, to invest either in government or short-term securities on a self-administered basis" (Local Br. A6). In this regard, it is not disputed that the total amount of monies in a fund affect the amount of benefits received by the participants. The Grubbs Study, see n. 21, *supra*, relied on by the petitioners (Local Br. 36-37) and *amici* (ERIC Br. 23-24; NCCMP Br. 19, 28-29), is implicitly based

edged (*see* page 15, *supra*) that the payment of pension benefits is affected by the efforts of the fund's trustees in managing the fund's investments and by the resulting investment performance of the fund. Finally, the petitioners' attempt to attribute significance to the fact that payments are made, in part, on the basis of actuarial assumptions and not solely on the basis of investment performance is answered by this Court's decision in *VALIC*, since variable annuity benefits are likewise based on actuarial assumptions. *VALIC*, 359 U.S. at 70 (*see* page 33, *supra*).

In *Howey*, this Court cautioned against obscuring the fundamental economic reality of transactions through the use of "unrealistic and irrelevant formula." 328 U.S. at 301. The petitioners, however, attempt to utilize such unrealistic formulae to negate the fact that the employee acquires an interest in the pension fund as compensation for his labor. Thus, IBT states that "[a]n employee does not part with money, he performs labor" (IBT Br. 37). But, unless the petitioners wish to suggest that the part of the employee's compensation which takes the form of contributions to the pension fund results from volunteer work, the economic reality is unchanged whether the employee first receives money which he must invest in a pension fund or whether the contribution to the pension fund is made directly by the employer.

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upon that assumption, in that it states (I-6): "In defined contribution plans and in multiemployer plans, any additional costs paid by the plan and its trust reduce the amount of benefits that can be paid to participants."

The idea that pensions are "gifts" from the employer to the employee has no currency in modern times.[29] Indeed, this Court has recognized that "future [pension] benefits may be traded off against current compensation." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593.

Curiously, the petitioners rely (IBT Br. 39; Local Br. 38-39) on *Alabama Power Co.* v. *Davis* in an attempt to demonstrate that the funding of a pension plan does not constitute compensation to the employee. The *Davis* case, however, involved a different type of pension plan than the plan involved in the present case—a single-employer plan. Thus, in *Davis*, this Court concluded that "pension plans are predominantly rewards for continuous employment with the *same employer*." *Id.* at 594 (emphasis supplied). The Local 705 plan, however, is a *multi-employer* plan. As long as a participant worked for any of the employers who would make contributions to the plan as an incident of his employment, he could receive a pension. Accordingly, the portion of *Davis* upon which the petitioners rely has no relevance to this case. In any event, whether the employee's interest in the plan is compensation for *daily* labor or compensation for *continuous* service is not relevant to the fact that the contributions to the pension fund constitute consideration for the employee's services and not a gift.

IBT notes that pension plans are negotiated by the union, not by the individual employee (IBT Br. 37).

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[29] *See* pp. 77-82, *infra*.

But, the way in which the terms of an investment are determined is not dispositive of whether or not an investment contract exists. In *Tcherepnin*, *United Benefit*, and *VALIC*, the individual investors could not negotiate the terms of their investment contract; they could merely choose to invest or not to invest.

Similarly, IBT makes the point (IBT Br. 41), without explaining its relevance to the question of whether there is a security, that the participant in a pension plan cannot convey that interest. But neither the securities laws nor the cases interpreting those laws require that an interest be transferable in order to constitute a security.

A similar misconception underlies IBT's claim (IBT Br. 42) that no security is involved because the employee's investment is subject not only to the risk of lack of investment success, but also to the risk that there will be a sharp reduction of employment or that contributing employers will become insolvent. But, every business enterprise, large or small, may suffer adverse economic circumstances or even become bankrupt from causes wholly outside the control of management. Thus, the investor in *Howey* was subject to the risk that poor weather would diminish the value of his investment.

Also without merit is Local 705's assertion that it is significant that an employee receives no document evidencing his investment (Local Br. 54). It is clear that the existence of a security is not dependent upon the issuance of a document. *See* H.R. Rep. No. 1838, 73d Cong., 2d Sess. 39 (1934); *Securities and Exchange Commission* v. *Addison*, 194 F. Supp. 709, 722 (N.D. Tex.); 1 Loss, *Securities Regulation* 458 (2d ed. 1961).

IBT also argues that the profits received by the investor in a pension fund do not result solely from the efforts of others because "the pension beneficiary himself must play a major role" (IBT Br. 50), presumably by performing the labor necessary to meet the eligibility requirements. But it is true of any investment that the investor's own efforts are involved in acquiring the money to invest. Moreover, the employee's services are not the "managerial" services on which his investment depends. *See* page 30, *supra*.

The petitioners place their greatest reliance on the *Forman* case, stating that "[t]he reasoning of Forman requires reversal of the decision in this case" (IBT Br. 30; *see also*, Local Br. 23). In so arguing, however, they have misread and misinterpreted *Forman*, and in addition, they fail to consider that case in the context of the five prior decisions of this Court discussed previously. The *Forman* decision is in no way inconsistent with the principles enunciated in the previous decisions which support the conclusion that interests in pension funds are securities. Indeed, the Court in *Forman* noted, "we do not write on a clean slate," and proceeded to apply what it characterized as "well-settled principles [previously] enunciated by this Court * * *." 421 U.S. at 848.

In *Forman*, this Court, reversing a court of appeals decision, held that interests in a cooperative housing association were not securities. The lower court had

relied on two alternate theories—that the interests were denominated "stock" and that the interests met the definition of "investment contract." This Court first rejected the literal approach of the former alternative. Viewing the securities laws as being primarily oriented toward transactions that are economic in character, the Court reaffirmed its earlier decisions to the effect that "Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." *Id.* at 849. The Court then concluded that the interests in the cooperative were not "stock" because "they lack what the Court in *Tcherepnin* deemed the most common feature of stock: the right to receive 'dividends contingent upon an apportionment of profits.' 289 U.S. at 339." 421 U.S. at 851.

Turning to the second alternative used by the court of appeals, the "investment contract" theory, this Court in *Forman* relied on the *Howey* formulation, stating (*id.* at 852):

> "[T]he basic test for distinguishing the [securities] transaction from other commercial dealings is 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.' *Howey*, 328 U.S. at 301."

The Court continued (*id.* at 852):

> "This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

The Court then rejected the conclusion of the court of appeals that "profits" were expected by purchasers of the cooperative interests. First, it rejected "summarily," as types of securities profits, benefits to cooperative purchasers consisting of favorable tax consequences and low rental charges. The Court did discuss the possibility that "profit" could be found in the fact that net income derived from the leasing of space for commercial facilities was to be used to reduce rental costs. However, it found (421 U.S. at 856-857):

> "The short of the matter is that the stores and services in question were established not as a means of returning profits to tenants, but for the purpose of making essential services available for the residents of this enormous complex."

Consequently, having been unable to find that any "profit" could be expected by the purchaser of the cooperative stock, the Court was forced to conclude that no security was involved. As the Court concluded (*id.* at 858):

> "What distinguishes a security transaction—and what is absent here—is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use."

In relying on *Forman*, IBT refers (IBT Br. 30) to the statement in that case that the "primary purpose" of the federal securities laws is to eliminate abuses in a largely unregulated securities market, thereby implying that, since pension interests are not traded in the securities markets, they should not be considered securities. But this language from *Forman* did not appear in that part of the opinion discussing whether there was an "investment contract," the term involved here. The language was used only in connection with the question of whether the shares of the cooperative, which were denominated "stock," were securities because the definition of "security" includes the term "stock." In determining whether the "stock" of the cooperative was the type of "stock" which Congress contemplated, the Court appears to have considered it significant that the cooperative stock was not traded in the securities markets. Such a limitation, however, has never been considered applicable to the investment contract portion of the definition of security.[30] Thus, in at least four of the

[30] As this Court noted in *Howey, supra*, 328 U.S. at 298:

> "The term 'investment contract' is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state 'blue sky' laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it has been broadly construed by state courts so as to afford the investing public a full measure of protection. * * *
>
> "By including an investment contract within the scope of § 2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation."

Under state "blue sky" laws, the term "investment contract" was never limited to apply only to securities traded in a securities market. *See, e.g., State* v. *Robbins*, 185 Minn. 202, 240 N.W. 456 (1932) (muskrats); *Stevens* v. *Liberty Packing Corp.*, 111 N.J. Eq. 61, 161 Atl. 193 (1932) (rabbits); *Kerst* v. *Nelson*, 171 Minn. 191, 213 N.W. 904 (1927) (vineyards); *Prohasta* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331 (1930) (farm lands).

five preceding Supreme Court cases, the interests held to be investment contracts, and therefore securities, were not traded on a market. Furthermore, in *Tcherepnin, supra*, 389 U.S. at 345, this Court took exception to the reasoning of the court of appeals in that case, which, in holding that the withdrawable shares were not securities, had noted that the securities laws "were passed in the aftermath of the great economic disaster of 1929." The court of appeals had therefore concluded that the securities laws were intended to deal only with "speculation in securities which had a fluctuating value and which were traded in securities exchanges or in over-the-counter markets." This Court responded (*id.*):

> "This statement suggests, and the respondents have argued in this Court, that the petitioners' withdrawable capital shares are not within the purview of the 1934 Act because their value normally does not fluctuate and because they are normally not traded in securities exchanges or over-the-counter. The accuracy of this assertion is open to question. But, more important, it is irrelevant to the question before us. As was ob-

served in *Howey*, 'it is immaterial whether the enterprise is speculative or nonspeculative.' 328 U.S. at 301." (footnote omitted).

IBT similarly refers (IBT Br. 30) to other language used by the Court in *Forman* only in its discussion of the term "stock"—the Court's statement (421 U.S. at 851) that the housing cooperative shares involved there had "none of the characteristics 'that in our commercial world fall within the ordinary concept of a security.' H.R. Rep. No. 85, [73d Cong., 1st Sess.] 11 [(1934)]." But neither did the citrus acreage,[31] chinchillas,[32] Scotch whisky[33] or numerous other property interests[34] which have been held to involve investment contracts.

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[31] *Howey, supra.*

[32] *Miller* v. *Central Chinchilla Group, Inc.*, 494 F.2d 414 (C.A. 8).

[33] *Glen-Arden Commodities, Inc.* v. *Costantino*, 493 F.2d 1027 (C.A. 2).

[34] *See Ahrens* v. *American-Canadian Beaver Co.*, 428 F.2d 926 (C.A. 10); *Securities and Exchange Commission* v. *MacElvain*, 417 F.2d 1134 (C.A. 5), *certiorari denied*, 397 U.S. 972 (interest in a lawsuit); *Continental Marketing Corp.* v. *Securities and Exchange Commission*, 387 F.2d 466 (C.A. 10), *certiorari denied*, 391 U.S. 905 (beavers); *Roe* v. *United States*, 287 F.2d 435 (C.A. 5), *certiorari denied*, 368 U.S. 824 (oil leases); *Blackwell* v. *Bentsen*, 203 F.2d 690 (C.A. 5) (citrus groves); *Lennerth* v. *Mendenhall*, 234 F. Supp. 59 (N.D. Ohio) (archery range); *Securities and Exchange Commission* v. *Payne*, 35 F. Supp. 873 (S.D. N.Y.) (foxes); *Securities and Exchange Commission* v. *Gilbert*, 29 F. Supp. 654 (S.D. Ohio) (motor boats).

IBT further interprets *Forman* as precluding "taking a complex transaction [and] breaking it into small parts," stating that the decision of the court below requires isolating the employee's "contingent expectancy" of receiving a pension from the "predominant considerations" in taking a job—"the nature of the job and the rate of pay" (IBT Br. 32, 33). IBT fails to recognize, however, that the purchaser in *Forman* was acquiring *only* housing—an interest which, as this Court emphasized, was not an investment for profits to be derived from the efforts of others (*see* page 45, *supra*). It was this lack of profit which was the critical factor in the Court's decision. By contrast, the employee who acquires an interest in a pension fund is obtaining, in addition to employment, an investment in a common fund with the expectation of profit—a security.[35] And, although IBT may well believe that "common sense" (IBT Br. 33)[36] indicates that the conditional promise of future pension rights is not a predominant consideration in taking a job, whether or not an interest is a security depends upon the objective characteristics

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[35] *Amicus* NCCMP argues that in the previous cases in which this Court found the existence of an investment contract, "the interest sold as an investment contract was advertised and sold as an investment" (NCCMP Br. 9-10). But Local 705 itself, in its booklet describing its pension plan (App. 70a, 14), has stated, "the contributions [to the fund] earn income by being invested. * * *. Without this income growth the Fund could not accumulate enough money to pay the $250.00 monthly benefits."

[36] *See also* NCCMP Br. 9.

of the interest itself, not on the motivation of the individual acquiring the interest.

Of course, the question of an individual's motivation in acquiring an investment vehicle may be relevant to whether he can prevail in a private damage action alleging violations of the antifraud provisions, insofar as a plaintiff in such a case must establish that his injury was *caused* by the alleged fraud. By contrast, when the Commission brings an injunctive action or administrative proceeding against a person for violations of the antifraud provisions, the Commission is not required even to show that any investor was injured by the alleged fraudulent conduct. As stated in *Berko* v. *Securities and Exchange Commission*, 316 F.2d 137, 143 (C.A. 2), a case involving judicial review of a Commission administrative proceeding, in which a salesman contended that the Commission must show that his customers were injured,

> "the fact that the salesman's clients were not misled and indeed may even have profited from his actions is legally irrelevant. *Hughes* v. *Securities and Exchange Commission*, 85 U.S. App. D.C. 56, 174 F.2d 969, 974 (1949). The Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury."

To encumber the definition of "security" with factors relating to the motivation of particular individuals—which motivation may vary from individual to individual—would seriously hamper the goals of the Commission's enforcement program which include quickly identifying fraudulent activity and "nipping it in the bud" by immediately seeking injunctive relief in the federal courts.

Like IBT, the Solicitor General also argues (SG Br. 16) that the question of whether there is an investment contract turns on a subjective factor—whether the individual investor has made an investment choice. His brief supports this argument with a quotation from *Forman, supra*, 421 U.S. at 858, that "[w]hat distinguishes a security transaction * * * is an investment where one parts with his money * * *" (SG Br. 16). The quoted language from *Forman*, however, does not address whether there is a security, but whether there is a securities "transaction"—a sale—and thus does not support the contention that "choice" is an element of the definition of investment contract.[37]

Just as IBT, as noted *supra* at page 49, has argued that the employee's investment in the pension fund cannot be separated from the other factors which may enter into his decision to take or retain a job, the Solicitor General, in a similar vein, argues (SG Br. 17-18) that in order for an interest in a pension fund to constitute a security the employees must be attracted to their jobs solely or primarily by the pros-

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[37] Accordingly, the Commission has addressed the argument that the acquisition of an interest in a pension fund does not involve a choice in the section of this brief discussing whether there is a sale. *See* pp. 83-86, *infra*.

pects of a pension. In making this argument, his brief quotes from *Forman*, at 421 U.S. 852, language that this Court in turn was quoting from *Howey*, 328 U.S. at 300, that investors are "attracted solely by the prospects of a return." But, when this Court used that language in finding an investment contract in *Howey*, it was merely describing the factual situation presented by that case. Neither in *Howey* nor in *Forman* was this Court presented with a situation in which an investment decision is coupled with another type of decision. In *Forman*, this Court's holding that there was no investment contract was based not upon the circumstance that the persons acquiring cooperative housing were attracted more by housing than by profits, but rather upon the fact that such persons were acquiring solely housing and that no profit element was present at all.

By contrast, in the present case the respondent, in return for the value he gave in the form of his labor, was receiving two things—wages as well as an investment in the pension fund; and the underlying investment character of a security is not destroyed simply because a purchaser of that interest may be acquiring something else with his investment. Thus, in *Forman*, in a footnote directly appended to the paragraph in which the language cited in the brief of the Solicitor General appears, this Court recognized that a different case would have been presented if there had been an offer of "both a commodity or real estate for use *and* an expectation of profits," 421 U.S. at 853 n. 17 (emphasis supplied)—a situation where the purchaser would have acquired both housing and a securities investment. This Court has also recognized that an investor may be attracted by several factors in *VALIC*, where the purchaser of the variable annuity was interested in both in the insurance element of benefit payments for life and the securities element of payments dependent upon the investment performance of the variable annuity fund (*see* pages 33-34, *supra*). Finally, in *United Benefit*, the Court was confronted with an argument that the insurance context of the annuity contract precluded the applicability of the securities laws to the security part of the contract (*see* page 34, *supra*). In rejecting this argument, the Court stated (387 U.S. at 207):

> "[W]e do not agree with the Court of Appeals that the 'Flexible Fund' contract must be characterized in its entirety. Two entirely distinct promises are included in the contract and their operation is separated at a fixed point in time."

The same is true here: the employee furnishes his labor in exchange for promises to pay wages during his working years and, by reason of the employer's payments into an investment fund on his behalf, pension payments after his retirement.

B. The Commission Has Consistently Taken the Position that Interests in Pension Funds Are Securities.

As we have demonstrated, the definition of security in the securities laws encompasses interests in pension funds. The Commission, although it formerly took the position that certain pension interests—those

involved in involuntary, noncontributory plans—did not involve a "sale" for the purposes of the registration process, has always recognized that such interests did constitute "investment contracts," and hence are securities. From the beginning, the securities laws were intended to protect from fraudulent conduct those persons who rely on the managerial efforts of others to return profits to them at a later date. In 1922, the House Report on one of the precursors of the securities laws described the kind of people the laws were intended to protect:

> "[The] victims [of securities fraud] are usually men and women of small means and little business experience and who have no means of judging the value of a security." [38]

Twelve years later, a House committee discussed the necessity of protecting investors who are unsophisticated in the ways of the financial world:

> "As a complex society so diffuses and differentiates the financial interests of the ordinary citizen that he has to trust others and cannot personally watch the managers of all his interests as one horse trader watches another, it becomes a condition of the very stability of that society that its rules of law and business practice recognize and protect that ordinary citizen's dependent position." [39]

The response of that Congress was to enact broad-ranging securities legislation designed, among other

[38] H.R. Rep. No. 760, 67th Cong., 2d Sess. 2 (1922).

[39] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 5 (1934).

things, to protect investors against fraudulent conduct.

Several years later, in 1941, the Congress considered, but did not adopt, an amendment to Section 2(1) of the Securities Act which would have excluded from the definition of security, "any interest (or any instrument representing such interest) of employees arising out of or resulting from the creation or operation of any employees' stock bonus, pension, or profit-sharing trust * * *." [40] Commissioner Purcell, testifying before the Congress concerning this amendment,[41] articulated the Commission's view that interests in pension funds are securities, since a pension fund is simply another investment vehicle through which the funds of individuals are managed. He stated (1941 Hearings at 895):

> "Now, any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an 'investment contract.' In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large."

The petitioners and supporting *amici* attempt to turn Commissioner Purcell's testimony on its head,

[40] Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 919 (1941) ("1941 Hearings").

[41] *Id.* at 887-920.

stating that "Commissioner Purcell was speaking only of voluntary, contributory plans" (IBT Br. 106; *see also* Bankers Br. 6; Local Br. 43). The proposal upon which Commissioner Purcell was testifying, however, related to *all* pension funds. Significantly, Commissioner Purcell stated two reasons why some employee plans do not require registration. First, he pointed out that some employee plans do not involve securities. The type of plans he viewed as not involving securities were not *pension* plans at all. Indeed, Commissioner Purcell delineated specifically the type of employee plans which do not involve a security (1941 Hearings at 896) (emphasis supplied)):

> "Now, in anything that I have said, I do not mean to imply that every employees' plan requires registration. It is only those plans which involve the sale of an investment contract or some other type of security. *Obviously I am not talking about plans which provide simply for sick benefits or hospitalization or social and cultural activities.* The Securities Act does not apply unless the employees' payments are made with a view of their being invested and earning a return for them."

Second, he pointed out that, "even where the plan involves securities," registration is not required where there is no sale. *Ibid.*[42] He stated (1941 Hearings at 896):

[42] Commissioner Purcell also indicated that, notwithstanding the fact that the Commission viewed compulsory, noncontributory plans as involving securities that are not subject to registration, all securities are subject to the antifraud provisions. *See* page 75, *infra*.

> "[C]ompulsory plans do not require registration. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved."

If, as the petitioners urge, the Commission had regarded interests in noncontributory, compulsory pension plans as not being securities, there would have been no need to address the issue of whether a sale was involved. Thus it is clear that the pension interests which Commissioner Purcell, speaking for the Commission, viewed as being securities encompassed not only interests in voluntary, contributory plans but also interests in involuntary, noncontributory plans, like the Local 705 plan.

The Commission has articulated on other occasions its position that interests in pension funds are securities. Thus, in its *Institutional Investor Study* in 1971, the Commission noted that "interests of participants in [pension] plans meet the definition of 'security' under the Securities Act of 1933."[43] This statement was introduced into the record by Manuel Cohen, after serving as Chairman of the Commission, when he testified before the Senate Labor Committee which

[43] Institutional Investor Study, Report of the Securities and Exchange Commission, Summary Volume at 69 (1971) ("Institutional Investor Study").

was considering the bill that eventually became ERISA." He also stated:

> "Pension plans represent an investment medium. Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute." [45]

C. Congress Has Taken Action Consistent With the View that Interests in Pension Funds Are Securities.

As the court below correctly noted (App. 233a), "[t]he legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans." The court found, however, "a measure of guidance" in certain legislative action relating to the securities laws (App. 233a).

First, the court noted (App. 233a) that, in 1934, the Senate adopted an amendment to the Securities Act to exempt from registration "an offering made solely to employees of an issuer or of its affiliates in connection with a bona fide plan for the payment of extra compensation * * *." 78 Cong. Rec. 8708 (1934). This amendment was eliminated in conference because employee participants in such plans "may be in as great a need for protection afforded by availability of information concerning the issuer for

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[44] Hearings on S. 3598 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 238 (1972).

[45] *Id.* at 231. For a discussion of the Investment Company Act provision to which Mr. Cohen referred, see p. 62, *infra*.

which they work as are most other members of the public." H.R. Rep. No. 1838 (Conference Report), 73d Cong. 2d Sess. 41 (1934). While the rejected amendment, as IBT notes (IBT Br. 92), did not expressly refer to the type of pension plan involved in this case, the Conference Report demonstrates that the Congress was aware that compensation for employment may take the form of an investment and that, notwithstanding the special characteristics of the employer-employee relationship, employees as investors are in need of securities law protection.

Second, the court of appeals also found a measure of guidance (App. 236a) in the fact that, in 1970, the Congress amended Section 3(a)(2) of the Securities Act to exempt from registration, but not from the antifraud provisions,

> "any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company * * * in connection with (A) a stock bonus, pension, or profit-sharing plan * * *." [46]

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[46] Section 3(a)(2), as amended in 1970, provides, in pertinent part, an exemption for

> "any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, other than any plan described in clause (A) or (B)

The court of appeals viewed this exemption, for the reasons set out in its opinion (App. 236a-241a), as encompassing interests acquired by employees in pension funds, and thus as reflecting a Congressional belief that such interests, for which registration is not required, are securities subject to the antifraud provisions as are all other securities.[47] IBT argues (IBT Br. 126) that the 1970 amendment to Section 3(a)(2) does not encompass interests of employee participants in pension funds, but rather is limited to

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of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401 (c)(1) of such Code."

[47] Section 17(c) of the Securities Act, 15 U.S.C. 77q, a part of the antifraud section, provides: "The exemptions provided in Section 3 shall not apply to the provisions of this section"; and the House and Senate committees, in considering the 1970 legislation, specifically stated:

> "As with other securities exempted under section 3 of the act, the amendment would not exempt the securities from the antifraud provisions of section 17."

H.R. Rep. No. 91-1382, 91st Cong., 2d Sess. 43 (1970); S. Comm. on Banking and Currency, Analysis of S. 34, 91st Cong., 1st Sess. 15 (1969) ("Analysis of S. 34").

interests sold by banks and insurance companies to pension plans.[48]

The legislative history of Section 3(a)(2) is not a model of clarity. But, even if the petitioners were correct in their reading of Section 3(a)(2), and we submit they are not for the reasons articulated by the court below and those set forth in note 48, *supra*, that does not negate the fact that Congress defined "security" to include "investment contract," a term which, as we have shown, includes employee interests in pension funds in light of well-established principles. Thus, the enactment of the 1970 Amendment to Section 3(a)(2) merely serves to bolster a conclusion which, we submit, is firmly grounded in the statutory definitions and the cases interpreting them.

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[48] IBT's argument might be supportable if Section 3(a)(2) exempted only interests in collective trust funds. That Section, however, also exempts interests in *single funds* from the registration provisions. In the case of a single pension fund, there is only one security—the employee's interest in that fund. A bank or insurance company may have investment discretion over the assets of a single fund, but it is not considered to have sold the fund a security separate from the employee's interest in the fund. It is unrealistic to assert that the pension fund is itself holding a security consisting of a trust containing solely the pension fund's own assets. Accordingly, if Section 3(a)(2) did not apply to the employee's interest—as the petitioners contend—there would be nothing, in the case of single funds, to be exempted by the section and Congress' exemption of interests in single funds would serve no purpose.

IBT argues (Br. 95-102) that the exclusion of employee pension trusts from the definition of "investment company," in Section 3(c)(11) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(11), supports its "contention that Congress has never regarded employee plan participants as investors to be protected by the securities laws" (IBT Br. 96). Even a cursory glance, however, at the various types of investment devices excluded from the coverage of the Investment Company Act demonstrates that the basis of exclusion is not that persons with interests in the excluded entities are not investors. Thus, excluded from coverage under that Act, for example, are issuers of securities with a small number of investors (Section 3(c)(1)), brokerage firms (Section 3(c)(2)), and banks and insurance companies (Section 3(c)(3)). A person who owns stock in, for example, an insurance company, is an investor, even though the company is not subject to the scheme of substantive regulation embodied in the Investment Company Act. And, the exclusion for pension plans is limited to plans meeting the requirements of Section 401 of the Internal Revenue Code, or collective trusts consisting of such tax-qualified plans. If the reason for exclusion from the Act was that participants were not investors, it would not make sense to exclude some plans and include others depending on the tax status of the plan.

In any event, as IBT recognizes, "[t]he Investment Company Act of 1940 goes beyond disclosure and introduces various substantive regulatory provisions

* * *."[49] Since Congress, and the Commission, have not subjected most pension plans even to the disclosure requirements of the registration provisions of the Securities Act, it would have been anomalous to subject those plans to the Investment Company Act's panoply of substantive regulation.

II. A SALE OF A SECURITY OCCURS WHENEVER AN EMPLOYEE TAKES ACTION WHICH RESULTS IN HIS GIVING VALUE IN EXCHANGE FOR AN INTEREST IN A PENSION FUND; AND WHERE HIS ACTION WAS MATERIALLY INFLUENCED BY FRAUDULENT REPRESENTATIONS CONCERNING THE PENSION, THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS PROVIDE REDRESS.

The applicability of the antifraud provisions depends not only on there being a security, but also on there being a sale (or an offer to sell). The term "sale" is defined in Section 2(3) of the Securities Act, 15 USC 77b(3), as including

> "every * * * disposition of a security or interest in a security, for value."

The term is defined in Section 3(a)(14) of the Securities Exchange Act, 15 USC 78c(a)(14), as including "any contract to sell or otherwise dispose of."

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[49] IBT Br. 96, quoting from Testimony of Securities and Exchange Commission Chairman Manuel F. Cohen, Collective Investment Funds, Hearings before a Subcommittee of the Committee on Banking and Currency, U.S. Senate, 89th Cong., 2d Sess. on S.2704, at 134 (1966). *See also, United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 704-705.

There appears to be no dispute that a sale occurs when an employee acquires an interest in a pension plan that is both contributory and voluntary, since the employee makes a separate decision to pay money directly into the pension fund. However, the Commission, in its early days, reached a different result for purposes of the Securities Act's *registration* provisions in the case of plans that are either noncontributory or compulsory. It was reasoned that there was no sale of an interest in a noncontributory plan because there was no direct investment of money by the employee; consistent with the then prevailing legal understanding, the employer's contributions were considered to be gifts. Similarly, it was reasoned that no sale was made in a compulsory plan. Although it was recognized that the individual had a choice whether to become or remain an employee, it was thought that the choice could never be affected by representations concerning the pension plan.

This Court, many years later, in this case involving a compulsory and non-contributory pension plan, is now presented with the question of whether the foregoing "no-sale" rationale may be extended to the antifraud provisions. The Commission believes, as did the court of appeals and the district court, that the "no-sale" rationale may not be so extended.

A. The "No-Sale" Rationale Has Been Applied Only to the Registration Provisions.

In 1941, Commissioner Purcell explained to Congress the basis of the Commission's "no-sale" ra-

tionale and its applicability to the Securities Act registration of interests in pension funds (1941 Hearings at 896-897, emphasis supplied):

> "[E]ven where the [pension] plan involves securities, *registration is not required* in the many cases where the employees pay nothing for the securities, but receive an interest in an investment fund by way of bonus from their employer; for, of course, a gift is not a sale, and the Securities Act is concerned only with sales of securities.
>
> "Similarly, compulsory plans *do not require registration*. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved. The purpose of the *registration provisions of the Securities Act* is to disclose to prospective investors the essential facts about securities which they are asked to buy, and if the employees are given no choice as to whether to buy or refuse to buy there hardly seems any point in the *registration process*. As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan."

The subsequent discussions of the "no-sale" rationale by the Commission and its staff demonstrate that the theory was developed and has been applied only in the context of registration. Thus, in a 1941 opinion letter, an Assistant General Counsel of the Commission stated:

"As to the question of finding a 'sale' within the meaning of Section 2(3) of the [Securities] Act, it is our position that, wherever a plan involves an investment contract or a certificate of interest or participation in a profit-sharing agreement and the employees have a choice whether or not to make contributions, there is obviously an 'attempt or offer to dispose of * * * a security * * * for value.' On the other hand, it is because of the language of Section 2(3) that we have taken the position in the past no 'offer' or 'sale' is involved in the case of a non-contributory plan, where the employees are not requested to make contributions, or in the case of a compulsory plan, where there is no element of volition on the part of employees whether or not to participate and make contributions.

> "I trust that this letter will make clear both the presence of a 'security' and the presence of a 'sale' in those cases in which the Commission considers that *registration* of interests in employees' plans is required" (emphasis supplied).[50]

In 1967, when Congress was considering an amendment to exempt certain pensions from registration, Commission Chairman Cohen testified:

> "The application of the Securities Act of 1933 to pension and welfare plans has presented difficulties over the years. Such plans could be regarded as involving the public offering of securities requiring *registration*. On the other hand, the special characteristics of these plans and the fact that they are often an integral part of labor relations, often determined by collective bargaining, has presented difficulties and in general *the Commission has not heretofore required registration of such plans under the Securities Act of 1933*, except where such plans are funded by investment in the employer's securities" (emphasis supplied).[51]

IBT argues (IBT Br. 60) that the Commission's "no sale" doctrine encompassed both the registration and the anti-fraud provisions of the statute. In this regard, IBT relies (IBT Br. 59) upon a statement in the Commission's Institutional Investor Study in an attempt to demonstrate that the Commission's "no sale" rationale applies to the antifraud as well as the registration provisions. But the statement to which IBT refers is only a recital of the fact that, as noted earlier (*see* page 65, *supra*), the Commission's staff had adopted the "no sale" rationale. The Institutional Investor Study specifically referred[52] to the 1941 Assistant General Counsel's opinion, which, as we have seen (*see* page 66, *supra*), dealt with registration only. The Commission has *never* taken the position that there is no sale for the purposes of the antifraud provisions.

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[50] 1 CCH Fed. Sec. L. Rep. ¶ 2231.21 (1941), [1941-44 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,386.

[51] *Hearings on Amendment No. 438 to S.1659 Before the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess., pt. 3, at 1326 (1967).

[52] *Institutional Investor Study, supra*, Vol. III at 996 n. 32.

IBT and two of the *amici*, relying on certain Congressional materials, claim that Congress, in its consideration of labor legislation, had the belief that not only the registration provisions but also the antifraud provisions of the securities laws were inapplicable to interests in pension funds (IBT Br. 73; ERIC Br. 10-11 n.6; Bankers Br. 15-16). We note, at the outset, that even if Congress had such a belief, there is no basis for concluding that it would have been based on the notion that a pension fund interest is not a "security." Instead, it is more likely that persons involved with the labor legislation, if they considered the issue at all, assumed, without analyzing the question, that the antifraud provisions, like the registration provisions, were subject to the "no sale" rationale.

In any event, we submit that the Congressional materials do not demonstrate that Congress regarded the antifraud provisions as being inapplicable. They do indicate that Congress was aware of the "no sale" rationale the Commission has consistently applied to pension plans for the purpose of registration. But, with respect to the antifraud provisions, it is likely, in light of the nature of those provisions, that Congress never thought about them, and was unconcerned about them, in connection with the type of labor-management and pension legislation that the Congress was considering at that time.

In contrast to the antifraud prohibitions, the legislation which Congress was considering involved, among other things, detailed and complex regulation

of pension funds through the prescribing of duties and responsibilities in their day-to-day operation, requirements for the filing of disclosure documents with a government agency, and the delegation to the agency of authority to adopt detailed rules and regulations with respect to pension funds. When the Congressional committees and their staffs commented on the absence at that time of adequate federal legislation, they were, of course, referring to the absence of the type of legislation that they were contemplating. The Commission does administer legislation of that type—the Investment Company Act, which imposes broad regulatory control over the operation of investment companies, and the registration provisions of the Securities Act, which require the filing with the Commission of a disclosure statement, and the delivery to the investor of a prospectus, containing detailed financial and other information. However, most pension funds were expressly exempted from the former act (*see* Section 3(c)(11), 15 U.S.C. 80a-3(c)(11)) and, by virtue of the "no sale" rationale, were not subject to the latter act's registration requirements. Presumably, it was the inapplicability of legislation similar to this to which the Congressional materials were referring when they commented upon the absence of appropriate Federal legislation; they were not referring to the far different type of requirements imposed by the securities laws' antifraud provisions, which are essentially a prohibition upon fraudulent activity.

B. The "No-Sale" Rationale Rests on a Very Narrow View of the Meaning of "Sale", Particularly in Light of the Evolution in the Economic Significance and Legal Understanding of Pensions, and It May Not Be Extended to the Antifraud Provisions.

In considering whether the "no-sale" rationale may be extended to the antifraud provisions, it is important to note that both the Securities Act and the Securities Exchange Act contemplate that the terms defined in those statutes, including the term "sale," need not be construed the same for all purposes. Indeed, the appropriateness of treating a transaction as involving a sale for purposes of the antifraud provisions but not for purposes of registration was recognized by this Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453. The Court there held that a corporate merger involved a sale for purposes of the antifraud provisions of Section 10(b) of the Securities Exchange Act and Rule 10b-5, notwithstanding the existence of a Commission rule providing that, for purposes of the Securities Act's registration provisions, such a transaction did not involve a sale.[53] The Court stated (*id.* at 466):

> "Although the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the lan-

[53] The Commission rule, Rule 133 under the Securities Act, was subsequently rescinded and replaced by Rule 145, 17 CFR 230.145, which provides for the applicability of the registration provisions to mergers and certain other business combinations.

guage Congress has chosen, ordinary rules of statutory construction still apply. The meaning of particular phrases must be determined in context, *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943). Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws; both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase 'unless the context otherwise requires.' 1933 Act, § 2, 48 Stat. 74, 15 U.S.C. § 77b; 1934 Act, § 3, 48 Stat. 882, 15 U.S.C. § 78c. We must therefore address ourselves to the meaning of the words 'purchase or sale' in the context of § 10(b). Whatever these or similar words may mean in the numerous other contexts in which they appear in the securities laws, only this one narrow question is presented here." [54]

[54] *See also, Exchange National Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126, 1139 (C.A. 2), where the court stated:

> "[T]he purposes of the registration and anti-fraud provisions differ, thus altering the 'context' to be examined to determine whether the admonition 'unless the context otherwise requires' is to be applied."

IBT notes (IBT Br. 110 n. 97) that in 1941, in the Commission's *amicus curiae* brief in *National Supply Co.* v. *Leland Stanford Junior University*, 46 F. Supp. 389 (N.D. Cal.), *affirmed*, 134 F. 2d 689 (C.A. 9), *certiorari denied*, 320 U.S. 773, the Commission stated that its "no sale" rationale for *mergers* applied to both the antifraud and the registration provisions. The Commission, however, later rejected that view, and, as Professor Loss notes, "has repeatedly urged as *amicus curiae* that a merger does involve a "sale" and "purchase" for purposes of that rule [10b-5] * * *." IV Loss,

This case, like *National Securities*, presents the question of whether a "no-sale theory," the applicability of which has been confined to the registration provisions, may be extended for purposes of the antifraud provisions. The "no-sale" rationale with respect to pensions rests on a very narrow view of the meaning of "sale," which is defined as including any "disposition of a security * * * for value" (*see* page 63, *supra*). An employee, even in the case of a compulsory, noncontributory plan, acquires his interest in the pension fund as a result of his voluntary decision to provide value—his labor—in exchange for the interest. Such a transaction falls within the plain meaning of the statutory definition.[55] It may well have been justifiable, however, to adopt a narrow construction of "sale" and thereby exclude this transaction from that term for purposes of registration, where a contrary interpretation would have led to

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Securities Regulation 2563 (1969). Indeed, in 1951, the Commission adopted a rule to codify its practice of not considering certain mergers to involve a sale to stockholders for *registration* purposes, but in adopting this rule stated the "[a]s a matter of statutory construction the Commission does not deem the 'no sale theory' which is described in the rule as being applicable for purposes of any of the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934." Securities Act Rel. No. 3420 (Aug. 2, 1951).

[55] *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756, where Mr. Justice Powell stated in his concurring opinion:

> "The starting point in every case involving construction of a statute is the language itself. * * * Before a court properly could consider taking * * * liberty with statutory language there should be, at least, unmistakable support in the history and structure of the legislation."

the possibly inappropriate or unnecessary application of the registration requirements in the employment context, and where the "no sale" rationale was supported by the then extant understanding of the nature of pensions. No such consideration is involved in the question of the applicability of the antifraud provisions, which are essentially a prohibition upon fraudulent activity including the making of false or misleading representations.[56] These provisions afford particularly valuable protection for purchasers of interests in pension funds, who are not likely to be sophisticated and knowledgeable investors and who are offered this complex investment in an atmosphere where there may well be a temptation to over-promote the investment. As one pension industry spokesman has testified:

> "The magnitude of the investment employers make in pension benefits for employees, encourages the tendency to present the plan in the most positive terms possible so that a return in positive employee attitudes can be realized on the investment. This leads to over simplification and an advertising sales approach. When, as is so often the case, the communication material is prepared by persons not thoroughly cognizant

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[56] *See* Mundheim and Henderson, "Applicability of Federal Securities Laws to Pension and Profit-sharing Plans", 29 Law and Contemp. Prob. 795 (1964), where it is pointed out (*id.* at 814):

> "Since th[e] antifraud provisions do not impose an undue burden on anyone, there is no reason why they should not remain as remedies available to employees for use in cases where fraud of the kind covered by these sections has been committed."

> of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading." [57]

Accordingly, the narrow construction of the term "sale" underlying the "no-sale" rationale is not warranted for purposes of the antifraud provisions.[58] Indeed, the Commission has historically recognized, and informed Congress, of the differences between exempting pension funds, as well as other securities, from registration and exempting them from the antifraud provisions. In Commissioner Purcell's testimony before Congress in 1941 concerning a proposal to exclude pension fund interests from the definition

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[57] Testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, *Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 765 (1973).

[58] The courts repeatedly have emphasized that the definition of "sale" must be construed liberally for purposes of the antifraud provisions. *See Coffee* v. *Permian Corp.*, 434 F.2d 383, 385 (C.A. 5); *Knauff* v. *Utah Construction & Mining Co.*, 408 F.2d 958, 961 (C.A. 10); *Lawrence* v. *Securities and Exchange Commission*, 398 F.2d 276, 280 (C.A. 1); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 634 (C.A. 2); *Dasho* v. *Susquehanna Corp.*, 380 F.2d 262, 266 (C.A. 7); *United States* v. *Robertson*, 181 F. Supp. 158, 162 (S.D. N.Y.). These decisions are consistent with this Court's admonition that the federal securities laws, "enacted for the purpose of avoiding frauds," must be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau Inc.*, 375 U.S. 180, 195, *accord*, *Tcherepnin* v. *Knight*, *supra*, 389 U.S. at 336.

of "security" (*see* page 55, *supra*), he stated (1941 Hearings at 920):

> "[T]he Commission believes that whatever exemption is afforded to employees' plans should be an exemption from registration on a par with the other exemptions contained in the act. H.R. 5065 would actually exclude the specified types of interests or instruments from the definition of the term "security." This would result in giving an exemption not only from the registration and prospectus requirements of section 5, but also from the civil and criminal liabilities for actual fraud which are contained in sections 12 and 17 of the act. Under the act today no securities at all—not even Government securities—are exempted from the fraud provisions of section 17(a). * * * Even if it be assumed that the protection of employee investors does not justify registration, it hardly follows that such investors should be denied a right under the act to recover from employers who have actually defrauded or deceived them. The Commission knows of no reason why employee investors should be singled out from all other investors for discrimination in this respect." [59]

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[59] In the same vein, the Commission, in reporting to Congress at that time on the proposed elimination of pension interests from the definition of security, stated:

> "H.R. 5065 would not only exempt employees' plans generally from the registration provisions of the act, but it would also deprive employees of the protection now afforded them by the fraud provisions of the statute. Even if it be assumed that there are situations in which the protection of employees does not justify the expense of registration, it hardly follows that employees should be

Similarly, Commission Chairman Cohen, testifying in 1967 concerning proposed legislation that would have exempted certain types of collective funds, not pension plans, from the definition of a security in the Securities Act and the Securities Exchange Act, stated:

> "No provision of these acts now authorizes anyone to exempt a security from the prohibitions against fraud, which apply even to government bonds, and we do not see why this should be done. Among other things, it would be an awkward type of authority to exercise because we can hardly see how any responsible agency would wish to exempt any security from the prohibitions against fraud and deception."[60]

The inappropriateness of extending the "no-sale" rationale to the antifraud provisions is reinforced by the evolution in the economic significance and legal

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denied a right under the act to recover from employers who have actually deceived them. Under the act no securities at all, not even Government securities, are exempted from the fraud provisions of section 17(a). Only Government securities are exempted from the civil liability provisions of section 12(2). The Commission knows of no reason why employee-investors should be singled out from all other investors for discrimination in this respect."

Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, House Committee Print, Printed for the use of the Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 15 (1941).

[60] Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 134 (1967).

understanding of pensions. The tremendous growth in the importance of pensions and the concomitant judicial recognition that a pension is not a gift (*see* pages 16-18, *supra*) have undermined the reasoning behind both components of the "no-sale" rationale—the "no value" reasoning with respect to a noncontributory plan and the "no choice" reasoning with respect to a compulsory plan. As to the former, it is no longer realistic to say that the employer's contribution is a gift rather than compensation for services, and that the employee, therefore, provides no "value" for his interest in the pension fund. Similarly, as to the latter component, it is not correct to view the employee's voluntary decision to accept or retain a job, and thereby receive an interest in a pension fund, as never being affected by misrepresentations about the pension.

1. *The "no value" reasoning*

The employer's contribution to a noncontributory pension plan is not a gift, but, rather, is compensation for the employee's labor. And, as has been recognized in cases arising under the antifraud provisions of the federal securities laws, the giving of labor for a security constitutes the giving of value.[61]

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[61] *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass.); *Securities and Exchange Commission* v. *Addison*, 194 F. Supp. 709 (N.D. Tex.). *See also*, Hannan & Thomas, "The Importance of Economic Reality and Risk in Defining Federal Securities," 25 Hastings L. Rev. 219, 236 (1974); Long, "An Attempt to Return 'Investment Contracts' to the Mainstream of Securities Regulations," 24 Okla. L. Rev. 135, 161-162 (1971).

We have previously seen (*see* pages 16-18, *supra*) that at one time pensions were legally considered to be mere gratuities given by the employer to his employees, until, in the *Inland Steel* decision in 1948, it was established that pension funds were a mandatory subject of collective bargaining on the ground that the employee's labor constituted the legal consideration for the pension interest. In the next twenty years, other decisions similarly held that pensions funded through employer contributions were not gratuities, but rather were purchased by employees through their labor; in other words, the employer contributions were considered to be, in the words of this Court, "really another form of compensation to the employees." *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 469.[62]

Whatever doubts about this proposition remained, however, were completely dispelled by the legislative history of federal pension legislation, including ERISA. As early as 1958, the Senate Committee on Labor and Public Welfare stated:

> "Regardless of the form they take, the employer's share of the costs of these plans or the benefits the employers provides is a form of compensation." [63]

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[62] *See also, Employing Plasterers' Ass'n of Chicago* v. *Journeymen Plasterers' Protective and Ben. Soc. of Chicago*, 279 F.2d 92, 99 (C.A. 7); *Ball* v. *Victor Adding Machine Co.*, 236 F.2d 170, 173 (C.A. 5); *Lucas* v. *Seagrave Corp.*, 277 F. Supp. 338, 343-344 (D. Minn.).

[63] S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958).

In 1961, Arthur Goldberg, then Secretary of Labor, engaged in the following colloquy during testimony before the Congress:

> "Mr. Pucinski. Do I understand the situation correctly: A company sets up a *pension plan* for its workers. This plan is part of the fringe benefits that are given to the worker and therefore may deter him from asking for additional salary in wage negotiations. Then the employer pays into this pension plan a certain amount of money and holds out to his employees that, when they retire and become eligible for benefits under this plan, they will have certain pension benefits available to them. Is this the way this works?
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> "Secretary Goldberg. There are two ways that this is generally done. Where you have a union, more often than not it is negotiated as part of a collective bargaining arrangement. *Very often when it is negotiated in this way the settlement allocates part of what might otherwise have gone into a wage package which the employee might receive, to the welfare fund for the benefit of the employees.* You may have noticed in the papers this morning the negotiation that is taking place right here in the District between some of the building trades unions where the sole request, if I read it accurately, was that a contribution be made into the welfare fund. So that, really in those situations *this is really part of what normally would be a wage settlement.* That is one way it is done" (emphasis supplied).[64]

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[64] *Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 27 (1961).

A union representative echoed this belief in 1973. Leonard Woodcock, president of the United Auto Workers, testified:

> "UAW members have regularly given a high priority to pension benefits in collective bargaining. Repeatedly, with membership support from all age groups, decisions have been made to direct substantial parts of a potential 'economic package' into pensions." [65]

Congress, in its consideration of ERISA, indicated its belief that pension benefits are deferred wages. In introducing pension legislation in 1972, Senator Williams, one of the two sponsors of ERISA, stated:

> "Pensions are not gratuities, but earnings saved and deferred to retirement. They represent compensation which the employee would have received in his paycheck had he not belonged to a pension plan.[66]

And Senator Javits, the other sponsor of ERISA, has stated:

> "I believe that the law [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that private pensions are a form of deferred

[65] *Hearings before the Senate Subcommittee on Private Pension Plans of the Committee on Finance*, 93d Cong., 1st Sess. 467 (1973).

[66] Senate Committee on Labor and Public Welfare, Retirement Income Security for Employees Act of 1972, Comm. Print, 92d Cong., 2d Sess. 100 (1972).

> wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short, the 'gold watch' theory of pensions is dead once and for all * * *." [67]

IBT argues (IBT Br. 61) that, since the securities laws were enacted at a time when pensions were generally regarded as gifts, that outdated premise must be the predicate for interpreting the securities laws today. This argument is unsound. The legislative history of the securities laws is silent on the question of whether pensions are gifts. At most, it might be possible to speculate that individual members of Congress who thought about the issue, if they thought about it at all, might have thought pensions to be gifts, but such thoughts, if any, were not enacted as part of the securities laws. The determinative factor is that Congress defined "sale" as "every contract of sale or disposition of a security or interest in a security for value." There is no indication that Congress even considered whether providing labor in exchange for an interest in a pension plan constituted value. But Congress drafted a definition broad enough to encompass any situation in which a person provides consideration in exchange for a security, even though notions of what constitutes consideration have changed.[68]

[67] Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits, September 19, 1974.

[68] Local 705 argues that if the employee's services constitute value given for the employer's contributions to the pension fund, "the employer, not the Local 705 Pension Fund, is the

Notwithstanding the petitioners' contentions, they are unable to dispute that the employer's contributions are part of the total compensation paid in exchange for the employee's labor. IBT itself, at one time, understood quite well this economic reality. In testimony before Congress, Sidney Zagri, legislative counsel of IBT, stated:

> "We subscribe to the concept that health and welfare and *pension funds are for the most part deferred wages* and, as such, should receive similar protection afforded other funds of a quasi-public nature" (emphasis supplied).[29]

purchaser and the employee is the seller" (Local Br. 55). The employee, however, cannot be the seller of a *security*—the only security involved in this case in the pension fund interest, which the employee purchases by providing value in the form of his services. Moreover, this argument seems to reflect a mistaken belief that a *defendant* in an action by a defrauded securities purchaser must be the seller of the security. A defrauded purchaser of a security, however, has a cause of action against "any person" who committed fraud "in connection with the purchase or sale," regardless of whether that person is the seller. Securities Exchange Act Rule 10b-5. *See, e.g., Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (C.A. 2); *Heit* v. *Weitzen*, 402 F.2d 909 (C.A. 2), *certiorari denied*, 395 U.S. 903.

[29] *Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor*, 87th Cong., 1st Sess. 225 (1961).

Local 705 also relies (Local Br. 45-46) on the decision of the Court of Appeals for the Second Circuit in *Securities Investor Protection Corp.* v. *Morgan, Kennedy & Co.*, 533 F.2d 1314, where the court held that employee beneficiaries of a profit-sharing trust are not "customers" of the broker-dealer firm with which the trust maintained a brokerage account. The court there held only that the individual beneficiaries of the

2. *The "no choice" reasoning*

As discussed previously, the Commission has taken the position for registration purposes that no sale to the employee occurs in a compulsory pension plan because it was believed that an employee's decision to take or retain a job was never affected by representations about the pension offered. That conclusive presumption of no sale should not now be extended to the antifraud provisions; while it may have had some basis in fact when the pension constituted an insignificant portion of the benefits received by the employee, it is no longer valid today when pensions represent a major element of the compensation package.

We have previously discussed the legal recognition of the importance of pensions to employees. We have also cited testimony before Congress, including that of union representatives, on the importance of pension funds in collective bargaining. It is not surprising, therefore, that it has been recognized that pen-

trust must make their claim against the broker-dealer through the trust, rather than individually. The contrary interpretation rejected by the court would mean, for example, that each of the hundreds or thousands of shareholders in a mutual fund would separately be able to take advantage of the guarantee provisions of the Securities Investor Protection Act, 15 U.S.C. 78aaa, *et seq.*, and thereby each obtain reimbursement from the Securities Investor Protection Corporation up to the maximum amount authorized by that Act to be paid to a single brokerage "customer." We do not see how this determination of the rights under that Act of the trust beneficiaries vis-a-vis the broker-dealer has any relevance to the rights of the beneficiaries vis-a-vis the trust itself.

sions can be a significant factor in the decision to take or keep a job. Thus, a Senate committee stated in 1956 that pensions are important in the attraction of good workers.[10] Similarly, then Secretary of Labor Arthur Goldberg, in testifying before Congress in 1961, observed:

> "It is commonplace today when you go into a firm for employment that one of the things you discuss is what type of welfare and pension plan an employer has. That is an essential condition of employment as any employer, I am sure, would tell you testifying before you." [11]

And, James Hodgson, then Secretary of Labor, echoed this comment eleven years later, when he stated to the Senate committee considering the bill which became ERISA:

> "Indeed, the variety of [pension] plan types is a significant element in the competition among employers for the workforce." [12]

Not only may representations about a pension affect a person's initial decision to take a job, they may also affect him thereafter in his decision whether to retain the job and its accompanying pension or to seek

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[10] *See* S. Rep. No. 1734, *Welfare and Pension Plan Investigation*, 84th Cong., 2d Sess. 11-13 (1956).

[11] *Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor*, 87th Cong., 1st Sess. 32 (1961).

[12] *Hearings before the Subcommittee on Labor on S. 3598, Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess. 99 (1972).

a different job with a different pension or no pension. And, in view of the extent of job mobility in this country, this decision whether to change jobs and pension coverage is a matter of continuing importance. The Bureau of Labor Statistics found that in a period of one year, ten percent of the labor force shifted from one job to another.[13] Moreover, a majority of the job shifts involved a change to a different industry. Thus, it is likely that an employee will be faced with a number of employment decisions in his lifetime and, as he gets older, such shifts will be more and more affected by the pension plan offered by the employer.

Accordingly, an employee may be faced with a meaningful decision, even in the case of a compulsory plan, whether to acquire an interest in the pension fund. And, this voluntary decision is sufficient to satisfy the "sale" requirement under the antifraud provisions of the securities laws. Indeed, cases have held, under the antifraud provisions, that a "sale" occurs in a variety of situations where there is *no* voluntary action by the alleged "purchaser." [14] Here there is even a stronger case for finding a sale, since

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[13] *See Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare*, 90th Cong., 2d Sess. 249 (1968).

[14] *See, e.g., Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (C.A. 2); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334 (C.A. 2), *certiorari denied*, 417 U.S. 932; *Zeller* v. *Bogue Manufacturing Corp.*, 476 F.2d 795 (C.A. 2); *Coffee* v. *Permian Corp.*, 434 F.2d 383 (C.A. 5); *Dudley* v. *Southeastern Factor and Finance Corp.*, 446 F.2d 303 (C.A. 5), *certiorari denied*, 404 U.S. 858.

the employee does take voluntary action (obtaining employment and thereafter performing labor for his employer) which results in his giving value for a security. As one court has stated, in *Collins* v. *Rukin*, 342 F. Supp. 1282, 1286 (D. Mass), where the defendants argued that the antifraud provisions should not apply to a security (a stock option) which is "incident to and part and parcel of an employment contract for personal services" (*id.* at 1287-1288):

> "No compelling reason has been suggested to this Court why one who, in the interest of promoting his company and employing the most talented people in a particular field, engaged in fraudulent practices in connection with the offer or sale of securities should enjoy any greater freedom from the operation of the federal securities laws than one who perpetrates a fraud without promotional or employment motive."

In arguing in this case that the acquisition of a pension interest in a compulsory plan does not involve a sale, the petitioners dispute the court of appeals' conclusion that the vote to ratify the collective bargaining agreement constitutes voluntary action which gives rise to a sale. They contend that that conclusion is contrary to a basic characteristic of collective bargaining that the individual employee relinquishes his right to bargain to his union (IBT Br. 65-66; Local Br. 57).[15] But, entirely apart from

[15] While we do not base our conclusion that there was a sale here on the ratification of the contract providing for the pension plan by the union membership, there is no inconsistency between collective bargaining principles and the conclusion that the ratification vote involves a sale. Although the majority's decision in the ratification vote overrides any individual employee's own choice, the majority's decision is made up of separate individual decisions. These individual decisions, and consequently the group's decision, can be affected by misrepresentations concerning the pension.

the ratification vote, and even in situations where no ratification vote is taken, we have shown, and the court of appeals held, that the employee's decision to take or retain the job, and thereafter perform labor for a package of compensation and benefits, constitutes voluntary action resulting in a sale. And, as the Secretary of Labor pointed out in his *amicus* brief to the court below (at pages 2-3, n. 1):

> "Individual decisions to take or leave employment are not governed by labor law, and are not central to the bargaining process that is of major concern to the Secretary."

The petitioners contend (IBT Br. 53; Local Br. 54) that a finding that a sale occurred in the present case would be inconsistent with this Court's holding in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, that persons who refrain from purchasing or selling securities based upon material misrepresentations or omissions do not have standing to maintain a private damage action under Section 10(b) of the Securities Exchange Act. In making this point, they erroneously have equated an employee's decision to retain his job with a stockholder's decision to retain his stock. The latter decision, however, results in the stockholder's giving no value and acquiring

nothing; he merely keeps what he already owns. By contrast, the employee who decides to retain his job makes a decision which results in his continuing to give value in the future to further his acquisition of an interest in the pension fund.

IBT also argues (IBT Br. 53-58) that in light of certain "policy considerations" relied upon by this Court in *Blue Chip*, the antifraud provisions should be held inapplicable to the present case. IBT posits that a holding that the antifraud provisions apply would lead to litigation in which the trier of fact must resolve "rather hazy issues of historical fact," and speculates that "the expense of defending a 10b-5 or 17(a) claim would invariably be greater than paying a pension to a claimant even if he is ineligible under the pension plan's rules" (IBT Br. 56-57). But, the issue before this Court in *Blue Chip* was that of the standing of a private plaintiff to maintain what this Court characterized as "a private cause of action which has been *judicially* found to exist" and which may be "*judicially* delimited" on the basis of "considerations of policy" which the Court there believed it was "free to weigh." 421 U.S. at 749 (emphasis supplied). By contrast, the issue in the present case of whether there was a "sale" is not one of policy but rather is solely a question of construing a statutory term expressly defined by the Congress. As this Court has recently stated:

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process has come to an end. We do not sit as a committee of review.

Tennessee Valley Authority v. *Hill*, 46 U.S.L.W. 4684. Furthermore, unlike the issue of standing in *Blue Chip*, which affects only private actions, the question here—the meaning of sale—involves an element of the violation itself and thus affects the statutorily created right of action of the Commission to maintain enforcement proceedings against violators of the antifraud provisions.

* * *

In sum, the reasoning behind the "no-sale" rationale has been undermined by the evolution of the economic significance and legal understanding of pensions. Accordingly, we believe that rationale, developed in the context of registration, has no applicability to the antifraud provisions.

C. Recovery Under the Antifraud Provisions Is Available Where an Employee's Choice Was Materially Influenced by Fraudulent Representations Concerning the Pension.

As we have stated (*see* page 83, *supra*), our objection to the "no choice" reasoning behind the "no-sale" rationale is that it rests on the unrealistic assumption that a decision to take or keep a job can *never* be based upon the pension plan. Thus, this reasoning creates a conclusive presumption that the employee's decision is not so based, thereby denying relief not only to the employee whose decision was in

fact not influenced by the pension, but also to the employee whose decision was so influenced. In urging that an employee's decision to give value for a security by accepting or retaining a job gives rise to a sale for purposes of the antifraud provisions, we are not arguing that he should be permitted, *ipso facto*, to recover damages under those provisions. Our position, rather, is that, consistent with general principles of causation,[76] recovery should be permitted where the employee's decision was materially influenced by fraudulent representations about the pension. An employee who acquires an interest in a compulsory pension plan may, as a practical matter, encounter some difficulty in establishing the requisite causation. But, that should not mean that such an employee should be deprived of an opportunity to prove the necessary elements of his claim.[77]

We recognize that an employee's decision to take or keep a job is not, by itself, an investment decision. But, when that decision is materially influenced by the existence of a security—in this case, an interest in a pension fund—which he will purchase with his labor, he is making not only an employment decision but also an investment decision which is protected by the antifraud provisions.

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[76] *See e.g., List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 (C.A. 2), *certiorari denied*, 382 U.S. 811.

[77] *See Spector* v. *LQ Motor Inns, Inc.*, 517 F.2d 278 (C.A. 5).

III. RECOVERY UNDER THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS FOR FRAUD OCCURRING IN THE SALE OF INTERESTS IN A PENSION FUND IS NEITHER DUPLICATIVE OF NOR INCONSISTENT WITH NATIONAL LABOR LAW OR POLICY.

The petitioners rely heavily on the fact that the Congress has enacted legislation directed specifically at regulation of pension plans—ERISA—to bolster their arguments that the securities laws do not apply to interests in pension funds. We note, however, that ERISA was enacted in 1974, long after the conduct complained of in this case. Thus even if ERISA had preempted the securities laws, which it did not, this case would be unaffected. Moreover, to the extent the petitioners may be arguing, irrespective of actual preemption, that the regulatory scheme of ERISA renders the protection of the antifraud provisions unnecessary, which it does not, that regulatory scheme did not exist at the time Mr. Daniel alleges he was defrauded concerning his pension eligibility. Accordingly, the relationship between ERISA and the securities laws has no applicability to the present case.

The petitioners do not argue that ERISA expressly ousted the federal securities laws. Indeed, they cannot. The Congress, in Section 514(d) of ERISA, 26 U.S.C. 1144(d), expressly provided:

> "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * *or any rule or regulation issued under any such law."

By contrast, Congress in ERISA did specifically preempt all *state* laws, but with the following significant exception (Section 514(b)(2)(A)):

> "[N]othing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or *securities*" (emphasis added).

The statutory scheme of state securities laws is generally similar to the federal scheme; they exempt pension interests from registration but not from antifraud provisions.[78] Congress could hardly have believed that the antifraud provisions of the federal securities laws would conflict with ERISA and, therefore, should be ousted, while at the same time it preserved the numerous antifraud laws of the various states.

Notwithstanding the absence of an express preemption of the federal securities laws' antifraud provisions, the defendants and *amici*, by contending that the application of those provisions would be duplicative of and inconsistent with national labor law and policy (IBT Br. 79; NCCMP Br. 16-27; AFL-CIO Br. 20-21; ERIC Br. 31-48), are arguing, in effect, for an implied preemption. IBT carries this argument still further, stating (IBT Br. 77) that "if Congress had been given any reason to entertain a doubt on this score [that the securities laws apply to

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[78] *See, e.g.*, Ill. Rev. Stat. Ch. 121½, Section 137.3; D.C. Code Sec. 2-2401(e)(5); N.Y. Gen. Bus. Law Sec. 359-f(2)(e) (McKinney 1962); 7 Uniform Laws Ann., Uniform Sec. Act Sec. 402(a)(11) (1970).

pension plans], it most probably would have taken steps to prevent the securities laws from expanding into this area * * *." But, ERISA expressly preserved all other federal law, and we are aware of no cases which stand for the proposition that preemption of a federal statute may be implied by speculation concerning what Congress *might* have done if it had had the benefit of additional argumentation such as the petitioners argue in their briefs to this Court.

An argument similar to that of the petitioners (although an argument that, unlike the petitioners', had some basis for its speculation as to what Congress would have done had it thought about a problem) was recently rejected by this Court in *Tennessee Valley Authority* v. *Hill*, *supra*, 46 U.S.L.W. 4673. That case presented the issue of whether a provision of the Endangered Species Act of 1973, which by its express terms would have the effect of prohibiting completion of a dam on which $78 million had already been expended, had been impliedly repealed by later Congressional action which actually appropriated money for completion of the dam. In addition, the Committee reports accompanying the appropriations bill stated that the Committees did not view the Endangered Species Act as prohibiting the completion of the dam. 46 U.S.L.W. at 4677, 4678. This Court, however, refused to give weight to the Committee reports and the later legislation, and instead based its decision solely on the plain language of the Endangered Species Act, stating that "[i]t is not for

us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *Id.* at 4682.

Thus, even if Congress, in enacting ERISA, was unaware that the antifraud provisions applied to interests in pension funds, such unawareness would not justify implied repeal.[79]

The contentions of the petitioners and *amici* that the securities laws are duplicative of, and inconsistent with, national labor law and policy do not justify implied preemption any more than the petitioners' speculations concerning the Congress's thoughts about the antifraud provisions. The petitioners have failed to satisfy the exacting standard which this Court

[79] IBT argues (IBT Br. 81-83) that this Court's holding in *Califano* v. *Sanders*, 430 U.S. 99, supports the view that the applicability of the antifraud provisions to this case should be governed by the impressions of the Congress enacting ERISA. *Califano* addressed the question of whether Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. 701-706, afforded an implied grant of subject-matter jurisdiction to federal courts. This Court decided that question in the negative because Congress subsequently, in 1976, had amended 28 U.S.C. 1331 to eliminate the amount-in-controversy requirement for general federal-question jurisdiction, thus conferring jurisdiction on the federal courts to review agency action with no need for jurisdiction under the APA because Section 1331, as amended, did the same thing. The situation in the present case differs from that in *Califano*, since ERISA, unlike the securities laws, does not give a cause of action for fraud.

Moreover, in *Califano*, another statute expressly precluded jurisdiction under the circumstances of that case. In contrast, no statute precludes applicability of the antifraud provisions to this case. Indeed, ERISA itself expressly preserved all other federal laws. *See* p. 91, *supra*.

has set for establishing an implied repeal stemming from an inconsistency between two statutes. In *Tennessee Valley Authority* v. *Hill*, *supra*, this Court re-enunciated the well established principle "that repeals by implication are not favored" and that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Tennessee Valley Authority* v. *Hill*, *supra*, 46 U.S.L.W. at 4683, *quoting from Morton* v. *Mancovi*, 417 U.S. 535, 549.[80]

That repeal of the antifraud provisions of the federal securities laws is not lightly to be inferred is demonstrated by this Court's decision in *Securities and Exchange Commission* v. *National Securities Inc.*, *supra*, 393 U.S. 453. In that case, the Court held that a federal district court, in an action brought by the Commission under Section 10(b) of the Securities Exchange Act and Rule 10b-5, had authority to "unwind" a merger between two insurance companies which had been approved by the Arizona Director of Insurance under state insurance laws. The Court au-

[80] *See also, Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456-457; *United States* v. *Borden Co.*, 308 U.S. 188, 198, 199; *Pasadas* v. *National City Bank*, 296 U.S. 497, 503; *Wood* v. *United States;* 41 U.S. 343, 363. *Cf. Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682-683, in which this Court concluded that an implied repeal of the antitrust laws resulted from an inconsistency between those laws and provisions of the federal securities laws. The Court emphasized in its opinion, however, that implied repeal "is not favored and not casually to be allowed," and that it may be found only where there is a "plain repugnancy" between the statutory schemes.

thorized this remedy for a violation of the antifraud provisions, notwithstanding a provision of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (*see* note 26, *supra*), that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *."

Here the defendants and *amici* have failed to satisfy the applicable criteria for implied repeal. First of all, their claim that the antifraud provisions would be duplicative of ERISA, even if true, would not justify an implied repeal of the antifraud provisions, since the mere existence of duplicative regulation does not constitute the "irreconcilable" conflict required for such repeal.

In any event, the antifraud provisions are not duplicative of ERISA. Although Section 502(a) of ERISA, 29 U.S.C. 1132(a), provides a right of action for a pension fund beneficiary "to obtain * * * appropriate equitable relief * * * to redress * * * violations" of any provisions of Title I of ERISA (Title I contains the labor law provisions of ERISA), there is no provision of Title I which generally prohibits the making of false or misleading representations to an employee concerning the pension fund. Although ERISA requires that the employee be furnished a summary description of the pension (29 U.S.C. 1022(a)) and annual summaries of financial information (29 U.S.C. 1024(b)), ERISA provides no relief where false or misleading representations are made either orally, or in written materials other

than the documents required by ERISA. Thus, while Congress, in enacting ERISA, provided some very important protections to participants in pension plans, it did not provide the type of protection available under the antifraud provisions of the securities laws.

Nor are the antifraud provisions and ERISA inconsistent with each other. Although there may be exceptional situations where a failure to make a disclosure which ERISA does not require would constitute a violation of the antifraud provisions, ERISA does not contain any provision prohibiting additional disclosures. And, the antifraud provisions do not impose across-the-board disclosure requirements as does ERISA.[51] In any event, in a particular case under the antifraud provisions, arising (unlike the present

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[51] By contrast, the Securities Act's registration provisions do require extensive and detailed disclosures. But, the position we are urging in this case would not result in the applicability of the registration provisions for two reasons. First, as we have indicated, *see* p. 70, *supra*, rejection of the "no sale" rationale for antifraud purposes does not require its rejection for purposes of registration. Second, the 1970 Amendment to Section 3(a)(2) of the Securities Act has specifically exempted interests in most pension funds from the requirement of registration. IBT disagrees (IBT Br. 133) with respect to the extent of the exemption afforded by Section 3(a)(2), contending that the exemption applies only to funds which are maintained by banks. In the Commission's view, however, the phrase "maintained by a bank," in Section 3(a)(2), modifies only "collective trust fund"; single pension funds are exempt from registration whether or not they are maintained by a bank.

case) after ERISA and involving (unlike the present case) allegations of omissions only but not misrepresentations, it would be appropriate for the court in such a case to construe the materiality of any alleged omission in light of the disclosure requirements of ERISA in order that the two statutes be harmonized.

One of the *amici* argues (ERIC Br. 31-38) that the applicability of the antifraud provisions would disrupt the collective bargaining process. But, insofar as the Commission is urging that a sale occurs when the employee decides to take or keep a job (as opposed to any sale which might occur when there is a ratification vote), the claimed disruption of the collective bargaining process is irrelevant. The Secretary of Labor so acknowledged in his brief to the court below (at pp. 2-3, n. 1): "Individual decisions to take or leave employment are not governed by labor law, and are not central to the bargaining process that is of major concern to the Secretary."

Local 705 argues that a holding that the antifraud provisions apply to this case would subvert the judgment made by the Congress in enacting ERISA not to apply ERISA's new vesting provisions (which would not allow the type of break-in-service rule that Local 705's plan had) retroactively (Local Br. 35). This argument misconceives the nature of the antifraud provisions. It is true that Congress made a decision that the new vesting standards embodied in ERISA should not be applied retroactively. But, in doing so, the Congress did not endorse the past right of persons to lie about unfair vesting pro-

visions. Nothing in the federal securities laws would prohibit a break-in-service rule such as the one involved in this case, just as nothing in those laws prohibits the sale of speculative securities of dubious worth.[22] And, nothing in those laws would permit the imposition of liability in this case merely because a court might agree with the respondent that Local 705's rule was shockingly unfair. Instead, Mr. Daniel can recover only if he can demonstrate, to the trier of fact, that he was *deceived* about this rule, and that in reliance on such deception he made an investment decision to continue working for an employer who contributed to the plan on his behalf, and that the deception caused him injury.

The petitioners and *amici* believe that it is undesirable as a matter of policy for the antifraud provisions to apply to pension plans. Of course, the *Congress* could make a policy determination, in future legislation, that antifraud protection for participants in pension plans would be more appropriate under the labor laws, and amend the labor laws accordingly. Or, Congress could even make the policy choice that persons who have been defrauded in the manner alleged in this case should not be entitled to any relief at all. But, to effectuate policy considerations (whether meritorious or not) relating solely to pension

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[22] Even in the context of registration, the Commission does not have the authority to evaluate the merits of a security registered with it. Indeed, criminal penalties attach to any person who represents that the Commission has passed upon the merits of a particular enterprise. *See*, Section 23 of the Securities Act of 1933, 15 U.S.C. 77w.

plans, by a *judicial* decision that the antifraud provisions of the securities laws are inapplicable, would have the effect of undermining over 40 years of judicial and administrative interpretation of those laws, and thus jeopardize the protection provided by the securities laws to investors in the offer and sale of securities in other contexts not involving employment or pension plans.

While policy, of course, has a role to play, at times, in a court's resolution of legal issues, including issues under the securities laws, the policy concerns that are appropriately considered are those which are embodied in the laws which the court is interpreting and applying. And, as we have seen with respect to the issues in the present case, the policy concerns embodied in the antifraud provisions of securities laws—including the policy of prohibiting fraud by those who manage other people's money—support applying those provisions to interests in pension funds. The policy considerations relied upon by the petitioners, however, are policies embodied not in the securities laws, but rather in the labor laws. Only the Congress may remove the protections of the securities laws on the basis of labor law policies.

This Court has refused to consider policy issues not related to the securities laws in determining the question of whether an interest is a security. *See Tcherepnin* v. *Knight*, *supra*, 389 U.S. at 346.[33] And, in a recent case in which policy concerns

[33] In *Tcherepnin*, the defendants argued that withdrawable capital shares of a savings and loan association were not

not embodied in the statute being construed in the case would have supported a different result than the language of the statute being construed, this Court stated:

> "While [it] is emphatically the province and duty of the judicial department to say what the law is, *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation."

Tennessee Valley Authority v. *Hill*, *supra*, 46 U.S.L.W. at 4684.

securities, contending that the plaintiffs, if successful in their rescission action under Rule 10b-5, would gain an unfair advantage over other investors in the association, which was in liquidation. This Court responded (389 U.S. at 346):

> "This argument, at best, is a *non sequitur*. This case in its present posture involves no issue of priority of claims against City Savings. This case involves the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners.—a question which turns on our construction of the term 'security' as defined by § 3(a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to the narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in that Association."

CONCLUSION

For the foregoing reasons, the Securities and Exchange Commission urges that this Court hold, as did the court of appeals, that the district court properly denied the motion to dismiss the securities law counts of the complaint, thereby affording the respondent an opportunity to prove his case.

Respectfully submitted.

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AUGUST 1978.

I authorize the filing of this brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Solicitor General, on behalf of the United States, moves this Court for leave to file a brief as *amicus curiae* after the time limit specified by Rule 42(2) of the Rules of the Supreme Court. Cf. Rule 42(4).

This case raises complex issues of law concerning the applicability of the securities laws of the United States to employees' interests in private pension plans. The court of appeals' decision is the first appellate resolution of those issues.

The Secretary of Labor and the Securities and Exchange Commission took conflicting positions as *amici curiae* in the court of appeals. The Secretary argued that employees' pension interests are not subject to the anti-fraud provisions of the securities laws; the Commission argued that they are. The Department of Justice has not heretofore taken any position on the issues involved. In order to arrive at the views expressed in the accompanying brief, therefore, it has been necessary to engage in several interchanges of written work and in extensive discussions with the Department of Labor and the Securities and Exchange Commission—as well as to consult at all stages with the Secretary of the Treasury and the Pension Benefit Guaranty Corporation, each of whom has statutory responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA).

The formulation of the position of the United States has been unusually difficult in this case because the government agencies most familiar with the operation and administration of pension plans

have had little experience in the interpretation and application of the securities laws, while the Securities and Exchange Commission has had little experience with the operation and administration of pension plans. The difficulties were compounded by the departure from the Office of the Solicitor General, before the work on this case could be completed, of First Deputy Solicitor General Daniel M. Friedman, who had been supervising the formulation of the views of the United States.

While we regret the inconvenience this delay may have caused the Court and the parties,[1] we believe that the views of the United States set forth in the accompanying brief will assist the Court in resolving the issues presented by this case.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[1] Typescript copies of the brief were served on the parties on the same day they were sent to the printer, July 31, 1978. The brief was thereafter served and filed as soon as printing service permitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

1. Whether, for purposes of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (the Securities Acts) an employee's

interest in an involuntary, non-contributory pension plan is a "security," as the Securities Acts define that term.

2. If so, whether the employee's acquisition of that interest is a "sale," as the Securities Acts define that term.

3. If the interest is a "security" acquired in a "sale," whether failure to disclose information that the Employee Retirement Income Security Act of 1974, 29 U.S.C. (Supp. V) 1001 *et seq.*, does not require to be disclosed gives rise to a cause of action under the securities laws.

INTEREST OF THE UNITED STATES

The court of appeals held that the anti-fraud provisions of the federal Securities Acts apply to employees' interests in involuntary, non-contributory pension plans. Many of these plans, such as the one at issue in this case, have been developed through the collective bargaining process and have been increasingly regulated through federal legislation culminating in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S.C. (Supp. V) 1001 *et seq.*

In enacting ERISA, Congress found that the growth in the size and scope of pension and other employee benefit plans, encouraged by preferential federal tax treatment, had been rapid and substantial in recent years, that such plans were affected with a national public interest and had become important

factors in commerce and in industrial relations, and that the continued well-being and security of millions of employees and their dependents were directly affected by these plans. Congress sought to foster the continued growth of such plans and to provide adequate protection to the employees dependent on the plans by establishing minimum federal standards for participation, vesting and funding of pension plans, federal standards of conduct for plan fiduciaries, and a federal guarantee of benefits upon termination of certain types of pension plans. The Secretary of Labor and the Secretary of the Treasury share administration of ERISA;[1] the Pension Benefit Guaranty Corporation (PBGC), a new federal corporation, administers the statute's termination provisions.[2]

The decision below holds applicable to many such plans a significant part of the requirements of another extensive scheme of federal regulation, the Securities Acts. The court of appeals' application of these Acts to pension plans exposes these plans both to the possibility of liability for past failure to act in accordance with the Securities Acts and to the significant costs of such compliance in the future.

The harmonization of these two bodies of federal remedial legislation, the Securities Acts and ERISA, is of direct interest to the United States. The Court's decision in this case will affect the responsibilities of both the Securities and Exchange Commission, which administers and enforces the Securities Acts, and

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[1] See 29 U.S.C. (Supp. V) 1204.

[2] See 29 U.S.C. (Supp. V) 1301 *et seq.*

those agencies of the United States with statutory responsibilities under ERISA: the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation. The Securities and Exchange Commission and the Department of Labor participated as *amici curiae* on opposite sides before the court of appeals.

STATEMENT

Respondent Daniel was a member of petitioner Local 705 of the Teamsters Union from 1950 to 1973. During those years he worked as a truck driver for various employers who hired members of Local 705. In 1955, Daniel was included in a pension plan established by the union and contributing employers (Pet. App. 5-6).

This plan is funded entirely by employer contributions to an irrevocable trust. The amount of those contributions is determined in collective bargaining on the basis of the service performed by employees. The plan is involuntary; that is, the employee is automatically covered. It is non-contributory; the employees pay nothing (Pet. App. 2). It is a defined benefit plan; that is, the amount of the benefit payable to an eligible participant upon retirement is not based on the amount (or even the fact) of employer contributions; the plan pays a specified benefit to eligible retirees (Pet. App. 2).

Under the plan, respondent could receive benefits only if he satisfied the plan's vesting requirement of 20 years' continuous employment (Pet. App. 3). At

retirement in 1973, Daniel had worked more than 22 years in employment the plan covered, but plan officials denied him pension benefits because a three-month involuntary layoff in 1960-1961 was found to constitute a "break in service," so that Daniel did not satisfy the plan's vesting requirement of 20 years of continuous service (Pet. App. 5-7).

In 1974, Daniel filed in the United States District Court for the Northern District of Illinois a class action against Local 705, its parent international union, the pension fund, and one of the plan's trustees, who is also an officer of the local (Pet. App. 1-2). He alleged that the defendants had violated the anti-fraud provisions of the federal Securities Acts, 15 U.S.C. 77j(b), 77q(a), by misrepresenting or failing to disclose material facts concerning the plan's vesting provisions, its actuarial basis and assumptions, and the alleged improper diversion of plan assets (Pet. App. 4). The complaint also alleged that Daniel had relied on these misrepresentations and omissions in continuing his employment covered by the plan. Daniel sought the elimination of the challenged vesting provisions and damages equal to (1) the "pension benefits unlawfully withheld from plaintiff and his class" and (2) any assets that had been diverted from the plan (Pet. App. 5).[3]

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[3] The complaint also alleged violations of the union's duty of fair representation under federal labor laws, failure to comply with Section 302(c)(5) of the Labor-Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U.S.C. (and Supp. V) 186(c)(5), common law fraud and deceit, and breach of fiduciary duty. Those allegations were not be-

The district court denied petitioners' motion to dismiss the Securities Acts counts of the complaint, holding that respondent had stated a claim for relief under those Acts.

On an interlocutory appeal under 28 U.S.C. 1292 (b), the court of appeals affirmed. It held that Daniel's participation in the pension plan involved an "investment contract," which the definition of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 includes. The court first held that Daniel's interest in the plan satisfied each of the elements of an "investment contract" as defined in *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298-299 (Pet. App. 13-21). Second, the court concluded that participants in pension plans must be covered under the Securities Acts, because of the economic importance of pension plans, both to individual participants and to the American capital markets (Pet. App. 21-24). Third, although noting that "[t]he legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans," the court held that "subsequent legislative action and accompanying SEC interpretation" support the view that an employee's interest in a pension plan is a security (Pet. App. 24-32). Finally, again referring to the importance of pension plans to workers and the capital markets, the court held that policy considerations favored the applicability of the Securities Acts to those plans (Pet. App. 32-34).

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fore the court of appeals and are not before this Court. See Pet. App. 5 n. 3.

The court further held that Daniel had acquired his interest in the pension plan in a "sale" because he had performed valuable services for his employers (Pet. App. 34-39), and that his complaint therefore stated a cause of action for violation of the anti-fraud provisions of the Acts, which prohibit deception or fraud "in connection with the purchase or sale of any security." 15 U.S.C. 77j(b), 77q(a). See also SEC Rule 10b-5, 17 C.F.R. 240.10(b)-5 (Pet. App. 39-42). The court held, as the parties had conceded, that ERISA had not preempted the anti-fraud provisions of the Securities Acts (Pet. App. 42-48) and dismissed as a "parade of horribles" arguments by petitioners and *amici* that application of the Securities Acts would have a grave adverse impact on national labor policy and on private pension plans (Pet. App. 43-51).[4]

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[4] The reasoning of the courts below in this case has been rejected in at least three other district court decisions: *Hurn* v. *Retirement Fund Trust of Plumbing*, 424 F. Supp. 80 (C.D. Cal.); *Wiens* v. *Teamsters*, BNA Pension Rep. No. 132, p. D-5 (C.D. Cal.) and *Robinson* v. *United Mine Workers of America Health and Retirement Funds*, 435 F. Supp. 245 (D. D.C.). In *Schlansky* v. *United Merchants and Manufacturers, Inc.*, BNA Pension Rep. No. 171, p. D-1 (S.D. N.Y.), the court agreed with the reasoning of the court of appeals in this case but dismissed a securities law claim for failure to plead the claim properly. In *Tanuggi* v. *Grolier, Inc.*, BNA Pension Rep. No. 175, p. D-3 (S.D. N.Y.), the court deferred decision on a motion to dismiss a securities law claim as to a voluntary, contributory pension plan, pending disposal by this Court of the petitions for certiorari in this case, noting however that "the rationale of *Daniel* appears strained" (*id.* at p. D-5).

SUMMARY OF ARGUMENT

1. An employee's interest in an involuntary, non-contributory, defined benefit pension plan is not a "security" within the meaning of the Securities Acts, for the employee does not "part[] with his money in the hope of receiving profits" nor is he "attracted [to his job] solely by the prospects of a return on [his pension] investment." *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 300; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852, 858. Employees in such plans make no investment in the statutory sense of the term; they do not decide whether to participate in the plan or to invest any particular amount in it. They have nothing to say about what is to be done with the money in the plan or how and where it is to be invested. They have no redeemable or transferable interest in the plan. Daniel does not allege, nor could any employee reasonably allege, that the existence or terms of a pension plan is the sole or even the primary factor in deciding whether to take or keep a particular job. A pension may be one of many material factors influencing such a decision, but that is not enough to make the pension a "security" within the meaning of the Securities Acts.

Furthermore, the legislative history of the Securities Acts is conspicuously devoid of any reference to pension plans, and hearings on amendments to the Acts specifically indicate that employee interests in pension plans were not intended to be covered by the Acts.

2. If the Court concludes, as we submit, that an interest in an involuntary, non-contributory pension plan is not a "security," the decision below must be reversed. If, however, the Court reaches the opposite conclusion, the question then arises whether the employee acquires his pension plan interest in a "sale" as the Securities Acts define that term. We believe that the employee does acquire his interest in a "sale," for he gives value in the form of his labor, and nothing in the statutory definition limits a "sale" to a transfer for cash. The employee's pension plan rights are one stick in the collectively bargained bundle of benefits which passes from employer to employee in return for services.

3. If the Court concludes that Daniel acquired a "security" in a "sale," it should then decide whether, and to what extent, he has a cause of action in the circumstances presented by this case. Any judicial delineation of the contours of a cause of action should take into account that Congress has, in ERISA, enacted a comprehensive statute to establish and protect workers' pension rights. Any interpretation of the securities laws that would engraft onto ERISA remedies under those laws enacted 40 years earlier and never before applied to pension plans should be adopted with caution lest the carefully designed scheme of Congress be disrupted.

Where, as here, Congress has provided specific directions on what information must be disclosed to the employee, such directions should be deemed to embody, for Securities Acts purposes, everything that is mate-

rial. If there has been compliance with ERISA's disclosure provisions there should be no liability under the Securities Acts for failure to disclose additional information. Moreover, because of the peculiar need to avoid the diminution of pension funds that would result from unanticipated claims and liabilities, any liability should be entirely prospective, making actionable under the securities laws only misrepresentations that occur after the announcement of this Court's decision.

ARGUMENT

I.

AN EMPLOYEE'S INTEREST IN AN INVOLUNTARY NON-CONTRIBUTORY PENSION PLAN IS NOT A SECURITY UNDER THE FEDERAL SECURITIES LAWS

Although the resolution of the primary issue in this case may have a great impact upon the financial soundness and administration of the country's pension plans, the issue itself is narrow. The question is whether an employee's interest in an involuntary, non-contributory, defined benefit pension plan is a security under the federal securities laws (and, if so, whether that interest is acquired in a sale), so that the employee may maintain an action for damages under the anti-fraud provisions of those laws based upon alleged misstatements and alleged non-disclosure of material facts in connection with his participation in the plan.

Here the employee had no choice whether to participate in the plan; he was automatically enrolled in it as a result of his employment. He did not directly make any payments to the plan. But since the plan was developed through collective bargaining, the employers' costs for the plan were one element in the total package that the employers provided as employee compensation. If there had been no pension plan, the employers presumably would have either paid the employees higher wages or furnished them other equivalent benefits. To that extent the employees' participation in the plan cannot realistically be viewed as wholly non-contributory, even though they did not directly pay anything to it as investors ordinarily do when purchasing securities or making other investments.

This case therefore does not involve any issue concerning the treatment under the anti-fraud provisions of the federal securities laws of employee interests in pension plans where the employees have the choice whether or not to participate or where their participation permits or requires them to make direct payments to the plan. As we suggest below, the latter types of pension plans may implicate different policies and considerations and may call for conclusions different from those we have reached with respect to this particular kind of plan.

Similarly, since the conduct upon which the claims in this case are based took place before Congress enacted ERISA in 1974, there is no occasion for the Court here to consider to what extent, if any, ERISA

precludes the assertion of claims under the anti-fraud provisions of the federal Securities Acts based upon alleged fraud in the operation of pension plans committed after 1974.

The court of appeals' conclusion that Daniel's interest in the Local 705 pension plan was a security rested upon three propositions: (1) the interest constitutes an "investment contract" (which the definition of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934 includes) under the decisions of this Court defining and applying that term; (2) certain actions of Congress subsequent to the enactment of the 1933 and 1934 Acts support that view; and (3) the Securities and Exchange Commission has consistently interpreted the term "security" in those Acts to cover interests in pension plans. Our submission is that, although the question is close, on balance, the materials upon which the court of appeals relied do not justify its conclusion, but rather support the contrary view.

A. The definition of "security" in the 1933 and 1934 Acts does not cover an employee's interest in an involuntary non-contributory pension plan.

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1), defines a "security" as

> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The definition of "security" in Section 3(a)(10) of the 1934 Act, as amended, 15 U.S.C. 78c(a)(10), is virtually identical, and we therefore focus our discussion on the definition in the 1933 Act. Cf. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 847 n. 12.

In *Forman*, this Court's most recent decision involving the meaning of "security" under the federal Securities Acts, the Court stated (421 U.S. at 852) that the "touchstone" of "the Court's decisions defining a security * * * is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." The Court quoted with approval (*ibid.*) its statement in *Securities & Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 300, that "[i]n such cases the investor is 'attracted solely by the prospects of a return' on his investment." "What distinguishes a security transaction," the Court continued in *Forman* (421 U.S. at 858), "* * * is an investment where one parts with his money in the hope of receiving profits from the efforts of others * * *." Again quoting

Securities & Exchange Commission v. *W. J. Howey Co.*, *supra*, 328 U.S. at 301, the Court said (421 U.S. at 852) that the test for determining whether a particular transaction is an investment contract is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."

Daniel's interest in the Local 705 pension plan involves some, but not all, of these elements—and those that are present are in a somewhat diluted form. The pension plan is in a sense a "common venture" or "enterprise," from which the participants expect to derive pension benefits which may be payable in part from anticipated "profits * * * from the efforts of others." The plan is a pool of capital that is the source of pensions for the employees whom it covers. The assets of the plan are invested to conserve the capital and to generate earnings through the receipt of interest and dividends and, it is hoped, of capital gains. While these "profits" of the plan (cf. *Forman*, *supra*, 421 U.S. at 852) cannot increase the defined benefits to which eligible participants are entitled (see p. 4, *supra*),[5] they may affect the financial ability of the plan to pay pensions when they accrue. The participants in the plan have no direct control over its management and operation; that is solely in the hands of others,

[5] The ceiling on the amount of benefits provided by the "defined benefit" aspect of the plan is, of course, analogous to similar characteristics of preferred stock or bonds.

namely, the trustees and managers of the plan.[6] The financial success of the plan depends upon the skill of those persons as well as on continuing employer contributions.

On the other hand, the fact that the plan is a "defined benefit" plan means that a participant in the plan never acquires any interest or right in contributions made with respect to his or her own hours of employment. The participant cannot redeem his "interest" or transfer it, but can only receive, upon satisfying the plan's vesting conditions, benefits fixed at a level which is unlikely to vary with the investment performance of the plan.[7]

[6] Employees control the managtment of the fund only indirectly, through election of half the fund's trustees. See 29 U.S.C. (and Supp. V) 186(c)(5)(B).

[7] ERISA now provides considerable assurance that an eligible participant's expectation of receiving the benefit promised by a defined benefit plan will be met, regardless of the plan's investment profits or losses. First, defined benefit plans subject to ERISA must satisfy a minimum funding standard. Somewhat oversimplified, the effect of this provision is to require the plan to compute its expected liability for benefits and allow amortization of that liability over a 30- or 40-year period, and to require the contributing employers to make contributions sufficient to amortize unfunded liability. 29 U.S.C. (Supp. V) 1082. If the plan's investments prosper, the employers' contributions will decrease; if the investments are not successful, the contributions must be increased to an amount necessary for amortization. In neither instance does investment performance directly affect benefits payable to participants (although investment performance may of course affect future bargaining for plan benefits).

Second, the Pension Benefit Guaranty Corporation (PBGC), established under Title IV of ERISA, 29 U.S.C. (Supp. V)

What this arrangement lacks to make it a security is the element of investment by the employees. An investment involves a decision by the investor to commit his capital to a particular venture. There is an element of choice, the selection by the investor of a particular investment medium. It is, as this Court recognized in *Forman*, a situation where "one parts with his money." By definition, the Local 705 pension plan is involuntary, i.e. participation is both automatic and mandatory. Its participants, including Daniel, make no decision whether or to what extent they will participate in the plan. Since there is no investment decision, the participants can not realistically be viewed as "investors" in the plan. They had nothing to say about what would be done with the money in the plan; how and where it would be invested; for how long; whether for income or for capital gain; and when particular investments would be terminated or changed. All those investment decisions were made by the managers of the plan, not by its beneficiaries.

Of course, when an individual purchases shares in a mutual fund, he also has no control over the

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1301 *et seq.*, is liable to pay basic vested pension benefits (up to a stautory maximum, currently about $1,000 monthly) in most private defined benefit plans which terminate without adequate funding. Although PBGC is not required to cover multi-employer plan terminations until July 1, 1979, it has discretion to guarantee benefits under such plans and is currently doing so in some instances. Thus, the investment success of a defined benefit plan primarily affects contributing employers and the PBGC, and is of limited interest to plan participants.

fund's investment of the proceeds. He does, however, make the initial decision whether or not to buy the shares at all, and he selects the particular fund in which to invest. He also can terminate his investment at any time by selling or redeeming the shares.

In contrast, the participants in the Local 705 pension plan have none of these options. They have no choice whether or not to be covered by the plan, no redeemable or transferable interest in the plan, and no say about the investment policies or practices of the plan. They are not, in any realistic sense of the term, "investors" in the plan—and in determining whether their participation involves a "security," "form should be disregarded for substance and the emphasis should be on economic reality" (*Tcherepnin* v. *Knight*, 389 U.S. 332, 336, quoted with approval in *Forman, supra*, 421 U.S. at 848).[8]

It would be equally unrealistic to conclude that Daniel made an investment decision when he decided to accept or retain employment with a firm, the employees of which were covered by the Local 705 plan. Daniel alleges (Pet. App. 6) that the promise of a pension from the Local 705 plan was a "material factor" in his decision to continue working for em-

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[8] While it might be argued that the considerations on which we rely in concluding that no "security" is involved here relate instead only to the question whether the particular transaction is a "sale" (discussed in point II, *infra*), we would disagree. In this Court's decisions in both *Howey* and *Forman*, on which our analysis is based, the fact of sale was undisputed and the only question was whether the interest sold was a security. See *Howey, supra*, 328 U.S. at 297-298; *Forman, supra*, 421 U.S. at 842 and n. 4, 848.

ployers covered by the plan. Without minimizing the role that the existence of a pension plan may play in a decision to take a job or in a series of decisions to continue in a particular job, it is not realistic to view these decisions as primarily or substantially decisions about investment in a pension plan. Rather, as a matter of "economic reality," the decisions would normally be based upon factors such as the wages, working conditions, types of work and opportunities for advancement that the job offered. The existence or terms of a pension plan may arguably be an additional such factor, but surely no more than that; the employee is not " 'attracted [to the job] solely by the prospects of a return' on [his pension] investment." *Forman, supra*, 421 U.S. at 852. Cf. *City of Los Angeles, Department of Water and Power* v. *Manhart*, No. 76-1810, decided April 25, 1978, slip op. 13 n. 30.

Notwithstanding Daniel's assertion about the material influence of the Local 705 plan on his em-material influence of the Local 705 plan on his employment decision, we believe that Congress has legislated—and that the Court should interpret that legislation—on the basis of the common perception, as stated by former SEC Commissioner Purcell, that "as a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan" (Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 896 (1941)). The federal securities laws are designed not to regulate employment decisions but "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions" (*Securities & Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 124). Daniel made no investment decision when he automatically became a participant in the Local 705 pension plan, and the interest which he acquired in the plan was not a "security."[9]

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[9] The court of appeals based its conclusion that Daniel's interest in the pension plan was a security upon the additional theory that, because private pension plans are of "immense importance" in the capital markets, "[i]f the sole investment vehicles for tens of millions of Americans which in the aggregate control a quarter or more of the entire capital market are exempt from the anti-fraud provisions of the securities laws, then policing of the capital markets is significantly neutralized" (Pet. App. 24). But the alleged difficulty of policing the capital markets that might result if interests in involuntary non-contributory pension plans are not securities cannot change the basic nature of those interests. For the reasons explained in the text, those interests lack an investment decision, the essential element of a security. This Court rejected a somewhat comparable argument in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197-201. Moreover, reversal of the decision below will in no way impair the effectiveness of the securities laws to police securities transactions that pension plans make in the capital markets. See *Securities and Exchange Commission* v. *Garfinkle*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,020 (S.D. N.Y.).

B. Congressional action subsequent to the 1933 and 1934 Acts with respect to pension plans does not support the view that interests in those plans are securities.

The court of appeals recognized (Pet. App. 25) that "[t]he legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans." The court concluded, however, that "subsequent legislative action and accompanying SEC interpretation" (*ibid.*) indicate that Congress understood and intended that interests in pension plans are securities. This subsequent legislative history involves various amendments to the legislation and Commission testimony at congressional hearings, all of which occurred between 1941 and 1970.

In none of this history did Congress explicitly state that interests in pension plans are securities. The court's conclusion that they are securities rests upon certain inferences the court drew from various changes Congress made in the legislation and its treatment of certain proposed amendments to those statutes, some of which the court viewed as congressional approval of the Commission's interpretation that these interests are securities. Legislative history of this type, involving actions long after the original enactment of the legislation, provides a dubious basis for determining what Congress meant years earlier. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132; *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 269; *United States* v. *Price*, 361 U.S. 304, 313. This is particularly so with respect to the Investment Company Amendments Act of 1970, 84 Stat. 1413, upon which the

court placed considerable weight (Pet. App. 27-32). Reliance upon that history involves an attempt to determine the meaning of legislation enacted in 1933 and 1934 on the basis of changes made in another act 36 years later.

1. The 1941 Hearings on proposed amendments to the 1933 and 1934 Acts.

The first significant congressional review of the 1933 and 1934 Acts came in 1941, when the House Committee on Interstate Commerce considered more than 80 proposed amendments to the two Acts.[10] The Securities and Exchange Commission believed that interests in pension plans were securities, and it proposed an amendment that would have exempted from the registration requirements of the 1933 Act those pension plans that met six specific investment and disclosure standards the Commission had formulated.[11] The principal witnesses on this issue were Murray W. Latimer, chairman of the Railroad Retirement Board and a recognized expert on pension plans, and Commissioner Ganson Purcell, who represented the Commission before the Committee. Representative Wolverton, the ranking minority member of the Committee, was the principal opponent of the amendment on the Committee.

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[10] Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. (1941) (hereafter "1941 Hearings").

[11] See 1941 Hearings, *supra*, at 908, 919. The committee rejected the amendment.

Latimer, testifying in support of the Commission's amendment, urged that certain aspects of pension plans, such as the amount of benefits and the vesting periods, be disclosed to employees so that they could make an intelligent decision whether to enroll (1941 Hearings, *supra*, at 866-875). Representative Wolverton, however, sharply disputed Latimer's assumption that the Commission had jurisdiction over pension plans. He stated (*id.* at 878):

> I was a member of this committee when the Securities Act was enacted. The matters that you are now bringing to our attention, to the best of my knowledge and recollection, were never even mentioned in connection with the Securities Act. This is something totally foreign to what we had under consideration at that time.

Representative Wolverton concluded (1941 Hearings, *supra*, at 878):

> If jurisdiction over employee pension and welfare funds is important—and I am not disputing that question at the moment—it does not seem to me that the Securities and Exchange Commission is the one to have the jurisdiction over such matters.

Commissioner Purcell stated that "[c]ertain plans are now subject to the Securities Act and the registration requirements" and "[c]ertain plans we are desirous of exempting from registration under appropriate safeguards" (*id.* at 887-888). Representative Wolverton interrupted to ask, "[b]efore you finish your statement today, will you show just how you

get this jurisdiction under the Securities Act? * * * Supervision of pension plans, and so forth, were never considered to come under the Securities Act" (*id.* at 888). Commissioner Purcell answered that Section 2(1) of the Act, which defines "security" to include an "investment contract," was the basis for the Commission's assertion of jurisdiction, because "any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract'" (*id.* at 895).

Purcell then suggested a second theory of jurisdiction, which the court of appeals relied upon here (Pet. App. 25-26):

> In addition to the detailed language of the act itself, there is legislative history which has made it quite apparent to the Commission that Congress intended investments in employees' plans to be included within the term "security." You may remember that among the proposals for amending the Securities Act [of 1933] which were advanced in 1934 there was one which would have exempted from registration—* * *
>
> > an offering made solely to employees of an issuer or its affiliates in connection with a bona fide plan for the payment of extra compensation or stock-investment plan for the exclusive benefit of such employees [1941 Hearings, *supra*, at 895].

Purcell noted that the amendment was eliminated in conference because, in the conference committee's

words, "participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public" (1941 Hearings, *supra*, at 895). Therefore, Purcell concluded, "[w]ith this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security" (*id.* at 896).

After reading the language of the amendment, Representative Wolverton said (*id.* at 904-905):

> Now, I do not take from that language that there was an intention on the part of Congress in the enactment of that legislation to include the type of jurisdiction that has been assumed by the Securities and Exchange Commission over pensions, mutual loan plans, and so forth, and other plans connected with industry.

Nor was Wolverton alone in his skepticism over the Commission's reliance upon the deleted amendment as a basis of its jurisdiction. Representative Paddock later asked Purcell (1941 Hearings, *supra*, at 909):

> Mr. Purcell, in view of the situation now, which now exists, in which the Commission asserts authority under an interpretation of the 1933 act and has as the only legislative reference to the problem we are discussing a negative, and not particularly clear, reference in a conference report, would it not be better for the Commission to come forward now with an amendment which

> specifically gives it authority over certain plans, rather than to propose exemptions to an authority which is not clearly in the statute?
>
> Commissioner Purcell: No, sir; I would not say so. We respectfully disagree with your statement that it is not presently in the statute * * *.

Representative Wolverton reiterated his view that Congress had not intended to treat interests in pensions as securities in the 1933 Act:

> Mr. Wolverton: Well, the more you talk, and the longer I listened to Mr. Latimer, the more I am impressed with the thought that the subject is so big, of such a character, and covers a field so wide that it should be a matter of special legislation, if it is necessary, and not to be tacked on to the Securities Act like a wart to something that was never intended to apply to it. It just seems to me that you are driving at something in that never was in contemplation when we passed this Securities Act. [1941 Hearings, *supra*, at 913.]

Commissioner Purcell also indicated that the Commission's interest in exempting pension plans from registration covered only voluntary plans, *i.e.*, those in which the employee had the choice whether or not to participate. He explained that the Commission's position was that "[i]f a plan is so set up that participation in it is a condition of employment * * * there is no sale involved," and hence that "compulsory plans do not require registration" (*id* at 896-897).

This history contains no indication that in 1941 the House Committee (which rejected the Commis-

sion's pertinent proposed amendment), let alone the Congress itself, concurred in the Commission's view that an interest in a pension plan is a security under the 1933 and 1934 Acts. Representatives Wolverton and Paddock both questioned the Commission's position. Representative Wolverton was the ranking minority member of the Committee and had been on the Committee when it drafted the 1933 and 1934 Acts. His and Congressman Paddock's statements apparently are the only expressions by members of the Committee with respect to whether an interest in a pension plan is a security. Moreover, 10 members of the Committee in 1941 had been on the same Committee in 1933 and 1934, which had drafted the initial regulation; none of them challenged Representative Wolverton's repeated statements that in 1933 the Committee did not believe that it was including pension plans within the statutory definition of a security.

2. ***The Investment Company Amendments Act of 1970.***

In 1970, Congress amended the Securities Acts and the Investment Company Act of 1940, 54 Stat 789. The court of appeals found in these amendments "substantial support for the proposition that an interest in an employee pension fund is a security" (Pet. App. 32). The amendments, however, do not support that conclusion.

Examination of the amendments begins with the general requirement of the Securities Act of 1933 that securities be registered with the SEC prior to sale.

However, 15 U.S.C. 77c(a) exempts certain classes of securities from the provisions of the Act. In 1970 the Senate passed an amendment which would have provided an exemption for

> any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan * * *.

The court of appeals did not dispute the petitioners' argument that the amendment as worded above "relates only to the sale of interests in certain bank collective trust funds and insurance company separate accounts for pension funds [and] the sale to employees of interests in the underlying pension fund is entirely outside [its] scope" (Pet. App. 30). The bill as finally passed by the House, however, was slightly different: it provided an exemption for "any interest or participation in a single or collective trust fund" maintained as above. The addition of the words "single or," said the court, "altered the focus of the exemption to encompass interests in the underlying pension funds" (Pet. App. 31).

The court of appeals attributed the addition of the words "single or" to a supposed desire by the House to adopt a suggestion made by Stannard Dunn, the General Counsel of the Sperry-Rand Corporation, who wrote to the House Committee suggesting that an interest in an employee's pension plan be exempted from registration. This suggestion, if adopted, might

have indicated Congress' belief that an employee's interest in his pension plan was in fact a security which, unless exempted, would have to be registered under the Act. The court of appeals said that it was "[i]n response to this suggestion" that "the Subcommittee reported out a bill with the added phrase 'single or' * * *" (Pet. App. 31).

The difficulty with the court of appeals' conclusion is that, contrary to its assumption, there is no indication that the House's addition of the words "single or" was "[i]n response to this suggestion." In the first place, no reference to the letter or to the suggested change was ever made at the hearing; the letter was simply inserted in the record without elaboration.[12] Second, the suggestion and the amendment are so dissimilar that they do not, without more, appear to be related. If the House was indeed adopting Dunn's suggestion it presumably would have chosen language that would have made it reasonably clear that an employee's interest in a pension fund would thenceforth be exempt from registration. Instead, it chose words that simply exempt from registration an interest in a single bank trust fund as well as in a collective one. Finally, the conference committee, which adopted the House's amendment, reported only that the amendment "codifie[s] a long established admin-

[12] The Court has previously noted in construing the Securities Acts that "written statements received without comment by the committee and without cross-examination" are of "limited value" and "entitled to little weight." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 and n. 20.

istrative practice of the Commission by making it clear that this exemption applie[s] not only to collective trust funds, but also to single trust funds" (Pet. App. 31).[13] There is no indication that the conference committee thought it was dealing with employees' interest in involuntary, non-contributory pension plans.[14]

[13] H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970).

[14] The court of appeals also found that "[t]wo subsequent changes in the language of the exemption" supported the conclusion that Congress believed in 1970 that interests in pension plans were "securities." The first such change excluded from exemption, thus requiring registration of, those funds where an amount in excess of the employer's contributions is used to buy that employer's securities. The SEC asserted that this change was necessary to conform the Act to the SEC's long-standing practice of requiring registration in such situations (Pet. App. 31-32). Even if it is assumed that this was the intent of Congress (and the Conference Report says nothing about the change or its significance), the change goes only as far as the "single trust fund" language: that is it excludes from the reach of the exemption certain single trust funds. For the reasons discussed in the text, the reference to single trust funds does not, in this context, include an employee's interest in an involuntary pension plan.

The second change was caused by the first, said the court of appeals (Pet. App. 32). As explained in the Commission's brief before that court, the above exclusion from the exemption provisions

> applied whenever an amount in excess of the employer's contribution was used to purchase *securities* issued by the employer. Since interests in pension funds are themselves securities, the exclusion might have been interpreted to subject to registration all pension plans where any money is contributed to the pension fund directly by employees. In such plans, it could be argued that this money is purchasing securities of the employer—the pension interests. Accordingly, Section 3(a)(2) was amended again to make

3. *Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).*

In 1958, Congress enacted the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, formerly 29 U.S.C. (1970 ed.) 301 *et seq.*, as the first important piece of federal legislation specifically aimed at regulating pension plans.[15] As this Court observed in *Malone* v. *White Motor Corp.*, No. 76-1184, decided April 3, 1978, slip op. 8, this legislation marked the first "[c]ongressional consideration of the problems * * * of the nearly unregulated pension field" and was the "first step toward protection of the workers' interests in their pensions * * *" (*id.* at 9). Although the WPPDA is generally considered to have been ineffective (it was repealed by the far more

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it clear that the term "security issued by the employer" as used in the exemption did not include the securities consisting of the interests in the pension fund. SEC Br. 34 (emphasis in original; footnotes omitted).

However, the change here discussed does not support the court's conclusion. The change added the phrase "(other than interests or participations in the trust or separate account itself)" to distinguish such "interests or participations" from the securities issued by the employer. It was purely a technical change, passed without any comment or other reference. Again, it goes only as far as the "single trust fund" language, and there is no indication in its adoption that Congress believed that an employee's interest in an involuntary, noncontributory pension plan is a security.

[15] Cf. Section 302(c)(5) of the Labor-Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U.S.C. (and Supp. V) 186(c)(5), which exempts contributions to certain employee benefit plans from a general criminal prohibition against employer payments to employees' representatives.

comprehensive ERISA in 1974), its legislative history sheds additional light on whether Congress believed that employees' interests in their pension plans were securities ~~even though pension legislation and securities~~ even though pension legislation and securities legislation have been handled by different congressional committees.

The Welfare and Pension Funds Subcommittee of the Senate Committee on Labor and Public Welfare, chaired by Senator Douglas of Illinois, conducted an investigation of employee welfare and pension plans and funds; one of the subcommittee's "major objectives" was "[t]o ascertain the scope and effectiveness of existing public and private regulatory controls in the operation of such plans." Hearings on Welfare and Pension Plans Investigations before a Subcommittee of the Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess. (1955). The subcommittee noted the tremendous growth of pension and welfare plans and concluded, "[t]here is no adequate legislation at either the Federal or State level to fully safeguard these welfare and pension funds or the rights of the employee-beneficiaries." S.Rep. No. 1734, 84th Cong., 2d Sess. 6 (1956). Specifically, the subcommittee found that "there are two Federal statutes which have some application to welfare and pension plans. They are [Section 302 of] the Labor Management Relations Act of 1947 [29 U.S.C. (and Supp. V) 186] and the Internal Revenue Code of 1954" (*id.* at 57; footnote omitted). The subcommittee also found that the Internal Revenue Code,

which provided tax exemption for qualifying funds, provided no effective remedy, and concluded (*id.* at 60):

> Thus, with the exception of the ineffective sections of the Labor-Management Relations Act, 1947, and the Internal Revenue Code, as discussed above, there presently exists no Federal statute, regulation, or authority which attempts to protect the rights of the beneficiaries of welfare and pension plans.

The 85th Congress took no action in the pension regulation field, and hearings were held again in 1957, before the same subcommittee, this time chaired by Senator Kennedy. Hearings on S. 1122, etc. before the Subcommittee on Welfare and Pension Plans Legislation of the Senate Committee on Labor and Public Welfare, 85th Cong., 1st Sess. (1957). In opening the hearings, Senator Kennedy reiterated the "inadequacy of present laws" in the area (*id.* at 1), and concluded that the investigations had shown "the inevitability and desirability of some kind of Federal legislation in this imporant field" (*id.* at 2). The full Committee's report clearly implied that the Securities Act did not apply to pensions:

> The inadequacies of safeguards at either the State or Federal level to protect those who rely on the security afforded by these plans are in sharpest contrast to the protection furnished comparable large-scale public savings and investments by the Federal Deposit Insurance Act, the Securities and Exchange Act of 1933 [sic], the Investment Company Act of 1940, and so forth.

S. Rep. No. 1440, 85th Cong., 2d Sess. 9 (1958).

As this Court observed in *Malone*, *supra*, slip op. 13-14: "The aim of the Disclosure Act was perhaps best summarized by Senator Smith, the ranking Republican on the Senate Committee and a supporter of the bill. He stated:

> * * * [O]ne of its aims is to make available to the employee-beneficiaries information which will permit them to determine, first, whether the program is being administered efficiently and equitably; and, second, more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them."

In short, Congress apparently believed in enacting the WPPDA that it was the first federal legislation aimed at requiring honest dealings (including certain disclosures) between plan sponsors, plans, and employees.

4. *Employee Retirement Income Security Act of 1974 (ERISA).*

Because the limited disclosure requirements imposed by WPPDA proved ineffective in regulating pension plan funds, especially in view of their continued growth after 1958, Congress in 1974, after lengthy consideration, enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (Supp. V) 1001 *et seq.* Unlike WPPDA, ERISA is a comprehensive federal regulation of virtually every aspect of the operation of privately funded pension plans. The voluminous legislative history of this statute again demonstrates Congress' belief that existing

regulation was inadequate and that the 1933 and 1934 Acts did not deal with the problems of pension interests.

The Senate Committee on Labor and Public Welfare, reporting out the bill, noted the huge size and growth of pension plans and stated, "[n]ot until 1958, with the enactment of the Welfare and Pension Plans Disclosure Act, was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds." S. Rep. No. 93-127, 93d Cong., 1st Sess. 3 (1973); Legislative History of the Employee Retirement Income Security Act of 1974 by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 589 (Committee Print 1976) (hereafter "ERISA Leg. Hist."). The committee stated that "[a] complete description of the federal regulation affecting the administration of private plans can be found in" the Interim Report of Activities of The Private Welfare and Pension Plan Study, 1971, S. Rep. No. 92-634, 92d Cong., 2d Sess. 91 (1972) (hereafter "Interim Report") (ERISA Leg. Hist., *supra*, at 590).

There, the subcommittee conducted an exhaustive canvass of federal authority over the administration and operation of private pensions, and found that eleven federal departments and agencies exercised some degree of control. With respect to the securities laws,

> [the Subcommittee found that the] SEC does not have direct regulatory authority over private pension plans, [but] certain provisions of the federal securities laws which it administers do apply to such plans. These provisions relate primarily to registration of securities and to annual and periodic reports required to be filed with SEC. [Interim Report, *supra*, at 96.]

Specifically, the subcommittee noted,

> [p]ension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*), unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. * * * If the plan's investment in the employer's securities exceeds the employer[']s contribution, both the employer's securities and the interests in the plan must be registered under the Securities Act with SEC. [*Ibid.*]

The court of appeals, quoting the paragraph above, said that the defendants' "quintessential error" was that "[t]hey confuse the requirements of the 1933 Act's registration provisions with the anti-fraud provisions of the 1933 and 1934 Acts" (Pet. App. 44). The registration provisions set up a mechanism of filing while, "[i]n contradistinction, the antifraud provisions * * * are essentially a generalized self-executing prohibition against fraudulent activity" (*ibid.*). However, this distinction, while generally accurate, is immaterial to the congressional understanding being expressed. The subcommittee was setting forth an exhaustive description of federal regulation of pensions, and there is no reason to believe

that it would have wholly ignored the SEC's authority to prevent fraud under Section 10(b), much less that it would have done so without even a note that such matters were beyond the scope of the subcommittee's inquiry.

This is particularly so when one considers that the subcommittee devoted a great deal of its attention to the fact that employees are furnished very little information on the operation of the plans, and that the information furnished is often confusing or inscrutable to the average worker. See, *e.g.*, Interim Report, *supra*, at 74-75, 84-85, 101-107. As the Subcommittee noted in its Interim Report, "[t]here is strong evidence that many participants in private pension plans are forfeiting pension benefits because of inaccurate or incomplete information concerning their rights and obligations under the covering plan" (*id.* at 101). Indeed, the subcommittee criticized the Department of Labor for not satisfactorily enforcing the WPPDA's requirement that pension plans be described to workers, and urged regulation "which will enable [employees] to know what their rights are under their plans, and what they can do to prevent the loss of such pension rights" (*id.* at 107). The subcommittee was therefore very much aware of, and concerned with, the problem of inadequate, misleading or deceptive information conveyed to employees. Furthermore, had the subcommittee believed that the SEC had any responsibility under the Securities Act to prevent such deception, it presumably would have criticized the SEC as well as the Department of Labor.

The subcommittee's desire to make intelligible information available to the employee was shared by the full Committee, which reported to the Senate that the Secretary of Labor's then-existing power under WPPDA to require plan officials to disclose the provisions of the plan is "[t]he only current federal requirement" of disclosure. S. Rep. No. 93-127, *supra*, at 11; ERISA Leg. Hist., *supra*, at 597.

The belief that existing federal law did not deal adequately with the problem of confusing or inadequate information was shared by Senators and Congressmen throughout the legislative deliberations on ERISA. For example, in the floor debate preceding final passage of ERISA, Senator Javits, the ranking Republican on the Senate Committee, said, "[m]any workers are led to believe they are covered by a good pension plan because of nicely phrased booklets and other assurances handed them by their employers. When the time comes for the payoff, they learn that the cold legal phrasing in pension contracts says otherwise" (ERISA Leg. Hist., *supra*, at 4750). Senator Schweiker, a member of the Committee, described "a long list of witnesses" whose "retirement dream turned into a nightmare, due to merger, bankruptcy, or just plain fraud [and] there was simply no Federal law to help them" (ERISA Leg. Hist., *supra*, at 4824).[16]

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[16] The particular failure alleged here—to inform participants that they would forfeit pension rights if they had a short break in continuous service—was well known to Congress. In ERISA, Congress wrote detailed rules to prevent

Thus, in the legislative history of ERISA as in that of the WPPDA, the congressional understanding on which the new legislation was premised does not support, and indeed appears inconsistent with, the proposition that an interest in an involuntary, non-contributory pension plan is a "security" within the meaning of the 1933 and 1934 Acts, or that the SEC had authority to enforce the anti-fraud provisions in that area.

5. ***ERISA Oversight Hearings of 1977.***

In October 1977—six weeks after the court of appeals' decision in this case—the Subcommittee on Labor of the Senate Committee on Human Resources held hearings "to explore a number of significant issues that have arisen in the 3 years since enactment" of ERISA. Hearings on S. 2125 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 1 (1977) ("ERISA Oversight Hearings"). During these hearings, Securities and Exchange Commission Chairman Harold Williams reiterated the Commission's views as expressed in its *amicus curiae* brief before the court of appeals in this case, and discussed the court of appeals' decision (*id.* at 106-116). In a subsequent letter to SEC Chairman Williams, Senator Harri-

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such occurrences in the future. 29 U.S.C. (Supp. V) 1023(b). Recognizing the great financial burden that retroactive correction of such failures would impose on plans, Congress expressly stated in 29 U.S.C. (Supp. V) 1023(b)(1)(F) that pre-ERISA break-in-service rules remained valid.

son Williams of New Jersey, chairman of both the subcommittee and the full committee, stated (*id.* at 129-130):

> At no time during the period of ERISA's development was it ever stated to me or, to the best of my knowledge, to any other member of Congress that the Securities Acts' antifraud provisions applied to noncontributory, involuntary pension plans, as they have been held to apply by the U.S. Court of Appeals for the 7th Circuit in *Daniel* * * *. * * * [T]he record is devoid of any affirmative statement by the SEC of the proposition it has supported in *Daniel* * * *. * * * In over 40 years [since passage of the 1933 Act] there was no affirmative statement and, most importantly, no action that would have put the Congress on notice.

6. ***Conclusion.***

There has not been a single affirmative indication from the Congress or any member of Congress in more than 40 years since the Securities Acts were passed that those Acts apply to employee interests in involuntary, non-contributory pension plans. Representative Wolverton's 1941 comments indicate that no such thought was before the committee that drafted the 1933 and 1934 Acts; the legislative history of WPPDA and ERISA recite the statutory law relevant to pension plans with no indication that the Securities Acts apply to such plans; and the Investment Company Act Amendments of 1970 do not support the interpretation which the court of appeals placed on them, especially when considered in light of the legis-

lative history of ERISA. Furthermore, Senator Williams' letter of December 13, 1977, to Securities and Exchange Commission Chairman Williams, although not, strictly speaking, "legislative history," affirms that the drafters of ERISA never contemplated that the Securities Acts applied to employees' interests in involuntary, non-contributory pension plans.

The Commission, as Senator Williams notes, has taken the contrary view in this litigation, and when pressed to take a position in congressional testimony has suggested that such interests are "securities" within the meaning of the Securities Acts. Senator Williams' letter correctly points out, however, that the Commission's interpretation is not reflected in a course of regulatory conduct or other administrative action. While a theoretical view, such as this, of the expert agency administering the statutes is of course entitled to respectful consideration, it is not the kind of administration interpretation reflected in a consistent course of agency conduct that this Court has held to be entitled to great deference in cases such as *Udall* v. *Tallman*, 380 U.S. 1, 16, and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210. See the concurring opinion of Judge Tone in this case (Pet. App. 52). For the reasons we have stated, we have concluded that an employee interest in an involuntary, non-contributory pension plan is not a "security" within the meaning of the 1933 and 1934 Acts.

II.

AN EMPLOYEE'S INTEREST IN A PENSION PLAN IS ACQUIRED BY MEANS OF A "SALE."

If, as we submit, an interest in an involuntary, non-contributory pension plan is not a "security," then the decision below must be reversed, for Section 10(b) (15 U.S.C. 78j(b)) and Rule 10b-5, and Section 17(a) (15 U.S.C. 77q(a)) proscribe deceptive conduct only in connection with the sale of "securities." Should this Court conclude, however, that such an interest is a security, the question arises whether the employee's acquisition of such an interest is a "sale" within the meaning of those provisions. For the reasons which follow, we believe that it is.

Section 2(3) of the Securities Act of 1933 provides that the term "sale" includes the "disposition of a security or interest in a security, for value." It is clear enough that the employee gives value, in the form of his labor, in return for his interest in the plan. Cf. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 590-594; *Malone* v. *White Motor Corp.*, No. 76-1184, *supra*, slip op. 6-7. Nothing in the statutory definition precludes holding such a transaction to be a sale, and lower courts faced with the problem have correctly concluded that a sale occurs when an employee receives securities in return for the performance of services. *Collins* v. *Rukin*, 342 F. Supp. 1282, 1289-1290 (D. Mass.); *Securities and Exchange Commission* v. *Addison*, 194 F. Supp. 709 (N.D. Tex.).

This conclusion properly recognizes that the purposes of the statute would be disserved by an interpretation which limited "sales" to transfers for cash. In *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 467, this Court held that shareholders allegedly defrauded into approving a merger had a right to relief under Section 10(b), 15 U.S.C. 78j(b). "Whatever the terms 'purchase' and 'sale' may mean in other contexts," said the Court, "here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange."

If the owner of securities agreed to sell half of them to one purchaser for $1,000, and half to another in return for 100 hours' labor, there would be little rationality in a result which found that only one sale had taken place. See *Collins* v. *Rukin, supra.* Similarly, if, in a plan other than a defined benefit plan, an employee agreed to work overtime in return for a contribution to his pension fund, there is little doubt that he would be giving value in return for his interest in that contribution. The result here is no different. The employee's pension plan rights are one stick in the collectively bargained bundle of benefits which passes from employer to employee in return for services. See *Alabama Power Co.* v. *Davis, supra*, 431 U.S. at 592-593. Thus, if (contrary to our submission) the pension plan interest is a security, it fits comfortably within the commodious statutory definition of a sale as a disposition for value.

This conclusion is not affected by the fact that the Securities and Exchange Commission has long taken the position that involuntary, non-contributory pension plans are exempt from the registration provisions of the 1933 Act because "there is no sale involved." 1941 Hearings, *supra*, at 896-897 (testimony of Commissioner Purcell). In holding that a corporate merger involved a sale for purposes of the anti-fraud provisions of the Securities Exchange Act, notwithstanding a Commission rule providing that it did not involve a sale for purposes of the Securities Act's registration provisions, this Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 466, pointed out that when the context so requires, "the same words may take on a different coloration in different sections of the securities laws * * *." Here, as in *National Securities*, the reasons that may warrant exemption from the registration requirements (basically, the absence of marketing) do not counsel a similarly narrow interpretation of the statutory protection against fraud in connection with all dispositions for value of securities.

III.

ANY CAUSE OF ACTION AUTHORIZED BY THE SECURITIES LAWS IN THIS AREA SHOULD BE COMPATIBLE WITH ERISA

If this Court were to decide that interests in involuntary, non-contributory pension plans are securities and that the employees acquire these interests in a sale, it should then decide whether, and to what ex-

tent, those employees have a cause of action in the circumstances presented by this case. In deciding similar questions in other cases under the securities laws, this Court has of course looked to the language of the Securities Acts and to the kinds of practices Congress intended those Acts to cover. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727-736; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195-206; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 471-477; *United Housing Foundation, Inc.* v. *Forman*, *supra*, 421 U.S. at 847-848. But the statutory words and legislative history do not conclusively define "the contours of a private cause of action under Rule 10b-5," because the development of private actions under that rule has been a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. at 737. Cf. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n. 10 ("the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants").

1. ***Reconciliation with ERISA.***

Even in a case like the present one in which the allegations relate to conduct occurring in the pre-ERISA period, any judicial delineation of the contours of a cause of action under the securities laws for employees who participate in involuntary pension plans should take into account that Congress has, in ERISA, enacted a comprehensive statute to establish

and protect workers' pension rights. Cf. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-716; *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283. A substantial part of ERISA addresses the general problem presented by this case: what the plan sponsors must tell the employee about the plan and when they must tell it to him. ERISA requires the plan administrator to provide each participant with a "summary plan description" [17] within 90 days after the employee becomes a participant in the plan. 29 U.S.C. (Supp. V) 1021(a), 1022(a)(1), 1024(b)(1). This summary plan description must contain specified information about the plan (including "the plan's requirements respecting eligibility for participation and benefits" and "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits"), 29 U.S.C. (Supp. V) 1022(b), and must be "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. (Supp. V) 1022(a)(1).[18]

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[17] The "summary plan description" is typically a substantial printed booklet which may or may not include a copy of the pension plan itself.

[18] Administrators must also furnish any plan participant, upon request, a statement indicating the total benefits which have accrued to that participant, and the unforfeitable benefits accrued. 29 U.S.C. (Supp. V) 1025. They must provide participants in pension plans with benefit status reports at certain times. 29 U.S.C. (Supp. V) 1059. ERISA also requires an annual detailed report on plan administration and operation, including financial statements, to be made to the Secretary of Labor, 29 U.S.C. (Supp. V) 1023, 1024, and this report is available to plan participants for inspection at the

ERISA provides that any plan participant or beneficiary may bring a civil action to recover benefits due him under the plan, to enforce his rights under the plan or to clarify his rights to future benefits. 29 U.S.C. (Supp. V) 1132(a)(1). A participant may also sue to enjoin any violation of the Act or to obtain other equitable relief to enforce any provisions of disclosure or the terms of the plan. 29 U.S.C. (Supp. V) 1132(a)(3).[19] ERISA does not specifically provide a cause of action to a plan participant or beneficiary for damages caused by misleading, deceptive or fraudulent statements made in connection with his plan; there is, in other words, no counterpart to Section 10(b) in ERISA.

It is not our contention that ERISA preempts or repeals the 1933 or 1934 Securities Acts as they might apply to pension plans.[20] ERISA is, however, the first comprehensive legislation regulating pension plans,

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office of the plan administrator, 29 U.S.C. 1024(b)(2), and to the public, 29 U.S.C. (Supp. V) 1026. ERISA further requires that a summary of the annual report be sent to all plan participants. 29 U.S.C. (Supp. V) 1023(a)(1)(A).

[19] ERISA also provides criminal penalties for willful violation of any provision of the reporting and disclosure requirements or regulations issued thereunder. 29 U.S.C. (Supp. V) 1131.

[20] Section 514(d) of ERISA, 29 U.S.C. (Supp. V) 1144(d), provides, with exceptions not here relevant, "[n]othing in this subchapter ["Protection of Employee Benefit Rights"] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law." See, also, 29 U.S.C. (Supp. V) 1144(b)(2)(A).

and, specifically, regulating the relationship between the employee, the plan sponsors, and the plan itself. Any interpretation of the securities laws that would engraft onto ERISA remedies under those laws enacted 40 years earlier and never before applied to pension plans thus should be adopted with caution lest the carefully designed scheme of Congress embodied in ERISA be disrupted.[21]

There appears to be little reason to differentiate affirmative misrepresentations made in connection with the acquisition of an interest in an involuntary pension plan and those made in connection with the sale of any security. For example, if a plan sponsor, intending to deceive, tells an employee that the employee will be eligible for a pension after 10 years' service, when the sponsor knows in fact that the employee will not be eligible until after 15 years' service, then the employee has a cause of action under Section 10(b), 15 U.S.C. 78j(b). See *Ernst & Ernst* v. *Hochfelder*, *supra*.[22]

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[21] We have argued above that Congress did not intend the Securities Acts to apply in any degree to employee interests in involuntary, non-contributory pension plans. The hypothesis of the present discussion is that the Court concludes otherwise, necessitating some reconciliation of the Securities Acts with ERISA.

[22] We do not at this time address the question of damages, or the measure of recovery. The question is not presented on this record, since the courts below denied a motion to dismiss the complaint, and, in light of the fact that the Securities Acts have never before been applied to pensions, the question of damages should await a trial on the merits in the event of remand.

Failures to disclose information, however, stand on a somewhat different footing, for Congress has required plan sponsors to include certain detailed information in the summary plan description. 29 U.S.C. (Supp. V) 1022(b). For example, the description must set forth requirements for eligibility, explain nonforfeitable pension benefits, set out circumstances which may result in disqualification or loss of benefits, and provide information on financing, claim processing, remedies for redress of claims, and so forth, all in language "calculated to be understood by the average plan participant." 29 U.S.C. (Supp. V) 1022 (a)(1). This section represents a carefully considered attempt by Congress to provide the employee with a comprehensive description of his plan. See ERISA Leg. Hist., *supra*, at 4742 (remarks of Senator Williams, Chairman of the Committee on Labor and Public Welfare).

Where, as here, Congress has provided specific and detailed directions on what must be disclosed, such directions should be deemed to embody, for Section 10(b) purposes, everything that is material. Thus, if the plan administrator complies with 29 U.S.C. (Supp. V) 1022, no plan sponsor, trustee or other person should be held liable under the Securities Acts for failing to disclose or provide further information. Such liability would put plan officials in the untenable position of having complied with a specific statutory directive regarding disclosure of pension information, yet vulnerable in a Rule 10b-5

action because a court later decides that the officials should have provided further information.

For example, the court of appeals stated in the present case that the effect of the district court's opinion "is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8% (410 F. Supp. 541, 551) that a member actually will receive pension benefits, * * * or otherwise defendants must face fraud liability under the securities acts" (Pet. App. 8). Nothing in ERISA, however, requires disclosure of "the actuarial probability * * * that a member actually will receive pension benefits." Plan officials should not be required to comply not only with the disclosure obligations Congress has specified, but also with those that a court may require some day in the future.

In sum, the broad authority of the judiciary in defining the contours of a cause of action under Rule 10b-5 (see *Blue Chip Stamps*, *supra*, 421 U.S. at 737) should be exercised in a manner best calculated to effectuate the will of Congress (*id.* at 727-736; *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S. at 195-206; *Santa Fe Industries, Inc.* v. *Green*, *supra*, 430 U.S. at 471-477; *United Housing Foundation, Inc.* v. *Forman*, *supra*, 421 U.S. at 847-848). Therefore, to the extent that the Securities Acts apply to employee interests in pension plans, ERISA provides appropriate guidance for construing the disclosure obligations under those Acts.

2. *Prospective application.*

In the event that this Court determines that employee interests in involuntary, non-contributory pension plans are protected by Section 10(b), 15 U.S.C. 78j(b), and Rule 10b-5, any liability should be imposed only prospectively, for the reasons recently stated by this Court in *City of Los Angeles, Department of Water and Power* v. *Manhart*, No. 76-1810, decided April 25, 1978. In *Manhart*, the Court recognized that (slip op. 18):

> The occurrence of major unforeseen contingencies * * * jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

We have argued in point I of this brief that Congress has not authorized a cause of action under the Securities Acts in the circumstances of this case. While that conclusion is subject to argument, we see no basis for arguing that Congress has "plainly commanded" retroactive liability in these circumstances under the Securities Acts. Any finding of liability would be a "marked departure from past practice," resulting in "devastating" liability which would be borne "in large part [by] innocent third parties" (*id.* at 19). We recognize that a damage remedy under the anti-fraud provisions, like the award of backpay at issue in

Manhart, should ordinarily not be withheld. Because of the peculiar problems of retroactive liability in the pension plan context, however, here as in *Manhart* liability, if imposed at all, should be entirely prospective, making actionable under the securities laws only those misrepresentations that occur after the announcement of this Court's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF MOTIONS FOR LEAVE TO FILE BRIEFS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MEMORANDUM FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF MOTIONS FOR LEAVE TO FILE BRIEFS AMICI CURIAE

There are presently pending before the Court motions by the United States and by the American Federation of Labor and Congress of Industrial Organizations for leave to file briefs *amicus curiae* out of time. There is also pending a motion by the American Bar Association for reconsideration of the order denying it leave to file such a brief. For the reasons to be stated herein we

support the granting of those motions. We note also that the Securities and Exchange Commission filed a brief on respondent's side, nine days after respondent's brief was due and filed. The SEC has not moved for leave to file out of time; that failure might ordinarily militate against excusing its delay. However, we do not urge that the SEC's brief be rejected, and would treat the SEC as if it had submitted a motion for leave to file, which we would support.

We submit that the Brief of the United States, which represents the views of the Treasury and Labor Departments and the Pension Benefit Guaranty Corporation, the agencies vested by Congress with exclusive responsibility for administering the federal pension law, should be considered by the Court. We also believe, notwithstanding our disagreement with its position, that the views of the Securities and Exchange Commission should be befor the Court. Moreover, because of the extraordinary potential ramifications of the decision under review, it appears that the briefs of the American Bar Association and the AFL-CIO would aid the Court, for they reflect the interest and experience of these important organizations. We note particularly that the AFL-CIO's brief comprehensively compares the disclosure scheme under the securities laws with those of the Employee Retirement Income Security Act of 1974 and its predecessor, the Welfare and Pension Plan Disclosure Act of 1958. That subject is addressed in the IBT's brief, but is far more fully developed in the AFL-CIO brief, whose concentration thereon had been anticipated by IBT counsel. It is also dealt with in the briefs on Respondent's side, and will therefore be discussed in the IBT's reply brief, which is in preparation. It would be convenient for counsel, and hopefully the Court, if the IBT's reply brief could incorporate by reference the AFL-CIO's discussion, and the regulations which are there quoted in detail. That

course would be unavailable if the AFL-CIO's brief is not properly before the Court.

Respondent, which obtained several extensions of time, and actually filed its brief on August 7, 1978 has not opposed the pending motions for leave to file and would not be prejudiced if they were granted. Respondent in fact has dealt with the AFL-CIO's brief, see Brief for Respondent, p. 10, n.20 and the brief for the SEC takes express issue with that of the United States, *e.g.*, pp. 51-52.

CONCLUSION

For the foregoing reasons the motions of the United States and the American Federation of Labor and Congress of Industrial Organizations for leave to file briefs *amicus curiae* out of time, and the motion for reconsideration of the American Bar Association should be granted. The Securities and Exchange Commission should also be granted leave to file a brief *amicus curiae* out of time, notwithstanding its failure to file a motion.

Respectfully submitted,

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No. 77-753 and 77-754

IN THE

Supreme Court of the United States

October Term, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

v.

JOHN DANIEL, *Respondent*.

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners*,

v.

JOHN DANIEL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

JOHN DANIEL, *Respondent.*

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners,*

v.

JOHN DANIEL, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioners in these cases.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 106 labor organizations representing approximately 13,500,000 employees throughout the United States. Those labor organizations are the

exclusive bargaining representatives for employees engaged in every facet of industry, commerce and government. They have secured pension coverage for many millions of employees who have received pnsion benefits, and for many millions who are presently working with the expectation of receiving benefits when they retire. In thousands of instances bargaining has resulted in the creation and maintenance of pension trusts which are jointly administered by unions and employers. Since the decision in these cases may well have a major impact on the administration of those plans, the AFL-CIO seeks this opportunity to acquaint the Court with its views.[1]

ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The accompanying brief *amicus curiae* attempts to avoid duplication of the arguments made by the petitioner and the other *amici* on the petitioners' side. Specifically, we do not address the questions of whether the Court of Appeals was right in holding that what it alternately terms "an interest in a pension plan" or "fund"[2] satisfies the elements

[1] On May 22, 1978 the petitioners, and several *amici curiae* supporting their position, filed their briefs. It is our understanding that the respondent has been granted to and including July 24 to file his brief.

Beginning on May 16 and continuing through June 22, the Senate debated H.R. 8410, the Labor Law Reform Bill of 1978, legislation which proposed a series of amendments to the National Labor Relations Act. Because of the far-reaching consequences for organized labor of those proposals, the AFL-CIO, the spokesman for the majority of trade unions, was required to devote full attention to that debate.

In light of that circumstance and the substantial time still available to the respondent for filing his brief, we request that the delay in filing this motion be excused.

[2] *E.g.* A. 219, 230, 234-236, 254, 259.

of a "security" laid down by this Court in *SEC* v. *W. J. Howey Co., Inc.*, 328 U.S. 293 and reaffirmed in *United Housing Foundation* v. *Forman*, 421 U.S. 837, or whether there is a "purchase" and "sale" within the meaning of the 1933 and 1934 securities laws when an individual takes or keeps a job which is covered by a private pension plan and when, as that court may also have held (compare A. 229, 242, 247 with A. 254, 255), union members vote to ratify a collective bargaining agreement which includes provisions with respect to a pension plan.[3] Rather we confine our argument to the practical consequences of the decision below on the day-to-day operations of private pension plans.

We discuss those consequences because the Court of Appeals was evidently moved by its perception that interpreting the securities laws to cover this transaction was necessary and desirable. (A. 232, 241-242, 254-259.) In our view, the basic policy judgments have already been made in Congress, first, when it enacted the securities laws in question to achieve certain goals relating to an important but discrete problem in our economy, and again in 1958 and 1974 when it enacted legislation specifically regulating private pension plans. But even if those judgments are not controlling, as we think they should be, at a minimum the determinations which

[3] In our brief *amicus curiae* in support of the petitions for certiorari in these cases, we noted our concern that the decision below creates large potential liabilities for pension plans, which would have a grave adverse impact on current plan participants. We have not renewed that argument because this Court has since expressed its appreciation of these practical realities and has therefore held that "the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislation has plainly commanded that result." (*Los Angeles Department of Water and Power* v. *Manhart*, 46 U.S.L.W. 4347, 4350 (April 25, 1978).)

Congress made in its pension legislation, particularly with respect to the disclosure obligations which pension plans have to their participants, deserve respectful judicial attention in assessing the Court of Appeals' view of what "makes good sense" (A. 254). Accordingly, we do not simply set forth our own perceptions why the decision below would have adverse consequences on the administration of pension plans—and both directly and indirectly on the participants and beneficiaries—but compare the regime of securities laws with those established by Congress in its 1958 and 1974 pension enactments. In particular we show that the decision below imposes on pension plans burdens—which Congress did not intend and indeed sought to avoid—in four respects: 1) It creates uncertainties as to what the disclosure obligations are; 2) it creates at least one, and probably many, additional disclosure requirements; 3) it requires disclosures to participants at times different from those intended by Congress; and 4) it subjects pension plans to regulation by an additional agency, which was not the chosen instrument of Congress, and which, indeed, once declined the task as unsuited to its expertise.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-753

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Petitioner*,

v.

John Daniel, *Respondent*.

No. 77-754

Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Louis F. Peick, *Petitioners*,

v.

John Daniel, *Respondent*,

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

SUMMARY OF ARGUMENT

We show below that application of the securities laws[1] to

[1] The Securities Act of 1933, 48 Stat. 74, as amended (15 U.S.C. § 77(a) *et seq.*), and the Securities Exchange Act of 1934, 48 Stat. 881, as amended 15 U.S.C. § 78(a) *et seq.*).

non-contributory involuntary pension plans would be inconsistent with the disclosure mechanisms which Congress has established [2] because it would impose on pension plans burdens—which Congress did not intend and indeed sought to avoid—in four respects: 1) It creates uncertainties as to what the disclosure obligations are; 2) it creates at least one, and probably many, additional disclosure requirements; 3) it requires disclosures to participants at times different from those intended by Congress; and 4) it subjects pension plans to regulation by an additional agency, which was not the chosen instrument of Congress, and which, indeed, once declined the task because as unsuited to its expertise.

ARGUMENT

1. *Uncertainties.* According to the Court of Appeals, the conflicts with the policies of Congressional pension regulation and the difficulties which the defendants and supporting *amici* below anticipated, are avoided by its holding that although the antifraud provisions are applicable to the relationship between private pension plans and their participants, the registration provisions are not. (A. 252).[3] But in deriving that conclusion from its holding the Court drew an inaccurate contrast. It is true that the registration provisions alone require "filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer" and that "the anti-fraud provisions do not establish an affirmative disclosure system

[2] Employment Retirement Income Security Act of 1974, 88 Stat. 832 (29 U.S.C. § 1001 *et seq.*), and its predecessor, the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, as amended (29 U.S.C. § 301 *et seq.*).

[3] That court's reliance on a 1970 amendment to the 1933 Act as the source of an exemption from registration for pension plans "maintained by a bank • • •" (see A. 236-242) is forcefully controverted on petitioners' side. We shall not enter into this controversy, and for the purpose of this discussion only assume that the registration provisions are inapplicable.

requiring the filing of documents." (*Id.*) But the anti-fraud provisions *do* "establish an affirmative disclosure system"; it is after all the failure to make affirmative disclosures which is the gravamen to the complaint herein, and the Court of Appeals itself imposes a wholly novel affirmative disclosure obligation just two paragraphs later in its opinion (A. 254-255 discussed at pp. 10-12 *infra.*).[4] So, too, the anti-fraud provisions, no less than the "registration provisions are designed to assure that investors wil be furnished with all material information concerning an informed investment decision." (A. 252)

An unofficial article co-authored by the present General Counsel of the Securities and Exchange Commission (SEC) expresses a view of the anti-fraud provisions which is at sharp variance with, and we think far more accurate than, that expressed by the court below:

> The disclosure requirements of the federal securities laws which are applicable to the transactional context are the antifraud strictures contained in several of the statutes administered by the Commission, the registration provisions of the Securities Act, and the tender-offer sections of the Securities Exchange Act. Both the antifraud and registration provisions are directly related to disclosures which must be made in the context of a proposed securities transaction. Each assumes that prior to making an intelligent investment decision an investor must be furnished with certain facts. In the registration context, the potential purchaser is supplied with a statutory prospectus which describes the operations of the company, the use of the

[4] Of course, given the affirmative disclosure requirements of the 1958 and 1974 Acts, pension plan administrators have not had and do not have the option—even if it were otherwise practicable—to adopt a pension plan and give employees no information whatsoever. Thus, if the anti-fraud provisions apply they create an affirmative disclosure obligation for all pension plans.

> proceeds, the persons in control, and, as a general proposition, a variety of facts dealing with the investment value of the securities being offered, or financial matters relating to the company's operations. Disclosures held to be required by the antifraud provisions of the securities laws, however, have been even more far-ranging, and of course, have not been limited to disclosures by issuers. At the very least it is safe to assert that the disclosures which are material in the registration context are within the same genre of disclosure which are required by the antifraud provisions of the federal securities law.[5]

Moreover, when the Court of Appeals says that "the antifraud provisions are essentially a generalized self-executing prohibition against fraudulent activity" (A. 252), it neither conveys anything about the meaning of "fraudulent activity" in the securities laws context nor describes the obligations this "generalized self-executing prohibition" entails. Indeed, the very fact that it is "generalized" and "self-executing" gives rise to hazards and uncertainties which Congress did not intend to subject pension plan administrators and trustees, as we now show.

A. The philosophy of the securities laws has been described by Professor Loss:

> The courts have traditionally refused, whether at common law deceit or under securities laws, to define fraud with specificity. Were any hard and fast rule to be laid down as to what constitutes fraud under the blue sky law, the Oregon court has said, "a certain class of gentlemen of the 'J. Rufus Wallingford' type—'they toil not neither do they spin'—would lie awake nights

[5] Sonde & Pitt, *Utilizing the Federal Securities Laws to Clear the Air! Clean the Sky! Wash the Wind!*, 16 How. L. J. 831, 852-854. (1971), (footnotes omitted).

> endeavoring to conceive some devious and shadowy way of evading the law. It is more advisable to deal with each case as it arises."[6]

The same attitude was expressed in a letter of Lord Hardwicke to Lord Kames dated June 30, 1759, which was requoted in *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 193, n. 41:

> Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.

Accordingly, it is the SEC's practice not to advise parties in advance as to what disclosures must be made in order to comply with the anti-fraud provisions of the 1933 and 1934 Acts and its own Rule 10b-5.

B. The underlying assumptions of the pension laws are entirely different. Congress recognized that those who sponsor and administer pension plans are not trying to obtain money from employees or employers for their own enrichment; after all, these plans are financed by the contributions of the very employers who established them unilaterally or in bargaining with unions. It believed that the interest of pension plan participants in knowing what they needed to know about their pension plans, and the practical exigencies of operating a pension plan are best served by providing explicitly what must be disclosed, to whom, and when. Accordingly, in 1958, and more elaborately in 1974, it established very clear guidelines for admin-

[6] 3 Loss, *Securities Regulation*, 1435-36 (2d Ed., 1961) (footnote omitted) quoting *State* v. *Whiteaker*, 118 Ore. 656, 661, 247 Pac. 1077, 1079 (1926).

istrators [7] setting forth the information which must be made available to pension plan participants, the Secretary of Labor and the public. Let us see what Congress has done.

(i) Disclosure under the WPPDA. Section 5(a) of the Welfare and Pension Plans Disclosure Act of 1958 required the "administrator" (as defined in § 5(b)) of any employee pension (or welfare) benefit plan to "publish in accordance with section 8 to each participant or beneficiary covered thereunder (1) a description of the plan and (2) an annual financial report." The description and report were to contain the information "required by §§ 6 and 7 of this Act in such form and detail as the Secretary shall by regulations prescribe."

In § 6(b) of the WPPDA Congress specified with particularity the information which the plan description was required to provide. (See pp. 1a-2a, *infra.*) Section 7(b) specified the information which all pension pans were required to provide in their annual reports. (See pp. 2a-3a *infra.*) Additionaly, all pension plans funded through the medium of a trust were also required to report therein "(A) the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of employees both retired and nonretired covered by the plan." and (B) "a statement showing the assets of the fund as required by section 7(b)" (§7(f)(1)).

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[7] Except as specifically indicated otherwise, the term "administrator" as used in this brief will include all persons who would be subject to the disclosure obligations of the security laws under the decision below.

[8] Additionally, the annual report was to contain, subject to certain exemptions, detailed lists of all investments and securities or properties of the employer or employer organizations, or any other party or interest, and all loans made to any of the foregoing. (§§ 7(f)(1)(C) & (D)). Section 7(f)(2) set forth additional information required of plans which were "funded through the medium of a contract with an insurance carrier". (See pp. 3a-5a, *infra*).

Publication of the plan (and amendments thereto) and annual reports to participants and beneficiaries covered thereby was to be made in two ways: (1) by making copies available for their examination in the principal office of the plan; and (2) by mailing the plan description (including amendments, etc.) as well as "an adequate summary" of the latest annual report to the last known address of any participant and beneficiary who requested the same in writing (§ 8(a)). The plan administrator was also required to file two copies of the plan description and each annual report with the Secretary of Labor, who was to make them available for public examination (§ 8(b). The times for publication and filing were also set forth (§§ 6(a), 6(b), 47(a)).

(ii) Disclosure under ERISA. When, after lengthy study, Congress enacted the Employment Retirement Income Security Act of 1974 (ERISA), which repealed and supplanted the WPPDA, it retained the basic approach of the 1958 Act that plan administrators were to be instructed as to their disclosure duties.

a) In ERISA, Congress determined for the first time that pension plan participants and beneficiaries were to be furnished information about the plan automatically, rather than on request, as under § 8(a) of the 1958 Act. At the heart of the new disclosure mechanism is the summary plan description described in § 102(a) (1):

> The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall

be furnished in accordance with section 104(b) (1) of this act.

And Congress spelled out what information it believed to be of particular interest to plan participants and beneficiaries; § 102(b) provides:

> (b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provision providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act).

A copy of the summary plan description is to be provided to any participant within 90 days of his employment and an updated copy thereof must, on written request of any participant or beneficiary, be mailed to him.[9] (§§ 104(a) (1),

[9] The administrator may make a reasonable charge to cover the cost of furnishing copies of the summary plan description, or any other material required to be mailed on written request by § 104(b)(4).

104(b) (1).) This document, as well as the plan description, must be filed with the Secretary of Labor, who shall also make them available to the public, (§ 104(a) (1)).

b) ERISA also requires plans to publish an annual report. Section 103(b)(2) requires all pension plans to include therein a formal statement; § 103(b)(3) lists eight separate schedules which must be attached to that statement; § 103 (c) prescribes certain information to be provided by the "administrator" (defined in § 3(16)(A)). Section 103(d) requires an actuarial statement of most funded pension plans.[9] The required contents of each of these statements is meticulously spelled out in the Act. (See pp. 13a-14a, *infra*.)

The complete annual report must be filed with the Secretary of Labor (who shall make it available to the public) but need not be furnished to the plan participants except by mail upon written request, and by being made available at the principal plan office. (See §§ 104(b)(2) and (4).) Each participant is entitled only to receive a copy of the statements of assets and liabilities of the plan, and of its receipts and disbursements during the preceding 12-month period, and "such other materials as is necessary to fairly summarize the latest annual report" (§ 104(b)(3)).[10]

In sum, by subjecting pension plan administrators to the inherent uncertainties of the anti-fraud provisions of the securities laws the decision below contravenes the Congressional design. While it is easy enough to say that persons should not "defraud" other persons, the concept of "fraud" under the securities laws has become so broad, particularly with respect to the obligation not to omit

[10] This requirement is implemented by a regulation of the Secretary of Labor (29 C.F.R. § 2520.104b-10(c), 41 F.R. 16694 (Apr. 23, 1976). We are advised that it is the general practice to furnish as a summary annual report, in addition to the two financial statements, a copy of the front page of the annual report which gives the names and addresses of the plan's sponsors and administrator and describes the nature of the plan.

material facts, that the problems of compliance are serious indeed. Moreover, the characteristics of a private pension plan are so different from those of the "types of instruments" that have previously been held to "fall within the ordinary concept of a security" (cf. H.R. Rep. No. 85, 73rd Cong., 1st Sess. 11) that the existing body of judicial and administrative decisions will provide little if any guidance as to what must be disclosed to comply with the anti-fraud provisions. Thus, the very novelty of the decision below will exacerbate the problems it raises for those who would be responsible for making disclosures under that legal theory.

2. *Scope of the Disclosure Requirement.* A. In affirming the District Court's denial of the Motion to Dismiss the Complaint, the court below addressed itself to only one of the several "misrepresentations" and "omissions of material fact" (A. 32) which were alleged in the Complaint. It declared that a plan must disclose "a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." (A. 255)

The Court of Appeals did not elaborate on what this "statistically determinable risk" represented, but its earlier reference to the District Court's opinion evidnces that the court meant thereby "the actuarial probability, here perhaps as low as 8% (410 F. Supp. at 551 [A. 123-124]), that a member actually will receive pension benefits." (A. 216). It must be noted at once that the "8%" figure refers to a Senate study of 87 pension plans which "established that forfeiture of pension benefits by plan participants was extremely high, in that 92 per cent of all participants *who left plans* which required 11 or more years of service for vesting and 72 per cent of all participants in the plans with 10 years or less for vesting did not qualify for benefits upon termination of employment."[11] Excluded from these figures were the large number of individuals who remained in those

[11] S. Rep. No. 92-634, 92d Congress, 2d Sess., cited at A. 123-124 (emphasis added).

plans until retirement and ultimately obtained benefits.[12] Accordingly, the 8% figure *does not* represent the probability (even among the plans studied) "that a member actually will receive pension benefits." (A. 216).

Moreover the principal vice in the requirement that that "actuarial probability" or its converse, "the statistically determinable risk * * *" (A. 254), be disclosed is that such information would be misleading to the individual who receives it. Precisely because it is a *statistic*, this figure says nothing about the prospects of any given individual. This point is well made in the brief *amicus curiae* for the American Academy of Actuaries, pp. 3 to 14, particularly at pp. 11 to 14, discussing the nature of statistical data. It is distressing that the court below should have declared a rule which would compel pension plans "to develop and present to individual employees quantitative information which" the experts in the field have determined "will be incorrect, misunderstood, and of little or no value in assessing the likely future course of [those individual employees'] working careers or the decisions they must make in connection with their employment." (*Id.* at 14.)[13]

One further observation is in order in this connection Congress was fully aware of the importance of actuarial assumptions in the establishment and maintenance of financially viable pension plan, and the necessity of disclosing these actuarial assumptions and any modifications therein. As we have noted, p. 9 *supra*, § 103(d)(3) requires most employee pension plans to have an actuarial statement in their annual report. That statement must include substantial statistical data including actuarial assumptions and a justification for any change therein (§ 103(d)(3)). (See pp. 13a-14a, *infra*.) But Congress did not believe that *any*

[12] See also the underlying study at pp. 125-126 of the Senate Report, and accompanying tables.

[13] That brief also cautions that the actuarial assumptions which are made in planning frequently turn out to be wrong, but the errors are self-correcting because new actuarial determinations are made annually. (See *id.* at p. 10, text and note at n. 15.)

actuarial information was of sufficient importance or utility to participants to require that it be conveyed in the summary plan description, see § 102(b), quoted at p. 8, *supra*. And, of course, it did not require, either in the WPPDA or ERISA, that pension plans disclosed to participants or to the Secretary the meaningless and misleading "statistically determinable risk" which the court below requires to be disclosed.

This itself should caution against substituting the open-ended obligations of the securities laws for the specific disclosure rules established by Congress. The contrast between the Court of Appeals' approach and that of Congress is further heightened when it is considered whether pension plans would be required, under the decision below, to disclose to participants their policies in investing assets of a funded plan. The Court of Appeals' holding that there is a securities transaction rested heavily on a supposed analogy between pension plans on the one hand and mutual funds (A. 231, 234, 235, 241), and variable annuities (A. 226-227, 231) on the other. Issuers of such securities are, of course, required to disclose their investment policies and changes therein in detail. Thus, if that court's anology is sustained, as it would have to be, at least tacitly, to affirm its "security" holding, plan administrators would rely at their peril on their own knowledge that the economic contexts and other characteristics of pension plans are so different from mutual funds, variable annuities, etc., that such investment information would not be "important" to a reasonable pension plan participant. (Cf. *TSC Industries, Inc.* v. *Northway*, 426 U.S. 438, 449.) Congress, however, has never required that this information be provided plan participants, or even published in the annual report.[14] Congress thereby made

[14] What ERISA does require is that investments held be listed in the annual report as part of the statement of assets (§ 103(b)(3)(C)), and that certain types of transactions, including any investment which involves more than 3 percent of the plan's assets be disclosed (§ 103(b)(3)(H)).

clear its judgment that, unlike the information which must be disclosed in the summary plan description or otherwise, the plan's investment policies are a relatively minor utility to its participants.[15] Again, if that assessment, embodied in ERISA's disclosure provisions, is not binding on the courts, it should at least be deemed highly persuasive. In any event, it is eminently sound, because investment performance has only a limited and indirect effect, if any, on participants in non-contributory, defined benefit plans.

The investment success of a defined benefit plan will be to the advantage of the employee participant only if the employer (or employers, in a multi-employer plan) who sponsors the plan chooses to raise the level of benefits. (Cf. *Alabama Power Company* v. *Davis*, 431 U.S. 581, 594.) If the level of benefits is kept the same, a more favorable investment performance than had been anticipated in the actuarial forecast would enable the employer to reduce his contributions; and of course, if the investment income is less, the employer would have to increase his contributions to maintain those benefits. But either way, the investment results affect the participants only indirectly, that is, they make it somewhat easier for the employer to provide higher benefits.[16]

[15] This determination strongly suggests also, that if Congress considered former SEC Chairman Cohen's comparisons between pension plans and mutual funds, it (contrary to the Court of Appeals, A. 235) regarded the differences which he described as more important than the similarities. See Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 3598, 92d Cong., 2d Sess., p. 231, quoted in part at A. 235 and IBT Br. 43, n. 29.

[16] Of course, where the level of the defined benefits is collectively bargained, employers generally will be more willing to promise higher benefits to the extent that the contributions required are less because of the plan's investment income; but there too, the impact on the employees is indirect, and their own bargaining strength is at least an equally significant fact.

C. If the anti-fraud provisions of the security laws apply, then whatever other disclosure may be or may not be required, plan participants would clearly be entitled to two kinds of information which they have not hitherto received: 1) information relating to the possibility that the employer, whose contributions fund the plan, will close down the plant where the participant is employed or otherwise liquidate his business in whole or in part, and 2) the employer's financial situation and prospects.[17] For, such information would indisputably be deemed material by a reasonable plan participant and would be subject to disclosure under the "investment" theory of the decision below. Specifically, both kinds of information relate directly to what is termed below "risk of loss" (A. 254)— that is, the possibiity that the employee will never obtain a pension. The financial information concerning the employer is aso relevant to the amount of the benefit if the employee does get a pension, beause the employer's financial condition will almost certainly have a direct effect on benefits due to its obvious influence on his ability and willingness to make or increase the contributions which are the primary and major source of the plan's assets.

1) In a study of pension plan terminations prepared by the Treasury and Labor Departments, it was stated that the "most frequently given reasons for plan termination were adverse business earnings and the liquidation or dissolution of employer organization."[18]

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[17] In multi-employer plans, the pertinent information would include also the financial situation and prospects of the contributing employers, and often of the employing industry.

[18] Study of Pension Plan Terminations, 1972—Final Report (Department of the Treasury, Department of Labor, August 1973 hereafter "Terminations Study"), pp. 48-51. The Terminations Study was before Congress when it was enacting ERISA. See Legislative History of the Employee Retirement Income Security Act of 1974 (GPO 1976) (hereafter "ERISA Leg. Hist."), p. 1599 (Senator Williams).

The Terminations Study explained:

> Of the 1,227 plans, 580 gave one or the other reason. Another 66 gave one or both in combination with other reasons. In all cases where combinations of reasons were given for termination, at least one of these two reasons was cited. Together, plans citing at least one of these reasons accounted for 40 percent of all claimants and 38 percent of all claimants with losses. In addition, while the study identified and separated those cases where a plan termination was due to the closure of a plant, division or subsidiary of a company, the closures themselves in several cases were due to adverse earnings or liquidation of the company production unit. About 10 percent of all claimants and about 9 percent of claimants with losses were in plans terminated because of change of ownership by sale or transfer. A much smaller percentage of claimants were in plans terminating because of a change of ownership by merger.

Id. at 51. See also Table, *Distribution of Pension Plans and Claimants by Reason for Termination,* 1972," *id.*, p. 50. Examples of individuals who had lost pension benefits because of plant closings were given by Senator Wiliams at the opening of the debate on the bill which became ERISA.[19]

The Terminations Study also stated:

> Seventy-one plan terminations involved the closure of a plant, division, or subsidiary by a parent company. These plans accounted for 23 percent of all claimants. The 29 such plans that terminated with losses accounted for 29 percent of all claimants with losses.[20]

As the Terminations Study explained:

> While a number of other specific reasons may be

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[19] ERISA Leg. Hist. p. 1059. See also *e.g.*, *id.* at pp. 1634-1638 (Senator Bentsen), 1866-1868 (describing individual cases), 2602.

[20] Terminations Study, p. 51.

given for a plan termination, a decline in the number of active participants in a plan can itself indirectly encourage a termination. Of course, a decline in the number of active participants prior to termination may be simply a reflection of an increasingly unprofitable employer. But for a plan with large, unfunded, past service liabilities, a decline in the number of participants, particularly younger participants, can cause a sharp rise in costs per employee remaining in the plan.

The great majority of plans for which information is available showed declines in participation prior to termination. This is true both for plans with losses and those without. As a rule, a reduction in employment involves a disproportionate decline in the number of younger employees, either through reduced hiring or lay-off. If past service liabilities have not been funded, such a reduction in the number of younger participants raises per capita costs for the remaining employees because the younger employees account for less than a proportionate share of past service liabilities. Thus, for a poorly funded plan, the increased costs per remaining participant of maintaining a plan can be a contributing factor in a decision to terminate it.[21]

And, short of a decision to terminate, the increased cost of past service liabilities per remaining employee will make it that much more difficult for the plan to increase benefits, because greater contributions will be needed simply to achieve the originally projected level of benefits. So too, where financial conditions have caused an employer, who is a major contributor to a multi-employer plan, to withdraw therefrom, the result may even be that expected benefits will be significantly reduced.[22]

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[21] *Id.* at p. 47-48.

[22] This is what happened to the New Jersey Brewery Employees' Pension Plan because of the closure of P. Ballentine & Sons. See *id.* at 52, n. 3, and ERISA Leg. Hist. at p. 1600.

Second, if the operation is unprofitable even in the short run, the employer may be forced to lay off workers; those who thereby lose their jobs will not only be deprived of their source of wages (which is usually of primary importance to them) but will forfeit the opportunity of ever satisfying the conditions of eligibility under that pension plan. A reduction in the employee force will also affect those employees who remain and ultimately do obtain a pension.

We can think of good reasons why employers should be required to warn their employees when a major business decision affecting their jobs is in the offing, but we are also aware that such a duty would be bitterly resisted by employers.[23] But that is a decision for Congress, and it seems to us to be an unprincipled resolution—which nothing that Congress has ever done would justify—to make the employer's duty to do so depend on whether he sponsors a pension plan. And while employers who have financed their businesses by entering into the capital market which is the true focus of the securities laws are, of course, required to make elaborate disclosures under those laws, other employers are not presently under such a duty; doubtless many have chosen alternate methods for securing capital precisely to preserve the confidentiality of their financial

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[23] Where the employees are represented, § 8(a)(5) of the NLRA does require that the union be given information at least soon enough to bargain with the employer about the consequences of this decision, although right to go out of business has been held to be absolute. See *e.g.*, *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (duty to provide information); *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203 (mandatory subjects of bargaining); but see, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (right to go out of business).

position and business plans.[24] Again, it is not a light thing for the courts to require them to provide their employees with financial information because the employers have established a pension plan; yet, the creation of just such a duty is implicit in the Court of Appeals' holding herein.

3. *Timing.* With respect to the timing of the disclosures under its decision, the Court of Appeals takes a position flatly contrary to that of Congress in enacting ERISA. Indeed, that court points to the difference as one of the reasons why its "reading the antifraud provisions of the securities laws be complementary to the requirements of ERISA makes good sense." (A.254.) The court below says: "Defendants have not shown that ERISA would provide relief to persons who have acquired an interest in a pension fund where false or misleading representations have been made *at inception or during subsequent ratifications or upon a job offer,*" at which times it would require disclosure. (A. 254-255, emphasis added.) Section 104(b)(1)(A) of ERISA, on the other hand, requires that the summary plan description be provided any time within 90 days after an individual accepts employment, the event which the court characterizes as an "investment commitment". (*Id.*) And under the WPPDA, the administrators were not at all required to provide a participant with information, except on written request or at the plan offices. (See p. 7 *supra.*)

In addition to the foregoing admitted inconsistency between the court below's requirements and those of ERISA, that court's opinion would create substantial uncertainty as to when, after initial employment, an existing plan must make disclosures. Its theory that there is a "sale" when an employee decides to retain his job would appear to entail continuing disclosure obligations. Unless by "job offer"

[24] An employer also has the duty to provide financial information to a union in collective bargaining, at least if he asserts a financial inability to meet the union's demands. See *Labor Board* v. *Truitt Mfg. Co.*, 351 U.S. 149.

that court meant not only the offer to begin covered employment but also a continuing offer to remain in covered employment, the opinion does not identify the occasions when disclosure is required (by an existing plan) other than contract ratification where the union provides for ratification. And it would appear from the discussion of that court's difference with ERISA (A. 255) that the securities laws would not require disclosure to individuals who are already employed after the plan is in operation, except, again, where there is ratification. But it would be hazardous for administrators to rely on this reading of the opinion, given its "sale" theory. They may feel compelled, for safety's sake, to make continuing disclosures to employees whenever there is any development which might be considered "material," a task all the more onerous because of the uncertainties surrounding what is material in this context. (See pp. 2-5 & 12-18, *supra.*)

Here again, Congress has been quite specific. The WPPDA required that the plan description be published within 90 days after the inception of the plan (or the effective date of the Act). (WPPDA § 6(a).) Changes in the plan were to be reported to the Secretary within 60 days after the change was effectuated (§ 6(b).) The annual reports were to be published within 150 days after the end of the plan year (§ 7(b).)

Under ERISA, any changes in the plan with respect to a matter required to be disclosed in the summary plan description is to be filed with the Secretary within 60 days after such modification is adopted, but can be distributed to plan participants at any time within 210 days after the end of the plan year in which the change is adopted. (See ERISA § 104(a)(1)(D) and § 104(b)(1).) One practical consequence of these provisions is, of course, that all changes which are adopted in one year and even longer can be furnished to the participants in a single document. A revised summary plan description incorporating all changes must be provided every five years (or ten years if

there are no amendments). (§ 104(b)(1).) The information which must be contained in the annual report may be filed with the Secretary and made available to participants anytime within 210 days after the close of the plan year. (See § 104(a)(1)(A); § 104(b)(1)).) Plainly, these provisions minimize the cost to the plan (thereby preserving its funds for the payment of benefits) and protect the participants from being inundated with material. Moreover, they show that Congress clearly did *not* believe that plan participants had an *immediate* need for that information. Thus, ERISA's approach strongly suggests that, unlike the Court of Appeals, Congress did not consider an employee to be making an investment decision by continuing in covered employment.

4. *Duplicative and Conflicting Statutory Requirements and Administration.* In § 3004(a) of ERISA, Congress gave the following extraordinary instruction to the two Departments in which it vested responsibility for administering that law:

> Whenever in this Act or in any provision of law amended by this Act the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which, to the extent appropriate for the efficient administration of such provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.

See also § 3004(b) reprinted at p. 16a, *infra*. To sustain the holding below that the securities laws are applicable would make inevitable the "duplication of effort," etc., which Congress strove to avoid, and would do so by authorizing the intrusion of another agency, the SEC, which was not

one of the instruments chosen by Congress to regulate pension plans and to oversee compliance by them with their duty to provide adequate information to their participants. In investing responsibility in agencies other than the SEC, Congress adhered to a judgment it first made in 1958 when it determined that that agency did not possess the necessary expertise in labor-management affairs. At that time the SEC agreed with that assessment, and indeed encouraged Congress to leave pension regulation to others, particularly the Department of Labor. (See IBT Br., pp. 68-72.) That the SEC has now changed its position cannot justify overturning the decisions which Congress in § 3004 has made, and thereby imposing the "burden of compliance" with conflicting or overlapping requirements on "plan administrators, employers, and participants and beneficiaries."

CONCLUSION

For the foregoing reasons and those stated by petitioners, the judgment of the court below should be reversed and the case remanded with direction to the District Court to dismiss Counts I and II of the complaint.

Respectfully submitted,

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APPENDIX

I. Excerpts from the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA), 72 Stat. 997, *et seq.*, 29 U.S.C. § 301 *et seq.* (repealed effective January 1, 1975).

Section 6, WPPDA, provided as follows:

(a) Except as provided in section 4 of this Act, the description of any employee welfare or pension benefit plan shall be published as required herein within ninety days of the effective date of this chapter or within ninety days after the establishment of such plan, whichever is later.

(b) The description of the plan shall be published, signed, and sworn to by the person or persons defined as the "administrator" in section 5 of this Act, and shall include their names and addresses, their official position with respect to the plan, and their relationship, if any, to the employer or to any employee organizations, and any other offices, positions, or employment held by them; the name, address, and description of the plan and the type of administration; the schedule of benefits; the names, titles, and addresses of any trustee or trustees (if such persons are different from those persons defined as the "administrator"); whether the plan is mentioned in a collective bargaining agreement; copies of the plan or of the bargaining agreement, trust agreement, contract, or other instrument, if any, under which the plan was established and is operated; the source of the financing of the plan and the identity of any organization through which benefits are provided; whether the records of the plan are kept on a calendar year basis, or on a policy or other fiscal years basis, and if on the latter basis, the date of the end of such policy or fiscal year; the procedures to be following in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part. Amendments to the plan reflecting changes in the data and information included in the original plan, other than data and informa-

tion also required to be included in annual reports under section 7 of this Act, shall be included in the description on and after the effective date of such amendments. Any change in the information required by this subsection shall be reported to the Secretary within six days after the change has been effectuated.

Section 7, WPPDA, provided in pertinent part as follows:

(a) The administrator of any employee welfare or pension benefit plan, a description of which is required to be published under section 6 of this Act, shall also publish an annual report with respect to such plan if it covers one hundred or more participants. However, the Secretary, after investigation, may require the administrator of any plan otherwise covered by the chapter to publish such report when necessary and appropriate to carry out the purposes of the chapter. Such report shall be published as required under section 8 of this Act, within one hundred and fifty days after the end of the calendar year (or, if the records of the plan are kept on a policy or other fiscal year basis, within one hundred and fifty days after the end of such policy or fiscal year).

(b) A report under this section shall be signed by the administrator and such report shall include the following:

The amount contributed by each employer; the amount contributed by the employees; the amount of benefits paid or otherwise furnished; the number of employees covered; a statement of assets specifying the total amount in each of the following types of assets: cash, Government bonds, non-Government bonds and debentures, common stocks, preferred stocks, common trust funds, real estate loans and mortgages, operated real estate, other real estate, and other assets; a statement of liabilities, receipts, and disbursements of the plan; a detailed statement of the salaries and fees and commissions charged to the plan, to whom paid, in what amount, and for what purposes. The Secretary, when he

has determined that an investigation is necessary in accordance with section 9(d) of this Act, may require the filing of supporting schedules of assets and liabilities. The information required by this section shall be sworn to by the administrator, or certified to by an independent certified or licensed public accountant, based upon a comprehensive audit conducted in accordance with acceptance standards of auditing, but nothing herein shall be construed to require such an audit of the books or records of any bank, insurance company, or other institution providing an insurance, investment, or related function for the plan, if such books or records are subject to examination by any agency of the Federal Government or the government of any State. In the case of reports sworn to, but not certified, the Secretary, when he determines that it may be necessary to investigate the plan in accordance with section 9(d) of this Act, shall, prior to investigation by the Department of Labor, require certification of the report by an independent certified or licensed public accountant.

* * * *

(e) Details relative to the manner in which any funds held by an employee welfare benefit plan are held or invested shall be reported as provided under paragraphs (B), (C), and (D) of subsection (f)(1) of this section.

(f) Reports on employee pension benefit plans shall include, in addition to the applicable information required by the foregoing provisions of this section, the following:

(1) If the plan is funded through the medium of a trust, the report shall include—

(A) the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of employees, both retired and nonretired covered by the plan;

(B) a statement showing the assets of the fund as required by section 7(b) of this Act. Such assets shall be

valued on the basis regularly used in valuing investments held in the fund and reported to the United States Treasury Department, or shall be valued at their aggregate cost or present value, whichever is lower, if such a statement is not so required to be filed with the United States Treasury Department;

(C) a detailed list, including information as to cost, present value, and percentage of total funds, of all investments in securities or properties of the employer or employee organization, or any other party in interest, but the identity of all securities and the detail of brokerage fees and commissions incidental to the purchase or sale of such securities need not be revealed if such securities are listed and trade on an exchange subject to regulation by the Securities and Exchange Commission or securities in an investment company registered under the Investment Company Act of 1940, or securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, and the statement of assets contains a statement of the total investments in common stock, preferred stock, bonds and debentures, respectively, valued as provided in subparagraph (B).

(D) a detailed list of all loans made to the employer, employee organization, or other party in interest, including the terms and conditions of the loan and the name and address of the borrower: *Provided,* That if the plan is funded through the medium of a trust invested, in whole or in part, in one or more insurance or annuity contracts with an insurance carrier, the report shall include, as to the portion of the funds so invested, only the information required by paragraph (2) below.

(2) If the plan is funded through the medium of a contract with an insurance carrier, the report shall include—

(A) the type and basis of funding, actuarial assumptions used in determining the payments under the contract, and

the number of employees, both retired and nonretired, covered by the contract; and

(B) except for benefits completely guaranteed by the carrier, the amount of current and past service liabilities, based on those assumptions, and the amount of all reserves accumulated under the plan.

(3) If the plan is unfunded, the report shall include the total benefits paid to retired employees for the past five years, broken down by year.

II. Excerpts from the Employee Retirement Income Security Act of 1974, 88 Stat. 829 *et seq.*, 29 U.S.C. § 1001, *et seq.*

Section 102, ERISA, provides as follows:

SEC. 102. (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1).

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1). Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D).

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act).

Section 103(a), ERISA, provides in pertinent part as follows:

SEC. 103. (a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a), and shall be made available and furnished to participants in accordance with section 104(b).

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

• • • •

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 104(a)(2), a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this title, the term "enrolled actuary" means an actuary enrolled under subtitle C of title III of this Act.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under section 103(b) as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

Section 103(b), ERISA, provides as follows:

(b) An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant; a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; infor-

mation concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such

schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organizations, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or

a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

Section 103(c), ERISA, provides as follows:

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Section 103(d), ERISA, provides as follows:

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 301(b), or (C) a plan described both in section 4021(b) and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 301(a)) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination

priority categories as set forth in section 4044 of this Act, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

Section 104(a)(1), ERISA, provides as follows:

SEC. 104. (a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

Section 105, ERISA, provides in pertinent part as follows:

SEC. 105. (a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12 month period.

Section 3004, ERISA, provides as follows:

(a) Whenever in this Act or in any provision of law

amended by this Act the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which, to the extent appropriate for the efficient administration of such provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.

(b) In order to avoid unnecessary expense and duplication of functions among Government agencies the Secretary of the Treasury and the Secretary of Labor may make such arrangements or agreements for cooperation or mutual assistance in the performance of their functions under this Act, and the functions of any such agency as they find to be practicable and consistent with law. The Secretary of the Treasury and the Secretary of Labor may utilize, on a reimbursable or other basis, the facilities or services, of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services, of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary of the Treasury and the Secretary of Labor and, to the extent permitted by law, to provide such information and facilities as they may request for their assistance in the performance of their functions under this Act. The Attorney General or his representative shall receive from the Secretary of the Treasury and the Secretary of Labor for appropriate action such evidence developed in the performance of their functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this subchapter or other Federal law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE

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MOTION OF THE AMERICAN ACADEMY OF ACTUARIES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Academy of Actuaries was formed in 1965 as a national accrediting organization by four national actuarial organizations—the Casualty Actuarial Society, the Conference of Actuaries in Public Practice, the

Fraternal Actuarial Association, and the Society of Actuaries (the "constituent organizations"). There are currently over 7,000 members of the Academy and the four constituent organizations. Members of the Academy include actuaries in all areas of specialization and practice within the profession. Membership in the Academy is open only to those who have satisfied both education and experience requirements. Over 90 percent of the actuaries in the United States who have met the entrance requirements of the Academy have become members.

One major area of specialization is the design and administration of employee retirement plans. Virtually every member of the Academy engaged in this branch of actuarial practice has qualified as an "enrolled actuary," pursuant to Section 3042 of the Employee Retirement Income Security Act of 1974 ("ERISA"), and as such is authorized to make the annual certification required by Section 103(a)(4)(A) of that Act.

Actuaries perform several functions in connection with the establishment and administration of pension plans. They render advice to plan sponsors concerning the design of their plans, which often includes estimates concerning the impact of alternate features upon the cost to employer sponsors or the level of plan benefits that can be provided by a specific contribution rate. A significant and continuing function involves advice as to the level of the contributions that should be made in order to provide prudently for the payment of the plan benefits. This involves taking into account many factors, including the age and sex distribution of eligible and potentially eligible employees, turnover rates, mortality rates, inflation trends, salary increase rates, and anticipated investment return. Actuaries also participate with the plan sponsors and with other expert consultants, including lawyers and accountants, in the preparation of literature intended to keep covered employees adequately informed about the terms and status of the plans.

The Academy, in the October 1977 term of this Court, filed a brief *amicus curiae* in *City of Los Angeles* v. *Manhart*, No. 76-1810 (decided April 25, 1978). As was the case in that litigation, there would be no reason for us to support either affirmance or reversal of the judgment below, if the criterion were solely the economic self-interest of the members of the actuarial profession. However, the decisions of the lower courts, as we show in the accompanying brief, appear to have been materially but erroneously influenced by what those course perceived to be the possibility and desirability of disclosing to participants and prospective participants what was characterized as the "actuarial probability" that benefits would be received. In addition, we are concerned that those decisions, if allowed to stand or at least if not clarified, could impose obligations upon plan sponsors and actuaries that would impede rather than advance the objective of providing plan participants with meaningful information about the terms and status of their plans. We believe we can provide the Court with information that may not be adequately covered by the parties or other *amici* relating to what actuaries do and to the feasibility of using the results of their work in providing covered employees with appropriate information about their plans.

Accordingly, the American Academy of Actuaries requests that this Court grant leave to the Academy to file the accompanying brief as *amicus curiae*.

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May 19, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the attached Motion for Leave to File Brief as Amicus Curiae.

INTRODUCTION AND SUMMARY

We do not believe that we can add usefully to the arguments by the parties and the other *amici* relating to the first of the two issues presented by petitioners—whether the expectation of, or in some cases the contractual right to, plan benefits acquired by covered employees when their employer establishes a pension plan, of the kind established by Local 705 of the International Brotherhood of Teamsters and the participating employers that employ persons represented by that union, constitutes a "security" for purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934. The opinions of the District Court and of the Court of Appeals, however, contain strong indications that their determination of this issue was significantly influenced by their belief that the public interest would be advanced if the antifraud provisions of the 1933 and 1934 Acts applied to the acquisition by employees of interests in pension plans. In Part I of this brief we offer our views about the availability, accuracy, and utility of the kind of information that the courts below believed would be appropriate or legally required if the antifraud provisions did apply.

If this Court should hold that interests in such pension plans do fall within the definitions of Section 2(1) of the 1933 Act and of Section 3(a)(10) of the 1934 Act, the second question is whether the interests are "sold" to the covered employees. The manner in which annual contributions are determined and their relationship to the promised or anticipated plan benefits may be relevant to this question, and this is the subject of Part II.

ARGUMENT

I. "ACTUARIAL PROBABILITY" OF THE RECEIPT OF PLAN BENEFITS

Portions of the opinions of both the District Court and the Court of Appeals suggest that their decisions were shaped in part by what we regard as an inadequate understanding of the nature of the findings and services that the actuarial profession provides to retirement plans. The District Court appears to have been singularly affected by a 1972 study which it interpreted as showing that "as few as eight percent of those participants in pension plans with vesting requirements of eleven years or more will ever receive any pension benefits."[1] The court went on to express the view, concerning union votes on wage packages, that "[t]he court is persuaded that few members would ever vote for an allocation to a pension increase in lieu of a greater salary increase if they knew at the time of the vote that they would have an eight percent or smaller chance of ever realizing any benefit from the increased pension allocation." 410 F. Supp. at 553. The District Court's conclusion was apparently rooted in allegations in the complaint that defendants omitted to state that the plan's "actuarial basis was arbitrary" and that they omitted to state the "pertinent information needed to disclose the actuarial basis upon which the funds were grounded" and "the actuarial likelihood that a union member will not receive any pension benefits at all."[2]

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[1] *Daniel* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 410 F. Supp. 541, 551 (N.D. Ill. 1976), citing Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess., at 15, 115-53 (particularly, it appears, 130-31) (1972). With respect to the District Court's interpretation, *see* note 12 *infra*.

[2] *Daniel* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 561 F.2d 1223, 1227 (7th Cir. 1977).

The Court of Appeals stated that the effect of the District Court's decision is to "require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability * * * that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits * * *" 561 F.2d at 1229. The court appeared to agree, pointing out that there should be no undue burden caused by such disclosure "because all of the material information will be readily available to the plan trustees since their actuaries needed all of the information in order to set up the plan in the first place." *Id.* at 1250.

The foregoing statements reflect an imperfect appreciation both of the nature and extent of the information available to actuaries and of whether it is feasible for an actuary or plan sponsor to use the information that is available as the basis for providing employees with meaningful and reliable predictions of the sort suggested by the courts below. As we observed in another context, the work of actuaries requires an understanding of a branch of mathematics—the theory of probabilities—without which anyone treating with averages can fall rather easily into serious error,[3] and this, for reasons we shall try to explain, is what has happened to the courts below.

First, some of the many factors that can affect the determination of what contributions are needed to meet the promised plan benefits are far more significant than others. In the interest of simplicity, actuaries often ignore those factors whose aggregate impact is of an order of magnitude that is small in relation to the margin of error inherent in the more significant factors that are

[3] Brief for the Academy, *amicus curiae* in *City of Los Angeles* v. *Manhart*, No. 76-1810 (decided April 25, 1978).

taken into account. Thus some of the information that the court below believed will be "readily available" in fact will not be. Second, conclusions that are accurate when made with respect to large numbers of persons are often either incorrect or else not meaningful and so not useful when applied to individual members of the group or to small subsets of individuals. We discuss each of these points in turn.

A. There Is No Particular Correspondence Between the Data Employed To Determine Pension Cost or Contribution Levels and the Data Needed To Inform Participants About "Actuarial Probabilities"

It is true, as the courts below evidently understood, that some of the factors that affect the determination of the cost of a single employer or a multi-employer defined benefit pension plan would be relevant also to the making of predictions concerning the likelihood that employees will receive plan benefits at retirement or earlier termination of employment. Mortality and disability experience and the rate of employee withdrawals (which may vary with age, sex, rate of compensation, length of service, and other factors) are among the most important.[4] Other factors, such as projected increases in salary levels and anticipated return on investments held on behalf of the plan, significantly affect the determination of annual contribution rates but are only remotely related to the question of whether pension benefits are likely to be paid.[5] The extent to which all of the above factors are actually taken into account, however, varies greatly from plan to

[4] McGill, Fundamentals of Private Pensions 312-20 (3d ed. 1975); *see also* Pension Plan Recommendations and Interpretations, § 6.2, in American Academy of Actuaries, Bylaws, Guides to Professional Conduct and Standards of Practice 90 (January 1, 1978).

[5] McGill, *supra* note 4, at 312.

plan, and, except for very large plans, it is often uneconomical and unnecessary to use all of them.[6]

Because the practicing actuary recognizes the rather limited effect on plan costs of certain factors such as variations in rates of withdrawal for reasons other than age, practical approximations are commonly used. It is often the case, for example, for the probability of withdrawal from a plan without vested rights in any given year, along with the probability of death or disability, to be assumed to depend solely upon the age of the employee, and not upon sex, length of service, rate of compensation, or any other factor. In choosing this approximate method, the actuary does not assert that the various other factors do not affect the rate of withdrawal. An actuary knows that the use of rates of withdrawal or retirement which depend not only on attained age but also on length of service will require the determination of actuarial present values and plan costs on the basis of 35 or 40 service tables (one for each entry age into the plan) where otherwise one would do.[7] Such extreme complexity is not warranted by the rather modest refinement in the estimated cost. What is required of the actuary is that the assumptions that are used must in the aggregate be reasonable.[8]

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[6] *See* Pension Plan Recommendations and Interpretations, § 9.1, *supra* note 4.

[7] For example, consider a plan with 40 entry ages from 25-64 inclusive with a retirement age of 65. If factors are based on age only, then service tables for this plan would have 40 entries, one for each age. However, if factors are based on both age and length of service, then 40 factors will be required at age 25 alone, 39 factors will be required at age 26, and so forth, producing a total of 820 factors (40 + 39 + . . . + 1 = 820). Thus, this seemingly modest refinement actually increases the number of factors required more than twenty-fold. Computers can of course assist in these refinements, but not without added cost.

[8] This concept is recognized, for example, in the actuarial review requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), § 302(c)(3).

In the case of a plan covering relatively few employees, for example, an actuary might well assume that there will be no employee turnover whatever, because this results in a conservative cost estimate.[9] An advantage of making conservative assumptions is that this produces a margin that can offset unanticipated bad experience in the future. To take another example, in valuing a pension plan which provides vesting at ten years of service, an actuary might employ a three percent probability of withdrawal without vested rights for every employee who is age 40 in the group, thereby assigning the same probability of withdrawal for employees of that age who have one year of service as for employees who have seven years of service. It would plainly be misleading, if a similar grouping were made in connection with an estimate of the likelihood of receiving plan benefits and the recently hired employees were informed that they have the same chance of receiving pension benefits as the employees who need to work only three more years for their right to receive benefits to vest. Moreover, the zero and the three percent withdrawal assumptions are not the only ones that can be actuarially sound. An actuary may quite properly choose from a range of acceptable assumptions, and there is no reason whatever to conclude that the ones that happen to be satisfactory for use in determining pension cost are also adequate for use in making an estimate of the likelihood of a single individual receiving benefits, if for some reason it is useful to make such an estimate.[10]

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[9] Typically, in a plan covering only a few employees, most of the cost is associated with one or two key employees who are often the owners or managers of the business. Thus, an assumption of some employee turnover might well understate costs in the plan if, as is usually the case, all key employees continue.

[10] *See* page 16 *infra* for an illustration, in quantitative terms, of how wide a difference there can be between two equally acceptable assumptions, with only a modest effect upon the amount of the contribution to be made.

If employees must be given quantitative estimates of their likelihood of receiving benefits, persons of different ages or lengths of service or occupations thus cannot be grouped together even where this may be appropriate where costs for the plan as a whole are being determined.[11] Moreover, the computations would have to be made anew each year if a "sale" is deemed to take place each time a contribution to the plan is made. The actuarial work required would involve a considerable addition to that now being done, contrary to the belief of the court below.[12]

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[11] Although it is unlawful for an employee to require higher contributions for female than for male employees, *City of Los Angeles* v. *Manhart*, *supra* note 3, and while actuaries might in many cases ignore sex differences when determining pension costs because other factors are more significant, if employees are to be given information concerning the likelihood of their receiving benefits, particularly with the degree of accuracy customarily required by the securities laws, additional computations would have to be made so as to include factors based upon sex.

[12] There is still another respect in which even a perfectly correct statement about past experience concerning the percentage of persons who have received pension benefits can nevertheless be highly misleading if used uncritically to predict what should be anticipated by particular persons. The point is most easily made by the use of an oversimplified hypothetical example. Consider a plan with 20 employees, 10 of whom remain until retirement and 10 who leave after less than a year (perhaps reflecting seasonal employment or high turnover in jobs that require less skill) and who are continuously replaced by a different group of 10 employees who also leave in less than a year. After one year the observed experience is that one out of two employees terminate without retirement benefits. After two years, it is two out of three; after four years, four out of five; and after nine years, nine out of ten. It is evident that the percentage of participants who retire entitled to benefits becomes extremely low if the experience of many years is accumulated and that this ever decreasing percentage cannot sensibly be equated with the probability that one of the original 10 employees will receive benefits upon retirement. Moreover, the percentage applies only to this one plan; of course those who leave the plan may join other plans. The "eight percent or smaller chance" referred to by the District Court (page 3 *supra*) is an asserted probability that is subject to the same infirmities as the 10 or even lower percent probability of this hypothetical example.

Of equal significance, the assumptions that an actuary finds it necessary to use in determining pension costs will frequently not be sufficiently reliable to use as a basis for informing employees about the likelihood of the vesting of their plan benefits. This is because a good many of the assumptions cannot be based on the facts of past experience but rather must be based on judgment. Consider, for example, a new defined benefit plan being installed by a group of employers. The actuary employed to develop initial costs will probably have no satisfactory data with which to develop the past experience for such factors as the number of hours an employee is likely to work in the course of a year,[13] the mortality to be expected of the group, the investment return that can be expected by this plan, or the average age of retirement under the new plan. In these circumstances the actuary must rely on judgment and experience with programs in other comparable organizations. There is no alternative, since a determination must be made of what contribution should be made for that year. It would be foolhardy, however, to use these assumptions as a basis for offering advice to the effect that the employees as a group have, say, an X% likelihood of reaching retirement age and receiving benefits. Under an on-going plan with considerable past experience available to the actuary, some predictions can be made concerning the future experience of large groups of employees, but the past experience has diminished predictive value with respect to groups of new entrants who have never been exposed to the prior conditions involved in the member companies.

The actuarial assumptions which most directly affect the likelihood of surviving to retirement age and re-

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[13] Although experience data on hours of work is theoretically recoverable from the member companies, as a practical matter it usually is not economically feasible to collect and collate the data for the purpose of actuarial prediction.

ceiving benefits are the possibilities of death or disability before retirement, withdrawal by employees from service without vested rights, and failure to complete a sufficient number of credited hours within the framework of the particular plan's eligibility requirements to maintain credited service.[14] While the mortality and disability elements are fairly predictable underlying factors which an experienced actuary can judge with reasonable accuracy for a given group, the likelihood of the failure of an individual to meet hourly work requirements under multi-employer plan provisions depends upon such factors as the economic climate, the transferability of the employee's work skills, the employee's marital status and financial responsibilities, and, possibly, other factors as well. In addition, the hourly work requirements under the pension plan themselves change from time to time so that the past experience under a prior set of economic conditions and plan provisions may have little predictive value as to the experience that is to be expected under future economic conditions and plan provisions.

Despite the inherent unpredictability of some of the factors mentioned above, they are often used, because an annual determination of pension costs has to be made, and there is nothing better available. The errors that may result, however, are not irretrievable since a new determination is made annually, and a corrective process is thus continually at work.[15] It would be seriously misleading, however, to make disclosures of the kind suggested by the court below without including qualifications of such stringency as to strip the disclosure of any genuine value.

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[14] *See* McGILL *supra* note 4, at 312-14; ERISA § 202.

[15] This concept is recognized in ERISA in the sections which provide for the amortization of actuarial gains and losses over time. *See* ERISA §§ 302(b)(2)(B)(iv), 302(b)(3)(B)(ii).

B. Even If Wholly Accurate Data Were Available Concerning the Anticipated Experience of Plan Participants as a Group, that Data Would Not Justify Quantitative Predictions to Individual Employees

In the preceding part we sought to explain that the data utilized by actuaries, while quite satisfactory for the intended purposes of computing the actuarial obligations of a pension plan and determining plan costs, does not serve as a basis for making reliable predictions for the purpose of informing employees about the probabilities of their receipt of plan benefits. Actuaries are equally concerned about the misuse of data relating to the anticipated behavior of large groups—even if it is accurate to within very narrow limits—as a basis for conclusions concerning individual members of the group.

In all statistical work the tendency of data to converge to fairly definite limits, as the number of observations increases, serves as the theoretical basis for using statistical experience from the past as a predictor for the future. The law of large numbers, a fundamental principle upon which much of the work of the actuary rests,[16] can be paraphrased for the purposes of this case as follows: "If a sufficient number of observations is made of decisions to withdraw from an industry or company, retirements from service, or deaths before reaching benefit status, and if there is a pattern to these events with regard to the members of a group, then the actual experience results will approximate that pattern." There are two separate assumptions in this statement: (1) there exists for the given group some true underlying pattern of, say, early retirement or withdrawal from service which can be discovered; and (2) sufficient numbers of observations can be taken to permit the statistical results to approximate the underlying pattern as closely as desired.

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[16] WALLIS & ROBERTS, THE NATURE OF STATISTICS 148-49 (1962).

The first assumption may not hold in the case of pension plans such as the Local 705 pension plan involved in this action. With an ever-changing group of employees and participating companies and an economic climate shifting from transportation by railroad and water to truck and air, it is far from clear that one can expect a stable underlying pattern of employee decision-making that would persist into either the near or the distant future. The second requirement, that sufficient observations must be made in order to discern any underlying pattern that does exist, might well be met for a plan with as many participants as there are in the Teamster plan. But the end result, while highly useful for some purposes, becomes meaningless if the attempt is made to apply them to a particular employee.

To illustrate the theoretical difficulty, two examples may be helpful. Consider the group of all families in the United States population, of which 28 percent have either two or three children.[17] This figure does have relevance for the United States as a whole, and even for major sections of the United States, and can usefully be employed for a number of important purposes. However, it is manifestly not the sort of data on which a newly married couple should rely, say, in examining their insurance needs, because a detailed exploration of their individual situation and plans is feasible. By the same token, it could not be accurate to say of a particular couple that there is a 28 percent chance that they will have either two or three children, simply because the individual factors that will affect the outcome in any given case, both volitional and otherwise, make a statement that is correct when said of the group incorrect when said of an individual. It would assuredly not be helpful to inform a

[17] U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, Table No. 60, at 43 (1976 data).

couple that already has five children that they have a 28 percent likelihood of having two or three. And while it may not be quite as self-evident it would also be incorrect to advise a newly married couple that the probability that they will have two or three children is 28 percent, since they may already have made a firm decision to have either none or five.[18]

To take a second example, the collection of extensive data about the height and weight of individuals may permit the making of accurate statements about the group or even about unidentified individuals. Thus, on the basis of extensive observation, it may be possible to establish with complete accuracy the probability that a 20-year-old selected at random will weigh more than 165 pounds. The statistic, however, would convey no useful information about his or her own weight to any particular 20-year-old.

Similarly, a mortality table has only the most limited predictive value for a particular person because the very validity of the table is based upon a large number of lives. For example, the statement may be loosely made that the "life expectancy" of a 65-year-old male is about 14 years. That statement is a shorthand substitute for the more precise statement that it is highly probable that for a very large number of 65-year-old males that have not been selected in some special way (*e.g.*, a sample not confined to college graduates earning over $50,000 per year) the mean age of death will be 79.[19] A much better prediction can be made for any particular individual by

[18] *Id.* The census data shows that 28 percent of all families have either two or three children. The probability that a newly married couple will have either two or three children is higher since many couples without children when the data was collected will subsequently have children.

[19] *Id.*, Table 95, at 65 (showing 13.7 years for all males age 65) (1975 data).

considering his or her current state of health, economic status, access to health care for the past 20 years, the longevity of parents and grandparents, and a host of other factors. There may be occasions when life expectancy alone will be used in relation to a particular individual as, for example, when a lifetime annuity must be valued for tax purposes,[20] but this is done only because a policy decision has been made that the tax laws be enforced with minimum administrative cost, thereby permitting a valuation based on only one factor.[21]

Where an option is available, it is the better part of wisdom to resist the urge to put in numerical terms what is more accurately expressed in narrative. Particularly where a major cause of termination of employment without the right to pension benefits is employee withdrawal, only a narrative explanation can provide the balanced and accurate presentation that should be available. In short, we believe that it would be most unfortunate for the Congress or this Court to require actuaries to develop and present to individual employees quantitative information which their professional training teaches them will be incorrect, misunderstood, and of little or no value in assessing the likely future course of their working careers or the decisions they must make in connection with their employment.

II. THE "SALE" OF PENSION PLAN INTERESTS TO COVERED EMPLOYEES

The issue of whether interests in pension plans—if they are held to be securities—are acquired by employees as the result of a "sale" will be extensively briefed by the

[20] Treas. Reg. § 1.72-9, 26 C.F.R. § 1.72-9 (1977).

[21] This Court's decision in *Manhart, supra* note 3, was based in part upon the conclusion that the fact that women as a class live longer than men does not warrant drawing a distinction that imposes a heavier burden upon an individual woman than upon a similarly situated man.

parties. We limit ourselves, accordingly, to a discussion of a possibly relevant subordinate issue that may not engage the full attention of others. We suggest that if the interests are "sold" then the amount of the selling price should be ascertainable. Conversely, if the amount of the sales price is necessarily uncertain, this may conceivably affect the determination of the ultimate issue of whether there is a "sale" at all.

A. Defined Benefit Plans

We consider first the type of plan most commonly adopted by employers in the United States, a defined benefit plan covering the employees of a single employer or of a small number of affiliated employers.[22] An oversimplified example serves to illuminate the nature of the problems. Let us suppose that an employer with 1,000 employees establishes a pension plan that will provide benefits of $300 per month to each employee who retires at age 65. Of the 1,000 employees, 500 are age 20, 400 are age 40, and 100 are age 60. Further, let us assume that the actuary for this program decides to determine its cost by using only mortality and interest factors with no discount whatever for possible withdrawal from service, a highly conservative but by no means unheard of approach. At 6% interest the individual level costs would be approximately $121 per year for the employees age 20, $489 for those age 40, and $5,316 per year for the employees age 60. The total cost per year would thus be $787,700.[23] In practice the actuary advises the employer

[22] Appendix A to the brief of the Academy in *Manhart, supra* note 3, sets forth a thumbnail sketch of the principal types and features of the retirement plans adopted in this country.

[23] These individual level costs were computed by standard actuarial techniques using the UP-1984 Mortality Table and six percent interest. *See* Fellers & Jackson, *Non-Insured Pensioner Mortality, The UP-1984 Table*, 25 PROCEEDINGS, CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE 456 (1976) (this table is for combined populations of men and women, that is, it is a "unisex" table).

only that a contribution of $787,700 is appropriate. No allocation is made, on the plan books or otherwise, of portions of this contribution to individuals or groups of employees. These amounts reflect the fact that the mortality table would show that the probability of the 20-year-old employees surviving until 65 is 79%, that the probability is 81% for the 40-year-olds and 92% for those of 60.[24]

Suppose, on the other hand, that the actuary had decided to take into account the possibility of withdrawal from the group under a fairly high scale of withdrawal rates, commencing with an annual rate of 30% at age 20, 20% at age 25, 10% at 35, 4% at 45, and mortality only for those older than 55. Under this set of assumptions the annual cost would drop from $121 to $10 for those age 20 and from $489 to $420 for those age 40. The total cost would drop from $787,700 per year to $704,600. However, under this new set of assumptions the employees age 20 are regarded as having—for the purpose of determining the annual contribution—only a 2% chance of reaching age 65 in service (rather than 79%), the employees age 40 a 53% chance (rather than 81%), and the employees age 60 a 92% chance (unchanged).

It is noteworthy that the extreme variation in the probability of reaching retirement age between the two sets of assumptions results in a fairly minor variation in aggregate pension cost.[25] Moreover, if the actuary chose to assume no withdrawal but assumed a 7% rate of interest rather than 6%, the program cost would drop from

[24] Based on UP-1984 Table, *supra* note 23.

[25] These data serve to reinforce the point made in Part I(A), *supra* page 7, to the effect that different assumptions may each be perfectly acceptable for the purpose of determining contribution rates but cannot safely be used if estimates are to be made of the chances that benefits will be paid to a particular individual.

$787,700 per year to $680,300 per year.[26] Furthermore, if retirement were assumed to be optional at age 65 but in fact experience showed that most employees retired at age 67 rather than age 65, the $787,700 yearly cost could prudently be reduced sharply to $527,400.[27] The probability of surviving in service to receive a pension would, however, remain unchanged since employees reaching age 65 have the right to retire but would simply not be expected to do so until 67 on average.

What would be the purchase price of the "securities" acquired by each employee? It does not seem appropriate simply to divide $787,700 or $704,600 or $680,030 or $527,400 by 1,000 (if a sensible choice among the four can be made), since evidently a much higher portion of the unallocated annual contribution will be used to provide the benefits for the older employees. And even if age and withdrawal rates based on age are considered adequate for the purpose of determining the annual contribution, a second question is whether other factors such as sex, length of service, and nature of employment should be taken into account if it becomes necessary to determine how much each individual employee has "paid" for his or her interest in the plan. It should also be noted that this computation would have to be made annually, and that some of the factors that are regarded as significant will probably change from year to year.

We do not suggest that an essential element of every "sale" must be the existence of an ascertainable and precise sales price. The securities laws do, however, contemplate that under certain circumstances a party to a sale may have the right to rescind it. In such case there is a right to get back what is given. Moreover, as a

[26] Application of standard actuarial techniques using the UP-1984 Table and seven percent interest. *See* note 23 *supra*.

[27] *See* note 23 *supra*.

matter of general contract law, when determining whether a "sale" has taken place, a court may sometimes countenance a missing or imprecise price provision, but will find that there is no contract and therefore no sale if there is no reasonable basis upon which the parties may establish the price to be paid or received.[28] In one of the examples given above, where the employer contributed $5,316 for a 60-year-old employee and $10 for a 20-year-old employee, are these the amounts regarded as having been "paid" by those employees into the fund held for the payment of benefits, or would it be more correct to use one of the other amounts that can as readily be chosen? It may be—accepting the conclusion that pension benefits are a significant part of the employees' "compensation"—that a better

[28] *See* 1 A. CORBIN, CONTRACTS § 97 (1963), 1 S. WILLISTON, CONTRACTS § 41 (1957), and 1 S. WILLISTON, SALES §§ 9-1 and 9-2 (4th ed. A. Squillante & J. Fonseca 1973). A contract of sale may be found to have been made where the price can be reasonably determined. *See, e.g., Henderson Bridge Co.* v. *McGrath*, 134 U.S. 260, 269-70, 275-76 (1890) (jury could ascertain the reasonable worth of construction of railroad piling, where proof on the worth was offered and other piling had been built and paid for), and *United States* v. *Swift & Co.*, 270 U.S. 124, 139-41 (1926) (price of monthly shipments of bacon could be left for determination according to costs incurred during the month). But where there is no reasonable basis for constructing a price term, there is no contract. *See, e.g., Red Wing Shoe Co.* v. *Shepherd Safety Shoe Corp.*, 164 F.2d 415, 416, 418 (7th Cir. 1947), where an agreement for an exclusive agency in shoes was held to be unenforceable, because the provision establishing the price by reference to manufacturing cost did not "explain how the costs and profits were to be broken down to establish the actual gross price from which the net to Shepherd was to be fixed for each item ordered by it." *See also* U.C.C. §§ 2-204(3), 2-305 and accompanying commentary.

In addition, with respect specifically to investment securities, U.C.C. § 8-301 accords rights to a "purchaser" upon "delivery," which requires the "transfer of possession" of the security. U.C.C. § 1-201(14), (32). A pension plan participation hardly fits naturally into this framework. It could be responded that the "security" acquired through participation in a pension plan is an "investment contract" but that it is not an "investment security," but this further illustrates the artificiality of applying these concepts in his area.

answer is that the Congress did not have transactions of this kind in mind when it used the term "sale" in the federal securities laws.

B. Multi-Employer Plans

The determination of the annual contributions that must be made by each employer that participates in a multi-employer plan proceeds somewhat differently. It is customary in the negotiation of pension benefits, and of other employee benefit plans as well, for the parties in collective bargaining to make a part of the discussions possible improvements in benefits together with the total cost required to support those improvements. In some cases the total cost of the improvements ultimately agreed upon is developed for the entire group and converted, for convenience in bargaining and in determining required contributions to the plan, into a cents-per-person-hour cost. Alternatively, the parties may bargain for an increase in wages and then decide how much should be in the form of increased wages and how much contributed for funding retirement benefits. The actuary will then determine what improvements can be made in the plan benefits.

Thus, for example, in the case of the illustrated pension plan covering 1,000 employees with a cost of $787,700 per year, the cents-per-person-hour based on a 40-hour work week and 52-week year would be 37.9. This is not to say, however, that each individual employee would have an expectation of a benefit that results from a contribution in that amount or that each of them would have received that amount in wages had the parties agreed not to have any retirement plan. Indeed, the individual factors used by the actuary in developing the cents-per-hour-cost might have produced an estimate of the cost for the employees at age 20 that was only about 2% of the cost for the employees at age 60 and a cost for the employees

at age 40 that was only about 9% of the age 60 cost.[29] Despite these discrepancies, total pension costs can clearly be determined for the group as a whole, and in the bargaining the various parties can agree to devote a certain number of cents-per-hour worked to the support of the entire pension program. The point is that such an amount cannot fairly be said to be related in any way to the benefit that any one particular employee will ultimately receive.[30]

Moreover, while the device of converting a total pension cost into cents-per-hour has the advantage of increasing employer contribution requirements as new employees are added to the group and decreasing them as employees leave, it is by no means the only device that can be adopted. The well known mine workers plan provides for payment of a stated royalty per ton of coal, for example, which by reason of automation in the industry is worth far more than a cents-per-hour contribution would have been. Since several operations are required to mine a ton of coal it is difficult if not impossible to say how many cents per hour are being paid for any particular employee. Other plans exist where contributions are not stated in cents-per-hour. For example, there is a master barber pension program with employer contributions expressed in terms of so many dollars per week per barber chair in the establishment. Thus the identical problem is presented under multi-employer plans as is presented under single employer defined benefits plans: Is it possible to say within any reasonable limits how much has been paid by each employee in return for the acquisition of an

[29] *See* page 15 *supra*.

[30] Nor are the benefits involved necessarily narrowly defined. Some younger employees may gain indirectly from higher pension contribution resulting from the presence of older persons in the work force, since retirements open up job opportunities, so that the availability and attractiveness of retirement to older workers can increase both the opportunity for advancement and job security for younger workers.

interest in the pension plan? As suggested above, it is possible to characterize what happens when a pension plan is established or modified as the occurrence of a number of transactions in which the promised benefits are "purchased" by each employee in return for a portion of his labor; then an arbitrary selection can be made of one of several acceptable amounts that each particular employee can be said to have paid for each year's interest in the plan. A far less tortured description, however, and one that we regard as more accurate, would be to say that part of each employee's compensation takes the form of a retirement benefit that will be payable if certain conditions are satisfied, in an amount computed in accordance with a stated formula, and that the cost of those benefits will be borne by the employer or employers without any allocation of that cost among the individual employees.

CONCLUSION

For a number of reasons, then, the belief of the courts below that a new employee could be readily furnished with a statement of the "actuarial probability" that the employee would actually receive retirement benefits is seriously in error. When making the necessary determination of the amounts that should be contributed toward the provision of pension benefits, actuaries do frequently consider the likelihood that eligible employees will not actually receive benefits. But their estimates, while wholly satisfactory for the purpose for which they are made, are not adequate for making the kind of predictions that the courts below thought possible. The data is sufficiently accurate for cost determination purposes, particularly since an annual corrective process is at work, but insufficient for the purpose of informing employees about their own prospects. Some relevant factors may safely be ignored for the first purpose—and commonly are—but not for the second. Also, it is commonplace to make conserva-

tive estimates when making cost determinations, but that may not be satisfactory if advice to employees is being given. Finally, and perhaps most importantly, actuarial data that is sound when applied to large groups cannot be relied upon by particular individuals who want to know something of their own futures.

We are in complete agreement with the view that full disclosure to participants about the salient features of their plans, and particularly about the factors that may affect the ultimate receipt of benefits, is both highly desirable and feasible. What we assert is that to provide quantitative estimates of the probability of receiving benefits would involve effort and expense altogether incommensurate with the value of the inherently unreliable conclusions that could be drawn. In the final analysis, each individual, given the kind of information provided by the summary plan description required by Sections 102 (a)(1) and 104(b)(1) of ERISA and by 29 CFR § 2520.102-3(j)(1) and (n), can best evaluate for himself or herself the likelihood of receiving benefits.

This Court should render its decision free from the misapprehensions of the courts below as to the availability and usefulness of the actuarial data that they believed would be provided to participants through the application of the federal securities laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

JOHN DANIEL, *Respondent.*

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners,*

v.

JOHN DANIEL, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

and

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

[Counsel Listed Inside Cover]

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America [hereinafter the Chamber], pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief as *amicus curiae* in support of the petition to reverse the decision of the United States Court of Appeals for the Seventh Circuit. The motion is necessitated by respondent's refusal to consent to the filing of the appended brief.[1]

The Chamber is the major national federation of business and professional organizations, both large and small, with a total membership in excess of 73,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and businesswomen throughout the United States. Over 69,000 corporations, partnerships, proprietorships and professional people are members of the Chamber; 83 percent of the members are small businesses with 100 or fewer employees. Many of the Chamber's members sponsor or participate in mandatory, non-contributory pension plans—the type of plan directly affected by the decision of the courts below.

In addition, the Chamber itself, for its employees, sponsors a mandatory, non-contributory pension plan qualified pursuant to 26 U.S.C. § 401 (1967) and subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* (1975).

The Chamber regularly represents its members' interests in matters before the courts, the United States Congress, the Executive Branch and Federal regulatory agencies. Such representation constitutes a sig-

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[1] Petitioners have consented pursuant to Supreme Court Rule 42.

nificant aspect of the Chamber's activities and includes participation as *amicus curiae* in numerous cases before this Court.[2]

The issue presented in this case is the applicability of the anti-fraud provisions of the Federal securities laws[3] to employee interests in mandatory, non-contributory pension plans. It has a direct and immediate impact upon the Chamber and its members. The decision below that such an interest is a "security" which is "sold" each and every work day to millions of employees, and thus subject to the Federal securities law, imposes substantial additional compliance obligations upon employers, plan administrators, trustees, and other fiduciaries who are already burdened by the comprehensive requirements of ERISA.

Furthermore, affirmance of the decision of the court below would invite state authorities to re-evaluate the status of pension plans under local securities laws and would likely result in significant additional burdens to many employers.

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[2] *E.g., United States* v. *United States Gypsum Co.*, No. 76-1560; *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (1978); *New York Telephone Co.* v. *New York*, No. 77-961; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 268 (1974); *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975).

In the area of securities law, the Chamber has participated in *Natural Resources Defense Council, Inc.* v. *Securities and Exchange Commission, appeal docketed*, No. 77-1761 (D.C. Cir. Aug. 22, 1977).

[3] Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1971); SEC Rule 10b-5, 17 C.F.R. 240.10b-5 (1977); Securities Act of 1933, § 17(a), 15 U.S.C. § 77(g) (1971).

It is the position of the Chamber that these burdens, devoid of any meaningful corresponding benefits to employees, would weigh especially heavily upon small businesses which would have to incur the additional costs which securities law compliance imposes. Neither the petitioners nor the other *amici curiae* can bring to this Court the unique perspective of small employers who sponsor mandatory, non-contributory pension plans.

For these reasons, it is respectfully requested that the motion of the Chamber for leave to file this brief as *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF AMICUS

The Chamber respectfully refers to its Motion for Leave to File Brief as Amicus Curiae in Support of Petitioners, to which this Brief is appended, as a statement of its interest in the above-captioned matter.

ARGUMENT

Undergirding the decisions of the courts below that a mandatory, non-contributory pension plan is a "security" or "investment contract" subject to the anti-fraud provisions, but not the registration and reporting provisions, of the Federal securities laws is the belief articulated by the Court of Appeals that "[t]he type of fraud allegedly perpetrated . . . is among those the securities laws were passed to prevent and remedy." 561 F.2d at 1242.

In order to reach this conclusion, respondent and the lower courts here, of necessity, engaged in a laboriously tortured reading of the purpose and scope of the securities laws, contradicting the views of sister courts which have addressed this same issue. *Hurn* v. *Retirement Fund Trust of Plumbing, Heating and Piping Industry,* 424 F. Supp. 80 (D.C. Cal. 1976); *Wiens* v. *Int'l Brotherhood of Teamsters,* Fed. Sec. L. Rep. (CCH) ¶96,005 (C.D. Cal. March 28, 1977); *see also, Robinson* v. *UMW Health & Retirement Funds,* 435 F. Supp. 245 (D.D.C. 1977); *but see, Schlansky* v. *United Merchants & Manufacturers, Inc.,* 443 F. Supp. 1054 (S.D.N.Y. 1977). Judge Tone, in his concurring opinion, deftly understated the degree to which the opinions below tax the whole area of pension plan administration when he stated that, "[t]he series of transactions by which Daniel acquired his interest or expectancy, such as it was, *do not fit neatly* into the traditional concept of a sale of a security." 561 F.2d at 1251. [Emphasis added.]

Furthermore, in reaching their conclusion, the courts below essentially ignored the onerous implications of their decisions by stating, again in the words of the Court of Appeals, that "[t]here should be no undue

burden caused by . . . the anti-fraud provisions . . . because all the material information will be readily available to the plan trustees since their actuaries needed all of the information to set up the plan in the first place." 561 F.2d at 1250.

The Chamber, as *amicus curiae,* respectfully suggests that the decisions of the courts below are fundamentally in error. First the pragmatic "economic reality" test enunciated in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 852 (1975), compels a finding that a mandatory, non-contributory pension plan is neither a "security" nor an "investment contract," nor does a "sale" take place each time a plan participant either takes a job in the first instance or decides each day thereafter to go to work.[4]

Second, the introduction of securities laws concepts to a foreign environment, namely, the relationship between and among (1) mandatory, non-contributory pension plans, (2) plan sponsors, administrators, trustees and other fiduciaries, and (3) plan participants and beneficiaries does not, as a matter of policy, yield sufficient benefit to employees to warrant the substantial cost to employers and plan administrators.

The first issue—that an interest in a pension plan is not a "security"—is being fully argued by the parties to this litigation. As a result, the Chamber will

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[4] That a mandatory, non-contributory pension plan does not "fit neatly" into the conceptual framework of the "sale" of a "security" is further demonstrated by this Court's discussion in *Alabama Power Co.* v. *Davis,* 431 U.S. 581 (1977):

> It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment. 431 U.S. at 593.

concentrate upon the ramifications of the opinions below in the context of a cost-benefit analysis. This analysis leads the Chamber to conclude that the importation of the securities laws into an alien environment, already dominated by ERISA, is unsound and unnecessary.

I. EXPANSION OF THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS TO THE PENSION PLAN AREA IS UNWARRANTED FROM ANY COST-BENEFIT ANALYSIS.

From a policy perspective, the Chamber considers it necessary to inquire whether novel and clearly strained interpretations of the securities laws below afford potential plaintiffs benefits which warrant the substantial costs of such interpretations. It is the judgment of the Chamber that they do not. Accordingly, the practical effect of the decision below could well be that a further deterrent to the creation or continuation of pension plans has been established without any compensating enlargement of employees' rights.[5]

A. Other Remedies Ave Available to Respondent and Other Plan Participants.

The Chamber does not understand that Daniel's remedy for any alleged wrong depends exclusively upon the outcome of this appeal. Breaches of fiduciary

[5] The administrative burdens imposed by ERISA have already contributed in substantial measure to terminations of pension plans, especially plans established by small businesses. A recent Congressional survey of selected businesses which reported termination of pension plans during the period from June 1976 through April 1977 found that ERISA had a "substantial" effect on the decisions to terminate in more than 66 percent of the cases. Over 90 percent of those surveyed had 50 or fewer employees. Staff of the House Comm. on Small Business, 95th Cong., 1st Sess., ERISA Questionnaire Results (Comm. Print 1977).

duty are actionable, as well as is common law fraud. Daniel himself recognized this in the pendent claims included in his complaint. *See* 410 F. Supp. at 543.

In addition, ERISA established a comprehensive program for the regulation of pension programs. So pervasive is that program that it is doubtful that Congress contemplated that the affirmative obligations of the anti-fraud provisions of Section 10b and Rule 10b-5 were to be added to it.[6] Indeed, ERISA mandates substantial disclosure of the provisions of pension plans to participants and beneficiaries. These disclosure requirements may not be co-extensive with, but approach anti-fraud disclosure requirements,[7] as the Securities

[6] Indicative of this judgment is legislation recently introduced which would have the effect of "overruling . . . the Daniel decision." 124 Cong. Rec. S.6585 (daily ed. May 1, 1978) (remarks of Sen. Javits).

As described in the section-by-section analysis accompanying the legislative text, section 274 of S. 3017, the "ERISA Improvements Act of 1978", provides:

> . . . that ERISA supercedes Federal and State securities laws to the extent that such laws might be applied to the interest of an employee in an employee benefit plan. This change makes it clear that the interest of an employee in an employee benefit plan described in section 4(a) and not exempt under section 4(b) of ERISA is not a security within the meaning of Federal or State securities laws unless such plan is an eligible individual account plan in which participation is voluntary. *Id.* at S.6600.

[7] ERISA § 104(b)(1), 29 U.S.C. 1024(b)(1) (1975), for example, requires that a copy of the pension plan and a summary plan description be distributed to each participant and beneficiary within 90 days after the individual becomes a participant or beneficiary. ERISA § 102(a)(1), 29 U.S.C. 1022(a)(1) (1975), requires that the summary "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Similarly, § 104(b)(2), 29 U.S.C. 1024(b)(2) (1975),

and Exchange Commission (SEC) itself has conceded. Oversight of ERISA, 1977: Hearings before the Subcommittee on Labor of the Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. (1977) 115 (testimony of Harold M. Williams, Chairman, SEC) (hereinafter cited as Senate Oversight Hearings.)

In view of the pervasiveness of the ERISA scheme and of recent interpretations limiting the scope of Section 10b in the securities area,[8] there seems to be

---

requires that "copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments" be made available for examination upon request by any participant or beneficiary. In addition, ERISA § 105(a), 29 U.S.C. 1025(a) (1975), requires that participants and beneficiaries who so request be provided an accounting of:

"(1) the benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

[8] For interpretations of the requirement of scienter see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977). For discussions of the requirement that the act or omission complained of be material see *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). For limitations on the class of plaintiff who can resort to Section 10b, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

It seems clear that these requirements would have to be met in a pension plan context. The following is a colloquy between Senator Harrison Williams, Chairman of the Committee on Human Resources, and SEC Chairman Williams:

> *Senator Williams.* If at the time of employment there was a full description of the plan in the mind of the individual describing the plan, and a detail were unintentionally left out, I would imagine then that later on if an action were brought claiming fraud, the burden of proof would be on the individual to prove that it was intentionally left out of the description.
>
> *Mr. Williams.* If I can take you literally that there was a detail omitted, I question whether the omission would be substantive enough to be a pivotal item. Apart from that, it would be a matter of whether the omission was substantive, whether there was scienter, whether the omission was either deliberate or grossly negligent, and whether, in fact, it was the type of information—or lack of information—that the employee can show he relied on. (Senate Oversight Hearings at 115.)

[9] Since the Summary Plan Description must contain a statement of the applicable break-in-service rules, 29 C.F.R. § 2520.102-3(n) (1977), it would be unlikely that the instant case could arise post-ERISA. As the Court of Appeals below itself noted with respect to causation:

> . . . if the plan documents sent to a plan beneficiary understandably disclose [the break-in-service rules], a retiree who does not meet the vesting requirements will have no remedy under the securities acts, *even if he subjectively did not comprehend the disclosed information*. 561 F.2d 1251. [Emphasis added.]

little public policy support for the extension of the anti-fraud provisions sought here by respondent.[9]

B. The Affirmative Obligations of the Anti-Fraud Provisions Which Would Be Imposed Upon Plan Sponsors, Administrators, Trustees and Fiduciaries Are Substantial.

Under the decisions below, an entire body of law, intended to function in the world of issuers, underwriters and investors, would be moved into the field of pension plan administration, already regulated by ERISA. The move is full of peril for even the most cautious plan sponsors, trustees, administrators and fiduciaries. It has been reported that one study, prepared for the Department of Labor, has assessed that potential liability to be in a range between $3.5 billion and $49.6 billion. BNA, Washington Financial Reports, p. A-19 (May 1, 1978).

The implications of such a move cannot be described with precision. What follows, therefore, can at best be

a partial assessment of the difficulties which can be anticipated.

1. The lack of precise guidelines.

A major problem is that even in the environment of securities regulation, the exact requirements of Section 10b and Rule 10b-5 are unclear.[10] There is already the suggestion that even less precision can be expected by their application to a new area. For example, the SEC itself has taken the position, with respect to the application of the anti-fraud provisions to pension plans, that "[t]here is, and can be, no definite list of items which must be disclosed under the antifraud provisions." Memorandum of SEC General Counsel's Office, Senate Oversight Hearings at 124. This same memorandum concludes that, "the efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required." *Id.* at 125.

Clearly, something beyond ERISA-type disclosures seems to be contemplated. While emphasizing the value of ERISA disclosures in the context of anti-fraud compliance, Chairman Williams of the SEC has stated that ERISA disclosure is not identical to SEC disclosures applicable to pension plans:

> It [compliance with the anti-fraud provisions] is not merely disclosure. What it says is that those responsible for pension funds—not merely administrators, but employers as well—will not make representations or it will not engage in failure to make misrepresentations, where the effect is to defraud the plan participant.
>
> Senate Oversight Hearings at 114.

[10] See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 1180 (1963).

Chairman Williams then concluded with respect to the guidelines for plan sponsors and administrators:

> I think they are very simple. Do not intentionally mislead your employees in a way that would serve *as any inducement* relative to a pension plan or retirement plan.
>
> *Id.* at 115 [Emphasis added.].

Far from being guidelines, these meaningless nostrums only enhance the prospect of litigation. The following discussion attempts to give some idea of the dimensions of future problems.

The court below would require that the actuarial probability that a plan participant will become a plan beneficiary be stated in a "manner comprehensible to the average worker." 561 F. 2d at 1251. To do so would also require that the assumptions upon which the actuarial probability is based be provided, since, otherwise, the plan participant could complain that a proper assessment of the actuarial report is not possible. The translation of such highly technical data into what, by judicial hindsight, is "comprehensible to the average worker" is difficult enough in the absence of guidelines; it is unknown whether compliance is possible at all since the information may not be available.[11] It seems

[11] With respect to the availability of such actuarial information, one study, prepared for the Dept. of Labor, has recently been reported to have reached the following conclusions:

> Disagreeing with the statement in the opinion of the seventh circuit appeals court that the type of disclosure contemplated by the antifraud provisions, including the actuarial probability that an employee would actually receive benefits, would not be unduly burdensome, the study says that in fact the information necessary to make such calculations is available for only a "handful of plans" and could not be developed in a statistically valid manner, even if cost was not a factor. Statements

anomalous that this requirement of furnishing an actuarial probability is brought in via an application of the securities laws when it was excluded by Congress from ERISA's comprehensive reporting requirements.

The illustration demonstrates that the courts below missed the fundamental point underlying the argument of the burdens imposed by its decision when the Court of Appeals concluded that, "the anti-fraud provisions do not establish an affirmative disclosure system requiring the filing of documents." 561 F. 2d at 1247. To be sure, the anti-fraud provisions are "a generally self-executing prohibition against fraudulent activity." *Ibid.* But this does not mean that the anti-fraud provisions impose no affirmative obligations upon those who administer the plan. Indeed, the anti-fraud provisions raise two substantial practical questions: First, what constitutes a material fact? Second, what safeguards must be undertaken to ensure against omissions or misrepresentations that might later be asserted as fraudulent?

In the context of pension plan administration, the issue of materiality will certainly be different than that which has been applied in securities cases. To guard against omission of a "material" fact, pension plan sponsors, administrators, trustees and fiduciaries would have to consider factors which workers would

---

to employees about their individual probabilities of receiving benefits would probably be misleading because of the virtual impossibility of providing accurate information and there is doubt that any disclosure in addition to that required by ERISA would provide assistance to employees, the study says. BNA, Washington, Financial Reports, p. A-10 (May 1, 1978).

themselves take into account in deciding whether to seek alternative employment.[12]

Using the criterion that decisions to seek alternative employment are investment decisions, the very health of the business enterprise itself *may* be deemed material to that decision by some future court, since all contributions to the plan are made by the employer. Surely, if an individual were aware that the industry or business were declining, this might influence his decision to seek or retain employment.[13] Consequently, *amicus* respectfully suggests that, for the small and medium-sized employer whose stock is exempt from registration under one or more of the provisions of the securities laws, compliance with the anti-fraud requirements in the context of pension plan administration may impose substantial obligations to which such employers are totally unaccustomed and—by statute and rule—which they are not otherwise required to bear. Similarly, non-stock enterprises would be required to familiarize themselves with a totally new area of regulation.

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[12] It is clear from the affidavit submitted by respondent to the District Court that he is well aware of the applicable definition of materiality. The Court of Appeals below recounted that, according to the affidavit, the Local 705 pension plan was a "material factor in his [Daniel's] continuing employment with Local 705 covered employees," and, had Daniel known of the break-in-service rule, "he would have sought employment elsewhere." 561 F.2d at 1227.

[13] As the Second Circuit has noted: "[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the *probable future* of the company and those which affect the *desire of investors to buy, sell, or hold the company's securities.*" *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 849 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). [Emphasis added.]

An example of the difficulty of the "materiality" test when applied outside of the securities area is afforded when a company is entertaining the thought of re-locating a plant site. The exploration of such a move normally would not be relevant in a securities context. However, it might be material to a worker who is, in the opinion of the court below, making a daily investment decision whether to accept alternative employment opportunities.

A second issue is that of the safeguards which potential defendants would have to adopt. Several courses might have to be followed that would result in detriment to sound employer-employee relations. This Court has evidenced its disinclination to throw open to the trier of fact many hazy issues of historical fact the proof of which depended almost entirely upon oral testimony. *Blue Chip Stamps, supra,* at 743. In the context of this case, if Section 10b liability were possible, then each and every time a plan sponsor, administrator, trustee or fiduciary, or their agents, discussed the terms and conditions of a mandatory, non-contributory plan, each such discussion would be subject to misunderstanding and provide a possible basis for litigation. Unlike the traditional securities market, where communications are habitually memorialized, except for those documents which ERISA mandates be provided plan participants and beneficiaries, most communications concerning plan terms and particularly plan benefits are oral. As a result, litigation may very often resolve itself into nothing more than "swearing contests" which demonstrate the inherent untrustworthiness of oral communications.

Alternatively and in order to avoid litigation, communications to employees may become restricted to formal writings, adopted from models used in submissions to sophisticated investors. This very likely course is antithetical to sound concepts of employee relations.

2. Possible liability under state law.

If an interest in a mandatory, non-contributory plan is an "investment contract" for Federal securities law purposes, it probably will be deemed to be an "investment contract" for state law purposes, and thus a security under the blue sky laws of most states.[14]

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[14] The following states define security to include an "investment contract:" Alabama, *Ala. Code* tit. 53 § 36(j) (Interim Supp. 1975); Alaska, *Alaska Stat.* § 45.55.130(12) (1962); Arizona, *Ariz. Rev. Stat.* § 44-1801(13) (1967); Arkansas, *Ark. Stat. Ann.* § 67-1247 (1) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-12(13) (1964); Connecticut, *Conn. Gen. Stat.* § 36-321(b) (1969); Florida, *Fla. Stat.* § 517.02(1) (1972); Georgia, *Ga. Code Ann.* § 97-102 (1976); Hawaii, *Haw. Rev. Stat.* tit. 26 § 485-1(12) (1976); Idaho, *Idaho Code* § 30-1402(12) (1967); Illinois, *Ill. Rev. Stat.* ch. 121½ § 137.2-1 (Cum. Supp. 1978); Indiana, *Ind. Code* § 23-2-1-1(k) (1972); Iowa, *Iowa Code* § 502.102,12 (Cum. Supp. 1977-78); Kansas, *Kans. Stat.* § 17-1252(j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.310(11) (1971); Louisiana, *La. Rev. Stat. Ann.* § 51:701(1) (West Cum. Supp. 1978); Maryland, *Md. Corp. & Ass'ns Code Ann.* § 11-101(0) (1975); Minnesota, *Minn. Stat.* § 80A.14 (q) (Cum. Supp. 1978); Mississippi, *Miss. Code Ann.* § 75-71-5(c) (1973); Missouri, *Mo. Rev. Stat.* § 409.401(k)(1) (Cum. Supp. 1978); Montana, *Mont. Rev. Codes Ann.* § 15-2004(11) (1967); Nebraska, *Neb. Rev. Stat.* § 8-1101(12) (1974); Nevada, *Nev. Rev. Stat.* § 90.090(1), (2) (1973); New Jersey, *N.J. Rev. Stat.* § 49:3-49(m) (1970); North Carolina, *N.C. Gen. Stat.* § 78-A-2(11) (1975); Oklahoma, *Okla. Stat.* tit. 71 § 2(1) (1965); Oregon, *Or. Rev. Stat.* § 59.015(13) (1971); South Carolina, *S.C. Code* § 35-1-20(12) (1976); South Dakota, *S.D. Compiled Laws Ann.* § 47-31-1(4) (Supp. 1977); Texas, *Tex. Stat. Ann.* tit. 19 § 581-4A (Vernon 1964); Utah, *Utah Code Ann.* § 61-1-13(12) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.005(12) (Supp. 1976); West Virginia, *W. Va. Code* § 32-4-401(1) (1975); Wisconsin, *Wis. Stat. Ann.* § 551.02(13) (West 1977); Wyoming, *Wyo. Stat.* § 17-117.13(k) (1957).

Some states provide an exemption for securities issued in connection with an employee benefit plan.[15] Even if this exemption is applicable, however, its availability is usually conditioned upon written notice to the appropriate state official a certain number of days before the inception of the plan.[16] Until recently it has

[15] Alabama, *Ala. Code* tit. 53 § 37(j) (Cum. Supp. 1973); Alaska, *Alaska Stat.* § 45.55.140(a)(5) (1962); Arkansas, *Ark. Stat. Ann.* § 67-1248(a)(10) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-13(k) (1964); Connecticut, *Conn. Gen. Stat.* § 36-322(a)(6)(D) (1969); District of Columbia, *D.C. Code* § 2-2401(e)5 (1973); Florida, *Fla. Stat.* § 517.06(5) (1972); Georgia, *Ga. Code Ann.* § 97-109(i)(2) (1976); Hawaii, *Haw. Rev. Stat.* tit. 26 § 485-4(11) (1976); Illinois, *Ill. Rev. Stat.* ch. 121½ § 137.30(1) (Cum. Supp. 1978); Indiana, *Ind. Code* § 23-2-1-2(a)(8) (1972); Iowa, *Iowa Code* § 502.202, 11 (Cum. Supp. 1977-78); Kansas, *Kans. Stat.* § 17-1261 (j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.400(11) (1971); Louisiana, *La. Rev. Stat. Ann.* § 51:704(12) (West Cum. Supp. 1978); Maryland, *Md. Corp. & Ass'ns Code Ann.* § 11-601(11) (1975); Minnesota, *Minn. Stat.* § 80A.15 (Subd. 1)(h) (Cum. Supp. 1978); Missouri, *Mo. Rev. Stat.* § 409.402(a)(11) (Cum. Supp. 1978); Montana, *Mont. Rev. Codes Ann.* § 15-2013(11) (1967); Nebraska, *Neb. Rev. Stat.* § 8-1110(10) (1974); New Jersey, *N.J. Rev. Stat.* § 49:3-50(a)(11) (1970); New Mexico, *N.M. Stat. Ann.* § 48-18-21(I) (1966); Oklahoma, *Okla. Stat.* tit. 71, § 401(a)(11) (1965); Pennsylvania, *Pa. Stat. Ann.* tit. 70 § 1-202(g) (Purdon Cum. Supp. 1977-78); South Carolina, *S.C. Code* § 35-1-310(10) (1976); South Dakota, *S.D. Compiled Laws Ann.* § 47-31-81 (Supp. 1967); Texas, *Tex. Stat. Ann.* tit. 19 § 581-5H (Vernon 1964); Utah, *Utah Code Ann.* § 61-1-14(1)(j) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.310(10) (Supp. 1976); West Virginia, *W. Va. Code Ann.* § 32-4-402(a)(11) (Michie 1975); Wisconsin, *Wis. Stat. Ann.* § 551.22(10) (West 1977); Wyoming, *Wyo. Stat.* § 17-117.14(a)(10) (1957). *See also Uniform Securities Act* § 402(a)(11).

[16] *See e.g.*, Alaska, *Alaska Stat.* § 45.55.140(a)(5) (1962); Arkansas, *Ark. Stat. Ann.* § 67-1248(a)(10) (1966); Colorado, *Colo. Rev. Stat.* § 125-1-13(K) (1964); Delaware, *Del. Code Ann.* tit. 6, § 7309(a)(11) (1975); Hawaii, *Haw. Rev. Stat.* tit. 26, § 485-4(11) (1976); Kansas, *Kans. Stat.* § 17-1261(j) (1974); Kentucky, *Ky. Rev. Stat.* § 292.400(11) (1971); Maryland, *Md. Corp. & Ass'ns*

not been seriously contended that interests in mandatory, non-contributory employee benefit plans are securities.[17] Accordingly, it seems highly unlikely that either employers or plan trustees would have provided the required notice.[18] All interests issued without the requisite notice would have been issued in violation of the applicable blue sky laws and consequently the plan trustees could be exposed to substantial liability, over and above the potential liabilities considered by Congress when it enacted ERISA.[19]

Code Ann. § 11-601(11) (1975); Missouri, *Mo. Rev. Stat.* § 409.402(a)(11) (Cum. Supp. 1978); Utah, *Utah Code Ann.* § 61-1-14(1)(J) (1953); Washington, *Wash. Rev. Code Ann.* § 21.20.310(10) (Supp. 1976); West Virginia, *W.Va. Code Ann.* § 32-4-402(a)(11) (1975); Wisconsin, *Wisc. Stat. Ann.* § 551.22(10) (West 1977); Wyoming, *Wyo. Stat.* § 17-117 14(a)(10) (1957). *See also Uniform Securities Act* § 402(a)(11).

[17] This fact greatly troubled Judge Tone, who, in his concurring opinion below, stated:

> Apparently for the first time ever, [the SEC] now takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws. The Commission has not been as candid as we might have hoped in acknowledging and explaining its change in position. As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan might well be an investment contract, the element of sale was lacking. *Before that, not even the existence of a security was acknowledged* . . . . [Emphasis added].

561 F.2d at 1251 (footnotes omitted).

[18] *See generally*, General Subcommittee on *Daniel, et al.* v. *International Brotherhood of Teamsters*, A Report to the Committee on Federal Regulation of Securities from the Study Group of 1933 Act, 32 *Bus. Law.* 1925, 1927 (1977).

[19] ERISA section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1975), provides, in pertinent part, that ". . . nothing in this title shall be construed to exempt or relieve any person from any law

Furthermore, several states do not exempt interests in mandatory, non-contributory pension plans from the blue sky law registration requirements.[20] In those states, the employer or plan trustee would be saddled with the burdens of compliance with the state blue sky laws which, in most if not all instances, are not designed to provide protection to employees acquiring interests in such plans.

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of any State which regulates . . . securities." Thus, this ambiguous exception from the all-pervasive pre-exemption provision contained in § 514(a) of ERISA, 29 U.S.C. § 1144(a) (1975), if read *in pari materia* with the decisions below, could be construed as support for state regulation of the kind discussed here. ***But cf.***, the discussion of pending bill S. 3017, *supra* at n. 6.

[20] Arizona, Mississippi, Nevada.

CONCLUSION

The judgment of the court below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITIONERS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 42 of the Rules of this Court, for

leave to file the attached brief as *amicus curiae* in support of the petitioners, urging reversal of the decision by the United States Court of Appeals for the Seventh Circuit. The Association has sought the consents of the parties to the filing of this brief; the petitioners have granted their consent, but the respondent has not.

The decision below held for the first time that for purposes of the antifraud provisions of the federal securities laws, an employee's right to receive retirement benefits from a pension plan to which he does not contribute is a "security" which the employee "purchases" through becoming and remaining employed.

Interest of the American Bankers Association

The American Bankers Association consists of approximately 13,500 banks and trust companies, or 93% of the commercial banks in the United States. Banks in the Association hold or manage the assets of more than 120,000 employee benefit plans, aggregating nearly $90 billion. Association members also maintain employee benefit plans for their own one million employees.

The parties typically involved in a pension plan are (1) the employees covered by the plan, who may be represented by a union; (2) their employer; (3) the individuals who administer the plan; and (4) the institution that holds and manages the plan's assets. No bank or other professional fiduciary is a party to this action, although banks manage most of the assets of the Local 705 Pension Trust fund involved here,[1] and banks

[1] Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, Exhibit 1, 183a (the suffix "a" denotes a page in the Appendix filed in this Court); *see Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1240 n.35 (7th Cir. 1977), *cert. granted*, 98 S.Ct. 1232 (1978) [hereinafter cited as *Daniel*].

in general manage over 65% of all private noninsured pension funds in the United States.[2]

Plaintiff is a retired employee with a particular grievance about his pension. Defendants are the employee's union, in its capacity as plan sponsor, and the labor-management Board of Trustees that administers the plan.[3] The general views of employers and unions were presented in the Court of Appeals by two *amici curiae*, the ERISA Regulations Industry Committee and the National Coordinating Committee for Multiemployer Plans. In addition, two regulatory agencies, the Department of Labor and the Securities and Exchange Commission, presented their (conflicting) positions. But neither the parties to this action nor the *amici curiae* below have presented or adequately could present the views of the fiduciaries of the nation's pension funds on the momentous issues they confront because of the decision below.

The American Bankers Association is uniquely situated to assist this Court in reviewing the decision of the Court of Appeals. The large number of professional fiduciaries among the Association's members are seriously affected by the decision below. They are expert in the financial and administrative aspects of pension fund management and are intimately acquainted with the problems

[2] 1975 Survey of Private Noninsured Pension Funds, 35 SEC Statistical Bulletin 552, 553 (Nov. 1976).

[3] The Local 705 Pension Trust Fund is administered by a Board of Trustees composed equally of union and employer representatives, pursuant to section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1970). These individuals should be distinguished from the professional bank trustees that manage approximately $54 million of the $97 million of assets held in trust for the Local 705 pension plan. Affidavit of A. S. Hansen, Inc., sworn to April 13, 1976, at 14, Exhibit 1, 183a; *see Daniel* at 1240 n.35.

presented by the extensive existing regulation of pension plans. The American Bankers Association participated in the congressional hearings and other deliberations that led to enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Association is also conversant with earlier legislation relating to pension plans, including the 1970 amendment to section 3(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(2) (1976), which was unduly accorded critical importance by the Court of Appeals.

The attached brief on the merits is limited to the following arguments:

— Nothing in the legislative or administrative history of the securities laws supports the application of those laws to interests in pension plans.

—Extension of the securities laws to pension plans is contrary to the public interest and is unnecessary in view of the comprehensive regulatory system already in effect under ERISA.

—The retired employee in the present case, and others similarly situated, can obtain full redress under well established principles of law, without resort to the securities laws.

The American Bankers Association seeks leave to present these considerations, which will not otherwise be presented from the perspective of the fiduciaries that manage pension funds.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae*, urging reversal of the decision of the Court of Appeals.

Dated: May 22, 1978

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BRIEF OF AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

Application of the securities laws to pension plans would have a serious negative effect upon the continuation and expansion of the private pension system of the United States. That prospect is of great concern to the American

Bankers Association, whose members—comprising about 93% of the commercial banks in the United States—have responsibility for holding or managing the assets of over 120,000 employee benefit plans, aggregating nearly $90 billion. As professional fiduciaries, these banks are well situated to gauge the impact an additional layer of governmental regulation would have on the already highly regulated field of pension plans. The Association believes the extension of the securities laws to pension plans not only is wrong as a matter of law and policy but also is not necessary for the protection of individual employees against fraudulent or improper conduct by pension plan administrators.

Accordingly, the Association submits this brief in support of the petitioners and urges the Court to reverse the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

We shall not reiterate the argument, adequately made in other briefs, that the term "investment contract," as used in the statutory definition of "security," cannot reasonably be read to include noncontributory pension plans. We shall, however, show that the history of the securities laws does not support that reading, that affirmance of the decision below would not be in the interest of employees generally or of the country's private pension system and, equally important, that this Court need not extend the regulation of the securities laws to pension plans in order to afford relief to the plaintiff. Although his is undeniably a hard case, he and any other employees with similar grievances can find full relief through other causes of action asserted in his complaint.

The question before the Court is whether the "anti-fraud" provisions of the securities laws[1] should be extend-

[1] Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1976); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976). These statutes will be referred to as the "1933 Act" and the "1934 Act", respectively.

ed to give a right of action to a member of a noncontributory pension plan who alleges that the forfeiture provisions of the plan have been unfairly applied and that those responsible for administering the plan have misled him about his potential benefits. To reach an affirmative answer to that question it is first necessary to decide that an employee's right to receive retirement benefits under a pension plan is a "security" which the employee "purchases" through becoming and remaining employed, even though he himself makes no contributions to, and is automatically covered by, the plan. The securities laws themselves contain no hint that this is so, and all agree that Congress never considered pension plans in enacting those laws.

Consequently, the issue is whether this Court should nevertheless decide that the statutory definition of "security" should be read to include an interest in a noncontributory pension plan and the statutory word "sale" should be read to include the process by which an employee earns the right to a pension.

In the absence of clear congressional intent, regulatory statutes should not be expanded to cover additional areas of conduct unless public policy strongly requires such expansion. Here the policy considerations are to the contrary. Regulation of pension plans under the securities laws would not be in the interest of either employees or employers; it would accelerate a recent trend toward abandonment of plans and curtailment of benefits and would further discourage the establishment of new plans, especially by small companies.

Moreover, Congress has specifically acted through the Employee Retirement Income Security Act of 1974 ("ERISA")[2] to bring pension plans under the most

[2] 29 U.S.C. §§ 1001-1381 (Supp. V 1975).

comprehensive regulation. To superimpose the regulation of the securities laws would not fill a gap in the congressional regulatory scheme but would run counter to its basic purposes. If ERISA had been in effect at the time of the plaintiff's retirement, his loss of a pension could not have occurred, and the "fraudulent" administrative conduct he complains of would have been actionable even without proof of any personal loss.

What remains, therefore, is only the question whether it is necessary to extend the regulation of the securities laws to pension plans generally in order to afford redress to individual employees who, like the plaintiff, have grievances antedating ERISA. The answer is clear: for the kind of arbitrary forfeiture provisions and misleading statements complained of by the plaintiff, the courts have developed fully adequate remedies without resort to the securities laws. Indeed, these remedies have been invoked by the plaintiff in his complaint, have survived a motion to dismiss and would give the plaintiff, if his evidence supports his pleadings, precisely the relief he seeks without needless extension of the securities laws to his case.

ARGUMENT

I.

The history of the securities laws does not support the application of those laws to noncontributory pension plans.

The language of the securities laws gives no direct indication that they cover pension plans. Moreover, as the Court of Appeals acknowledged, "The legislative history of the 1933 and 1934 Acts themselves is silent on the question of pension plans."[3] However, the Court said it

[3] *Daniel v. International Bhd. of Teamsters*, 561 F.2d 1223, 1237 (7th Cir. 1977) (footnotes omitted), *cert. granted*, 98 S.Ct. 1232 (1978) [hereinafter cited as *Daniel*].

found "a measure of guidance" in "subsequent legislative action and accompanying SEC interpretation."[4]

Actually, the "subsequent legislative action" on the 1933 Act demonstrates clearly that Congress never considered whether an employee's right to benefits under a noncontributory pension plan was a security. As for the "accompanying SEC interpretation", the record shows that the Commission has consistently indicated that noncontributory pension plans were outside the scope of the securities laws.

A. Legislative action and administrative interpretation of the securities laws, 1933-1970.

In seeking "guidance" from "subsequent legislative action", the Court of Appeals referred first to the 1934 rejection by a House-Senate Conference Committee of a proposal to add to the 1933 Act an exemption from registration for any "offering made solely to employees of an issuer or of its affiliates in connection with a bona fide plan for the payment of extra compensation or stock investment plan for the exclusive benefit of such employees."[5] The Court quoted the conferees as explaining they had deleted the proposed exemption "in order to protect participants in such plans who 'may be in as great need of protection afforded by availability of information concerning the issuer for which they work as are most other members of the public.' "[6]

From this action of the conferees, and this extract from their statement, the Court, without further explanation, evidently drew an inference that interests in all

[4] *Daniel* at 1237 (footnotes omitted).

[5] *Daniel* at 1237 (emphasis omitted), *quoting* 78 Cong. Rec. 8708 (1934).

[6] *Daniel* at 1237-38, *quoting* H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).

employee benefit plans were subject to the 1933 Act absent a specific exemption. Such an inference is clearly not justified. The very passage relied on by the Court of Appeals demonstrates this when read in full: "The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in *employees' stock-investment plans* may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) (emphasis supplied). The conferees' refusal to exempt an offering to employees of an issuer under an employees' stock-investment plan hardly suggests that a security offering would be involved in maintaining a noncontributory pension plan. The proposed exemption plainly was intended for an entirely different kind of arrangement: a "stock-investment plan" under which participating employees would make cash contributions for investment in stock of their employer. *Id.*

The next "guidance" found by the Court of Appeals to show that pension plans were within the scope of the securities laws was some 1941 testimony by SEC Commissioner Purcell on a proposal that the Commission be given power to exempt certain "employee plans" from the registration requirements of the 1933 Act.[7] In fact, however, the thrust of Purcell's testimony was in the opposite direction. While he did observe that an interest in an "employee plan" might be a security, his full testimony made clear that he was talking about a contributory plan, in which money was freely invested by employees. *See* Hearings on Proposed Amendments to the Securities Act of 1933 and the Securities Exchange Act of

[7] *Daniel* at 1238.

1934 Before the House Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 888-92, 895-96, 902-04, 909-10 (1941) (statement of Ganson Purcell). The question whether an employee's interest in a noncontributory pension plan might be a security simply did not arise because, as Purcell was at pains to emphasize, inclusion of employees in such a plan would not involve a "sale" in any event. *Id.* at 896-97.

The Court of Appeals then referred to what it said was the opinion of an Assistant General Counsel of the SEC in 1941 that the term " 'security' within the definition of the 1933 Act included employee pension plans."[8] However, the opinion letters the Court cited did not intimate, let alone conclude, that an interest in a noncontributory plan was a security. In the first of two letters to the same correspondent, the Assistant General Counsel said: "The Commission has always taken the position that the offer or sale of interests in *certain types of voluntary, contributory plans* is subject to the registration and prospectus requirements of the Securities Act of 1933. . . ."[9] In the second letter, obviously written in response to an inquiry from the correspondent as to why an interest in those types of plans should be viewed as a security, the Assistant General Counsel said: "You are correct in surmising it to be our position that the security which is involved within the meaning of Section 2(1) of [the 1933] Act in connection with the offer or sale of interests in certain types of plans [*i.e.*, voluntary, contributory plans] is normally an 'investment contract.' " The second letter went on to say that no offer or sale was involved "in the case of a non-contributory plan".[10]

[8] *Daniel* at 1238 (footnote omitted).

[9] [1941-44 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 75,195 at 75,386 (1941) (emphasis supplied).

[10] *Id.* at 75,387.

These early events in the history of the 1933 Act obviously did not support the view that noncontributory pension plans were within the scope of the securities laws. The Court of Appeals therefore sought to buttress its conclusion by reference to what it saw as the implication of an amendment to the 1933 Act in 1970. That amendment carried no such implication.

B. The 1970 amendment to the 1933 Act.

The Investment Company Amendments Act of 1970 amended section 3(a)(2) of the 1933 Act by exempting from registration

> "any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with . . . a stock bonus, pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954. . . ."[11]

The Court of Appeals concluded that by the adoption of this exemption Congress recognized that "interests in employee pension funds are 'securities' ".[12] However, the background of the 1970 amendment shows such a conclusion to be unjustified. We say this with some assurance because the American Bankers Association was closely involved in the development of that amendment.

The 1970 amendments to section 3(a)(2) of the 1933 Act and to corresponding provisions of the 1934 Act were the result of a seven-year effort by banks and their regulators and the Securities and Exchange Commission to clarify the status under the securities laws of various kinds of commingled investment funds maintained by bank trust

[11] Pub. L. No. 91-547, § 27(b), 84 Stat. 1434 (1970).
[12] *Daniel* at 1239.

departments for their customers.[13] The status of pension plans as such was not involved. The focus was rather on whether the Commission should regulate the potential proliferation of bank common trust funds into new, more investor-oriented fields.

The common trust fund was developed by banks to bring the efficiencies and other advantages of scale to the management of trust funds. Under traditional fiduciary principles, a trustee was required to hold the trust assets separate and apart from his own funds and those of others. With the emergence of bank trust departments as professional trustees, however, it became common for a single department to serve as trustee of hundreds of trusts, and it was natural for banks to seek a way of combining funds for investment purposes. The common trust fund was a solution.[14] In its classic form (though there are variations), a common trust fund is created by a bank's execution of an instrument declaring that the bank will hold in a separate trust such money or property as it decides to transfer to itself, as common trust fund trustee, from trusts of which the bank is trustee. The entire arrangement is effected by the bank itself. Neither the grantors nor the beneficiaries of the participating trusts are required to act when assets are transferred into or out of the common trust fund.

To avoid violation of the fiduciary rule against commingling, banks at first obtained authority to use a common trust fund by including express provisions in the

[13] Certain "separate accounts" maintained by insurance companies also became involved because of their asserted similarity to the commingled funds maintained by banks.
[14] For a history of the development of common trust funds and their regulation, see Saxon & Miller, *Common Trust Funds*, 53 Geo. L.J. 994 (1965). Messrs. Saxon and Miller were Comptroller of the Currency and Deputy Comptroller of the Currency, respectively.

trust instruments of the participating trusts. Later, state statutes were enacted, authorizing banks to transfer assets to common trust funds even where the trust instruments were silent on the subject. In either case, common trust funds were subject to regulation under state laws or by the administrative rules of bank regulatory agencies, or both, to protect against possible abuses.[15]

By 1933 common trust funds were well known. However, they were not mentioned in either the 1933 Act or the 1934 Act,[16] and it was generally accepted that they were outside the scope of those Acts.

With the rapid expansion of pension and profit sharing plans after 1941, banks came to be the trustees under many such plans. They naturally turned to the common trust fund technique as a means of achieving efficient and profitable collective investment of funds coming into their hands in that capacity. As in the case of the earlier common trust funds, no questions were raised about the applicability of the securities laws to bank common trust funds for pension and profit sharing trusts.

During the early 1960's, however, extension of the common trust fund concept into new fields, where participation was offered directly to customers, brought the securities law status of common trust funds into question for the first time. The most significant development was the attempt of First National City Bank to establish commingled accounts for the collective investment of funds of individual bank clients for whom the Bank served

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[15] *See, e.g.*, N. Y. Bank. Law § 100-c (McKinney 1971 & Supp. 1977); Comptroller of the Currency Reg. 9, § 9.18, 12 C.F.R. § 9.18 (1977).

[16] Common trust funds maintained by banks were exempted from regulation as mutual funds by the Investment Company Act of 1940, § 3(c)(3), 15 U.S.C. § 80a-3(c)(3) (1976).

not as trustee but only as custodian and investment manager.[17] The Commission took the position that interests in such commingled "managing agency accounts" should be subject to its jurisdiction on the ground that such interests constituted securities issued directly to bank customers by the commingled account itself, as a separate entity.[18]

At the same time, the Commission was confronted with the potential public offering of interests in bank-sponsored commingled trusts for retirement plans of self-employed individuals (so-called "Keogh Plans"), which were initially authorized by the Internal Revenue Code in 1962. Here too the SEC viewed the commingled fund as issuing securities of its own directly to the individuals maintaining Keogh Plans.[19]

As the Commission sought to regulate these two new types of commingled funds, the banking community became concerned that such regulation, depending on its form, might call into question the status of the older common trust funds. Consequently, the nation's banks, led by the American Bankers Association, began in 1963 to seek legislation dealing with all commingled investment funds maintained by banks.[20]

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[17] The history of that attempt is described in *Investment Company Institute v. Camp*, 401 U.S. 617, 619-23 (1971).

[18] *See* Hearing Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 1st Sess. 4, 16-18 (1963) (statement of William L. Cary); *In re First National City Bank (Commingled Investment Account)*, 42 S.E.C. 924, 926 n. 4 (1966).

[19] *See* Hearing Before a Subcomm. of the House Comm. on Government Operations, *supra* note 18, at 6-7.

[20] The reasons for bank concern about traditional common trust funds were outlined in a statement made by representatives of the banking industry:

> "In light of the existing administrative relief granted this type of fund, it may appear to members of this committee that

After much debate and long consideration, Congress developed a proposal to amend the 1933 Act to remove any doubt about the freedom from registration of all interests in traditional bank common trust funds and in commingled trusts maintained by banks for the investment of pension plan assets, but to subject to registration participating interests in commingled managing agency accounts and collective trusts for Keogh Plans. The SEC was willing to support this proposal, since it conformed to the SEC's own position.

None of these developments could possibly be viewed as having any implications for the status of pension plans as such. The proposals dealt only with collective investment arrangements. Now, however, occurred an episode to which the Court of Appeals accorded critical importance. At the last minute, the word "single" was conjoined with the word "collective" in the description of the kinds of bank-maintained trust funds that were to be exempted if used for investment of funds of qualified pension and profit sharing plans. The general exemption was thus phrased as extending to "any interest or participation in a single or collective trust maintained by a bank" in connection with a qualified employee benefit plan.

As pointed out by the Court of Appeals, the word "single" was inserted as the result of a suggestion by the General Counsel of Sperry Rand Corporation, who was concerned about the possible negative implication of the

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explicit statutory provisions are not required. This probably would be so were it not for the fact that amendments to the securities laws are being proposed for other types of bank collective funds, and to leave the statute silent as to this particular type of fund might raise questions and ambiguities as to their future status under the securities laws."

Hearings on Amendment No. 438 to S. 1659 Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 1284 (1967) (statement of Robert D. Ferguson).

proposed exemption for "collective trusts". It does not follow, however, that anyone believed that noncontributory pension plans would have been subject to the 1933 Act in the absence of an express exemption. On the contrary, the final form of the exemptive language, including the word "single", was officially explained as codifying the "long established administrative practice of the Commission". H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970). As recounted above, the Commission's "long established administrative practice" had recognized that interests in commingled trusts should not be subject to registration and, except in the case of trusts providing for investment of employee contributions in employer securities, that interests in noncommingled pension trusts should also be free from registration. However, the express exemption for all "single" trusts did serve a purpose: it specifically rejected the suggestion the SEC had made from time to time (but had never applied in practice) that trusts under *contributory* pension and profit sharing plans might be issuers of securities registrable under the 1933 Act.[21] An express exemption for collective trusts only might have implied support for that suggestion. Concern over that possibility was doubtless what spurred Sperry Rand Corporation into action. Sperry Rand had particular reason for concern, for it had just adopted a *contributory* profit sharing plan for its employees, and had established (but of course had not registered) a bank trust under that plan.[22]

In the light of this record, the most that can be said of the 1970 amendments is this: (1) Congress accepted the position of the banks that the collective trust funds they had long maintained for the commingling of funds held as

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[21] *See* pp. 6-7, *supra.*

[22] Sperry Rand Corporation, Notice of Annual Meeting and Proxy Statement 16 (1968); *see* U. S. Dep't of Labor Form D-1 of Sperry Rand Corporation, Item 12 (File No. 07-50-11, November 6, 1969).

trustees under trusts created by unrelated grantors—whether by individuals or testators or sponsors of pension plans—were not subject to registration under the securities laws; (2) Congress did not wish to extend this exemption to the newer forms of collective investment funds designed to offer participation directly to the public, such as commingled funds for managing agency accounts or Keogh Plans; and (3) Congress made clear that all trusts funds maintained by banks under pension plans, whether contributory or noncontributory, were not subject to registration.[23]

The history of the 1970 amendments thus contains nothing to warrant a conclusion that Congress regarded the rights of an employee under a noncontributory pension plan as a security.[24] The development of federal pension legislation culminating in ERISA confirms that in 1970 Congress had no such view.

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[23] For simplicity, we have ignored in this enumeration trust funds maintained by banks under plans, usually profit sharing plans, that invest employee contributions in stock of the employer. The 1970 amendments did not exempt such trusts from registration.

[24] Since the decision of the Court of Appeals, the Securities and Exchange Commission has recognized that the 1970 amendment to the 1933 Act should not serve as the basis for extending the securities laws to noncontributory pension plans. In a letter to the Chairman of the Senate Committee on Human Resources, the Chairman of the SEC stated that a memorandum the AFL-CIO had submitted to the Committee "incorrectly asserts that the 1970 amendment 'is crucial to the Commission's entire position in Daniel.'" The letter explains, "This assertion ignores the fact that the major thrust of the Commission's argument, rather than being directed toward the 1970 amendment, is that an interest in a pension fund is an 'investment contract,' as that term has been defined in numerous Supreme Court decisions." Letter from Harold M. Williams to Harrison A. Williams, Jr., n.3, *reprinted in* [1978] Pens. Rep. (BNA) No. 175, at R-3 n.3 (February 13, 1978).

C. The development of ERISA.

ERISA was developed over a period of 15 years as a scheme for comprehensive federal regulation of pension plans. Throughout that period, Congress was never given any reason to believe that the securities laws already required the dissemination of information about the terms of pension arrangements or created federal rights of action for plan participants in cases of inadequate disclosure.

From 1954 to 1957, the Senate Committee on Labor and Public Welfare held lengthy hearings to consider the need for legislation to cure instances of fraud, mismanagement and unfairness in the operation of pension funds. The Securities and Exchange Commission was actively involved in those hearings because it was being considered as the agency to administer the new legislation. The testimony on behalf of the Commission indicated repeatedly that it had little, if any, existing statutory authority to deal with pension plans.[25]

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[25] The following exchanges indicate the position the Commission took:

> "Senator Douglas. The whole theory of the Securities and Exchange Act is primarily that the investor in securities should be furnished with accurate information about what he is purchasing, isn't that true?
>
> "Mr. Woodside [Director, SEC Division of Corporation Finance]. That is right.
>
> "Senator Douglas. So you carry the principle of disclosure into the purchase of securities. I wonder if there are any principles of disclosure which you think might be carried over from that field to the management of pension and welfare funds?
>
> "Mr. Woodside. Senator, I don't know that I am competent to talk about what should be done with pension or welfare funds, or what disclosures should be or might be required of them.
>
> . . . .
>
> "Senator Allott. To bring this thing back into focus a little bit, to be sure we are eliciting material which is pertinent, isn't it a fact that generally speaking the Securities and Exchange Commission would come into this particular field only by accident, so

During the ensuing years (and despite the 1970 amendments to the securities laws), the Commission never indicated by regulatory actions or in testimony before Congress that the antifraud provisions afforded pension plan participants a federal cause of action or gave the Commission power, under the antifraud rules, to require disclosure of the terms, financial condition or actuarial basis of pension plans. Congress agreed. As late as 1972, a congressional committee studying existing federal regulation of pension plans concluded that "[p]ension and profit sharing plans are exempt from coverage under the Securities Act of 1933 . . . unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer."[26]

On this whole record, it must be concluded that neither statutory language, nor legislative history, nor subsequent legislative action, nor administrative interpretation provides any basis for extending the coverage of the securities laws to noncontributory pension plans. The question before the Court, therefore, is whether there are policy considerations so strong as nevertheless to require such an extension.

to speak, by virtue of the fact that, *for example, in some of these plans stock is offered?*

"Mr. Goodwin [Commissioner, Securities and Exchange Commission]. *That is right.*

"Senator Allott. It is really an accident you are in it at all since you have no primary concern in it as certain other departments might—for example, the Internal Revenue Service.

"Mr. Woodside. I think that is correct. As I understood it, what was really wanted of us was an explanation of how our disclosure provisions operate with respect to certain other areas, and also some discussion of the way in which our acts affect those situations where a security is offered in connection with the plan."

Hearings Before the Subcomm. on Welfare and Pension Funds of the Senate Comm. on Labor and Public Welfare, 84th Cong., 1st Sess. 945, 946-47 (1955) (emphasis supplied).

[26] Subcomm. on Labor of Sen. Comm. on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92d Cong., 2d Sess. 96 (1972). *See also* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 7 (1973) and S. Rep. No. 93-127, 93d Cong., 1st Sess. 11 (1973), which, in describing then-existing requirements of disclosure in connection with pension plans, did not mention the securities laws.

II.

Extension of the securities laws to regulate pension plans would not be in the public interest.

The Court is being asked to read the words "investment contract" to include an employee's right to a pension and to read the word "sale" to include the process of working for a living, solely on the ground that it is necessary to do so in order that the policy of the securities laws be furthered.

This Court has often recognized that a remedial statute, however broadly framed, should not be applied to regulate every kind of conduct that might conceivably be read into its terms. Unless it is clearly necessary to further the policy embodied in the statute, such a law will not be extended to cover acts outside the ordinary sense of the words used. *See, e.g., United Housing Foundation v. Forman,* 421 U.S. 837 (1975). Such an extension of the law is not only undesirable but unnecessary in this case.

The decision below makes applicable to pension plans as if they were issuers of stocks or bonds, and to employers as if they were underwriters, the requirements of the "antifraud" provisions of the securities laws, which make it unlawful to use fraudulent schemes or false representations in selling securities. Although the Court of Appeals attempts to minimize these requirements,[27] they

[27] *Daniel* at 1250.

would in fact subject employers and trustees to a complex disclosure burden which would almost certainly damage the country's private pension system, when superimposed upon the already massive information and reporting requirements of ERISA.

ERISA, designed as a comprehensive disclosure statute,[28] compels the dissemination to employees of all pertinent information about employee benefit plans and provides sanctions to ensure compliance.[29] While ERISA was supported by the American Bankers Association as constructive legislation, one of its less salutary results has been a heavily increased burden of paperwork and governmental regulation. This burden has been onerous enough, and costly enough, to bring about the abandonment or curtailment of many pension plans.[30] As demonstrated by this experience under ERISA, the addition of another layer of regulation would further encourage the

[28] ERISA also was intended to set minimum standards for the operation and funding of pension plans, to establish standards of conduct for plan fiduciaries and to guarantee the payment of benefits. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 7-8, 11 (1973).

[29] ERISA § 2(b), 29 U.S.C. § 1001(b) (Supp. V 1975).

[30] A recent study by the General Accounting Office covering 595 employers that reported termination of pension plans during the period from September 1974 to June 1976 concluded that ERISA was a major factor in 53% of the terminations. Increased costs and the administrative burden of meeting ERISA's reporting and disclosure requirements were among the most significant aspects of ERISA leading to such terminations. Comptroller General, Report to the Congress of the United States, Effect of the Employee Retirement Income Security Act on the Termination of Single Employer Defined Benefit Pension Plans 9-15 (HRD-78-90, April 27, 1978). Another government survey of 1,661 small businesses that reported termination of pension plans from June 1976 through April 1977 showed that ERISA had a substantial effect on the decision to terminate in more than two out of three cases. Staff of House Comm. on Small Business, 95th Cong., 1st Sess., ERISA Questionnaire Results (Comm. Print 1977). *See also* Bankers Trust Company, ERISA Related Changes in Corporate Pension Plans 1 (1976).

elimination of benefit improvements and the abandonment of private pension plans.

The Court of Appeals hypothesized that "the antifraud provisions do not establish an affirmative disclosure system requiring the filing of documents"[31] and optimistically predicted that "[t]here should be no undue burden caused by the type of disclosure the anti-fraud provisions would encourage. . . ."[32] However, the holding below is specifically premised on the finding that the antifraud provisions require disclosure of information that differs in both form and substance from what the Court termed the "plethora of information"[33] required to be disclosed under ERISA. The effect of the Court of Appeals' decision is to impose on pension plan administrators and fiduciaries, retroactively, a standard of conduct which is both new and ill-contrived to give employees the kind of protection they really need.

If, as the Court of Appeals held (wrongly in our opinion), a pension plan is really an investment contract which "resembles a mutual fund",[34] it may be anticipated that compliance by pension plans with the securities laws would involve the dissemination to potential plan participants of the kind of information that must be given to prospective investors in mutual funds. What this would entail, in the view of the Securities and Exchange Commission, may be deduced from the disclosure requirements the Commission prescribes in its prospectus rules for mutual funds. The required information would include, among other things, full details about the investment policies of the pension plan; specific information about the

[31] *Daniel* at 1247.
[32] *Daniel* at 1250.
[33] *Daniel* at 1248.
[34] *Daniel* at 1236.

trustee's power and intention to borrow or lend money, or to invest in real estate or in other specialized forms of investment; a disclosure of the present or proposed concentration of investments in particular industries or geographic areas; the percentage of assets that may be invested in the securities of any one issuer, and the percentage that may be invested in each type of security proposed to be acquired; the rate of portfolio turnover; and a description of any legal proceedings to which the plan is a party.[35]

As these policies and facts changed from time to time, updated information would have to be given to all those who had received the prior distribution. Silence in the face of change could be held misleading.

The Court of Appeals indicated, moreover, that in the case of a pension plan the antifraud provisions of the securities laws would require more than the dissemination of "investor" information of this kind. The Court said each prospective participant in a pension plan would have to be told "the actuarial probability . . . that a member actually will receive pension benefits"[36]—that is, the odds on his getting a pension, taking into account the probability of his living long enough, and the probability of his working long and continuously enough, to qualify for a pension—as well as the "risk of loss" and the possibility that the plan will be terminated before the time for

[35] *See* Securities and Exchange Commission Form S-5, Item 1(a), 17 C.F.R. § 239.15 (1977), and Form N-8B-1, Items 4, 5 and 9, 17 C.F.R. § 274.11 (1977). A mutual fund relies on a single investment manager. It is not uncommon for a pension plan of a large corporation to employ half a dozen. Their diverse investment policies would all presumably have to be described under the decision of the Court of Appeals.

[36] *Daniel* at 1229.

payment comes.[37] As a practical matter, meaningful actuarial information could not be provided for each individual employee, since actuarial probabilities are based upon statistical assumptions about group mortality, average rates of personnel turnover, projected salary levels and estimated future interest rates. Generalized information about actuarial assumptions could be given, but it would necessarily consist of a mass of data and formulae, comprehensible only to actuaries, which could not realistically be related to any particular employee's case.

The kind of information the securities laws would require plan sponsors and administrators to give to employees contrasts sharply with the kind of information Congress thought appropriate when it actually turned its attention to that question in formulating the reporting and disclosure provisions of ERISA. ERISA, which was specifically designed to afford employees all relevant information about pension plans in which they may participate, requires that employees be individually informed in great detail about such matters as how an employee may qualify to participate in the plan; when he will become eligible for benefits; how benefits are determined; what events may lead to loss of benefits; and how he may enforce his rights if benefits are denied. Congress also recognized the importance of disclosing the actuarial and investment policies and practices of pension plans, but instead of compelling plan administrators to distribute these technical data to each prospective participant, ERISA calls for their submission in periodic reports to the Government. All such information is, of course,

[37] Though the Court of Appeals did not mention it, the availability and extent of pension insurance under ERISA in the event of plan termination also would have to be considered in cases arising after the effective date of that Act. *See* ERISA §§ 4001-68, 29 U.S.C. §§ 1301-68 (Supp. V 1975).

available to employees and other interested parties. This approach obviously reflects a congressional judgment that information of the sort deemed important to investors in mutual funds has little relevance or utility for prospective participants in pension plans.

These examples of differences between the kind of useful plan information ERISA requires to be given to employees and the kind of information that is appropriate for investors give only a hint of the difficulties engendered by the decision below. The Court of Appeals did not attempt to catalogue all of the additional disclosure requirements imposed by the antifraud provisions. Instead, the burden and risk of anticipating such requirements has been placed squarely upon those responsible for employee benefit plans.

The difficulty of compliance with the requirements of the securities laws is compounded by the Court of Appeals' findings that the "primary distribution" of interests in a pension plan takes place when the plan is first established,[38] and that an employee makes a "further acquisition of interests in the pension fund" not only each time he "decides to retain his job",[39] but also each time he performs services that result in payments into the fund and each time union members vote to accept or ratify collective bargaining agreements affecting the pension plan. Almost unbelievably, the decision of the Court of Appeals would require advance distribution to *prospective* employees of all material facts that might affect the amount and the ultimate payment of pensions they could qualify for as retired employees. And under familiar securities law concepts the documents setting forth this information

[38] *Daniel* at 1246 n. 46.
[39] *Daniel* at 1243.

would have to be updated and distributed repeatedly. The additional burden of these requirements is obvious.

It is easy to say that disclosure can only be helpful, and the more information the better. But this takes no account of the cost, in time and money, of the disclosure process, in relation to the value of the information to those who receive it. Unquestionably the additional work by executives, lawyers, actuaries and accountants that would be required for compliance with the securities laws as interpreted by the Court of Appeals would dramatically increase the already burdensome administrative expenses of maintaining pension plans.[40] Pension plan management fees also would have to be raised to cover the additional responsibilities and administrative burdens placed on fiduciaries; the increased costs could not be absorbed by banks without a substantial increase in their fees.

The Court of Appeals believed most pension plans would find compliance with the securities laws no great burden[41] because interests in trusts "maintained" by banks under corporate pension plans are specifically exempted from the *registration* requirements of the Securities Act of 1933,[42] and many pension plans use banks as trustees. Banks themselves are far less sanguine. As a

[40] There are indications that Congress now recognizes the disproportion of even the ERISA compliance burden. Following hearings, a bill has been introduced that would cut back the present reporting and information requirements. S. 3017, 95th Cong., 2d Sess., 124 Cong. Rec. S 6589 (daily ed. May 1, 1978). One of the cosponsors of this legislation has stated that the purpose of the proposed changes in the reporting and disclosure provisions of ERISA is "to avoid disruptive and costly duplications of professional services and to further reduce paperwork burdens." 124 Cong. Rec. S 6582 (daily ed. May 1, 1978) (remarks of Sen. Williams).

[41] *Daniel* at 1250.

[42] Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2) (1976). Under the Court of Appeals' decision, plans served by trustees other than banks would presumably be subject to the 1933 Act's registration requirements as well as its antifraud provisions.

practical matter, a prudent plan administrator seeking to assure compliance with the antifraud provisions of the securities laws would have to provide potential plan participants with the equivalent of a 1933 Act prospectus, even though a formal registration statement might not be required. To do less, or to make no written record of the information provided, would be to risk liability for damages in an action under the antifraud provisions.

Another serious consequence of the decision of the Court of Appeals is the open-ended risk created by retroactive application of the securities laws to pension plans whose sponsors and fund managers never imagined that they might be subject to those laws. Although the Court of Appeals did not specifically address the measure of the plaintiff's damages, the plaintiff seeks payment of the entire amount of the pension benefit to which he claims to be entitled. Thus, in addition to potential liability for damages caused by attempted compliance that may be found deficient in the future, pension plans now face the prospect of innumerable claims for benefits by ex-employees who are no longer covered by the plans but who complain that they were not given adequate investor information.[43]

It is clear that bank fiduciaries will not be willing to bear the risk of such liabilities unless provision can be made for insurance or adequate reserves, either of which would of course increase the charges against pension plans. But it is unlikely that insurance will be available; private insurance carriers have so far proven unwilling to

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[43] *Cf. City of Los Angeles, Department of Water and Power v. Manhart*, 46 U.S.L.W. 4347, 4352-53 (April 25, 1978), holding that retroactive liability should not be imposed to redress the effect of a requirement, held to be illegal, that women employees make larger contributions to a pension plan than men. The Court said that "[r]etroactive liability could be devastating for a pension fund." *Id.* at 4347 (footnote omitted).

cover the risks of fiduciary liability under ERISA at any reasonable cost.

The increased burden, cost and risk of administering pension plans if they are held subject to the antifraud provisions of the securities laws will inevitably contribute to the abandonment of many plans and the curtailment of benefits under others, especially those of small and middle-sized companies. The ultimate effect will be to harm the very employees whom the Court of Appeals purports to protect as it strains to provide relief under the securities laws in this case.

III.

Extension of the securities laws to pension plans is not necessary to provide relief to the plaintiff or other employees "defrauded" by forfeiture clauses or by inadequate disclosure statements by plan administrators.

A. ERISA now provides full protection against loss of pension benefits through harsh forfeiture provisions or through inadequate disclosure.

The "fraudulent" conduct alleged by the plaintiff to have resulted in his loss of a pension occurred before the enactment of ERISA. If ERISA had been in effect at the time, the plaintiff would have received his full pension; it would have been illegal for his union's plan to have included the harsh forfeiture rules that caused his loss of benefits.

ERISA requires all pension plans to conform to specified vesting rules, which would assure a worker like the plaintiff, who had reached the age of 63 and had completed over 22 years of service, a 100% nonforfeitable

interest in his pension, notwithstanding his four-month layoff. Under the rules of ERISA, his pension rights could not have been cut off by even a much longer break in service, for any reason.[44]

Moreover, if ERISA had been in effect at the time of the events giving rise to this case, a failure by the plan's administrators to have explicitly informed the plaintiff in writing, upon becoming a plan member, of any circumstances that could result in his loss of benefits would have been a violation of ERISA that could be remedied at the hands of either the plaintiff or the Department of Labor (among others) without regard to whether the plaintiff or anyone else had suffered, or might suffer, any actual loss as a result of such a failure of disclosure.[45]

In short, this case is an anachronism. It could no longer happen. This Court should not allow the unprecedented and disruptive decision of the Court of Appeals to stand merely to afford relief to the plaintiff or to others with pension plan grievances antedating ERISA. They will find adequate remedies for any significant wrongs done them, without resort to the securities laws.

B. The plaintiff can obtain full redress without resort to the securities laws.

The way in which this case has developed has obscured the fact that the plaintiff has other causes of action available that could give him full redress. The defendants have appealed only from that portion of the

[44] ERISA § 203, 29 U.S.C. § 1053 (Supp. V 1975).

[45] ERISA §§ 102, 104, 502, 29 U.S.C. §§ 1022, 1024, 1132 (Supp. V 1975). *See* 29 C.F.R. § 2520.102-3 (Contents of summary plan description) and § 2520.104b-2 (Summary plan description) (1977).

district court's order which denied their motion to dismiss the plaintiff's counts under the securities laws. Four other counts included in the complaint were upheld against the motion to dismiss and are not subject to interlocutory review. If this Court reverses the decision of the Court of Appeals and dismisses the plaintiff's claim for relief under the securities laws, and if the case is then tried on the remaining counts, there is little doubt the plaintiff could prevail by establishing the facts pleaded in his complaint, and that if he does so he can obtain the redress he seeks—complete restoration of his pension.

The complaint alleges—in addition to the causes of action based on the securities laws—that the "break-in-service" rule of the union's pension plan, as applied to his involuntary layoff of less than four months, arbitrarily denied him pension benefits and that the defendants misled him concerning the existence of this rule. Complaint, Counts IV and V, 42a-47a. Both claims afford a basis for relief under existing case law.

1. Pension eligibility rules which result in forfeiture of benefits on the basis of a brief, involuntary break in service are not enforceable.

Relying on the explicitly fiduciary character of pension trusts, which requires pension plans to be administered exclusively in the interest of employees, courts have frequently acted to set aside pension eligibility requirements which are "arbitrary and capricious" in denying benefits, or which are not reasonably related to the function of the pension plan. *See, e.g., Connell v. United States Steel Corp.,* 516 F.2d 401, 407 & n.8 (5th Cir. 1975); *Roark v. Boyle,* 439 F.2d 497, 500-04 (D.C. Cir. 1970).

The courts have specifically struck down eligibility requirements like those imposed on the plaintiff here, which operate to penalize an employee because of a break in service which is beyond his control. In *Lee v. Nesbitt,* 453 F.2d 1309 (9th Cir. 1972), the court refused to apply a break-in-service rule against a plaintiff who, after completing the minimum service requirement but before reaching retirement age, had an involuntary service break which disqualified him for a pension.

> "We think that the rule [of the pension plan], to the extent that it prohibits benefits to an employee solely because of an involuntary interruption in employment after the completion of his minimum employment requirement and before reaching retirement age, is unreasonable on its face." *Id.* at 1312.

In reaching its conclusion, the *Lee* court specifically noted that pension plans "generally differentiate between voluntary and involuntary breaks in employment insofar as the effects on accumulated credits for prior services are concerned. When the break is due to lack of jobs, credits are preserved; but they are lost when the employee quits." *Id.* at 1312 n.3.

In *Burroughs v. Board of Trustees,* 542 F.2d 1128 (9th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977), the court followed *Lee,* holding that it was fundamentally unfair to apply a break-in-employment rule retroactively and without notice to destroy fifteen years of service credit. In *Insley v. Joyce,* 330 F. Supp. 1228 (N.D. Ill. 1971), the district court upheld a complaint challenging a break-in-service provision of the Teamsters Local 710 Pension Plan, which deprived employees of any credit for employment prior to a break of more than three years—far longer than the brief period for which the plaintiff here was unemployed—saying such a rule might

be found to violate the requirement that a pension plan be for the sole and exclusive benefit of employees. *Id.* at 1233.

Similar in principle are cases holding that a "signatory last employment" rule (requiring an employee to have worked in a covered bargaining unit for a specified period immediately before retirement) should not be given effect when the employee is unable to satisfy the rule because work is unavailable. *E.g., Teston v. Carey,* 464 F.2d 765 (D.C. Cir. 1972); *DePaoli v. Boyle,* 447 F.2d 334 (D.C. Cir. 1971). The courts also look with disfavor on forfeiture provisions, such as that involved here, under which one person can obtain a pension by working in covered employment a shorter period than another person who is denied benefits. *See Roark v. Boyle,* 439 F.2d 497, 507 (D.C. Cir. 1970). As the court observed in *Lee v. Nesbitt,* 453 F.2d 1309, 1312 n.3 (9th Cir. 1972), and as the Court of Appeals itself said in the opinion below,[46] it is uncommon for a pension plan to penalize an employee by destroying past service credit when a break in service is occasioned by circumstances beyond the employee's control.

Strong support for the plaintiff's common law counts is also found in a case recently decided by the New York Court of Appeals. *Mitzner v. Jarcho,* 44 N.Y.2d 39, 403 N.Y.S.2d 490, 374 N.E.2d 388 (1978). Mitzner's situation was remarkably like that of the plaintiff here. Mitzner had worked in the plumbing trade from 1922 until 1968, joining the union upon its organization in 1939.

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[46] "A survey of 32 pension plans representing over half of the Teamster membership disclosed no other plan which would have absolutely disqualified a man in Daniel's circumstances. Most plans have continuity requirements but involuntary breaks in service are usually remediable upon satisfaction of certain requirements." *Daniel* at 1226 n.1.

A union pension plan was instituted in 1952. Eligibility for benefits was premised on (among other requirements) 1250 days of employment at the plumbing trade, including some employment with a contributing employer during each of the two years preceding the application for retirement. There was originally no other service requirement, but in 1966 the plan was amended to add a requirement of fifteen consecutive years of employment with a contributing employer immediately before application for benefits. Mitzner would have met this new requirement but for a one-year break in 1961, during which he was employed as an officer of a plumbing company in which he owned stock.

In 1966, Mitzner applied for early retirement benefits on the basis of a physical disability, but he was told by the plan trustees that he had not met the 1250-day requirement. He thereupon continued to work through 1968, when he satisfied the 1250-day rule and renewed his prior application for benefits. This time the trustees denied his application on the ground that he had not met the fifteen-year service rule because of his 1961 break in service. He had not previously been informed of the fifteen-year service requirement.

The New York Court of Appeals held that the continuous service requirement, though not inherently unlawful, had been arbitrarily applied in Mitzner's case to deny him a pension to which he was entitled. The court pointed to the retroactive application of the service rule and to the trustees' failure to notify Mitzner of that rule as exacerbating its basic unfairness, but the underlying ground of the court's decision was the operation of the plan to strip 21 years of service credits from a worker who "was clearly an intended beneficiary of the trust fund." 44 N.Y.2d at 46, 403 N.Y.S.2d at 494, 374 N.E.2d at 391.

The treatment of the plaintiff here obviously violates the principles laid down by both federal and state courts in the decisions described above. If the allegations of the complaint are true, the plaintiff should be able to establish that it was arbitrary for a plan intended to provide retirement income for long-service employees to deny him the accumulated benefits of 22 years of service on account of an involuntary four-month absence from work. It is not necessary for the courts to stretch the federal securities laws to provide relief against such a result.

2. Employees have remedies against shortcomings in disclosure of pension eligibility requirements.

The plaintiff alleges that the defendants misled him about the existence of the rigid break-in-service rule of his pension plan. If this is true, he has an adequate remedy without resort to the securities laws and even though he is not covered by ERISA. The courts will not permit application of a break-in-service rule to an employee who but for a break would have qualified for a pension but who was not told about the rule by the plan administrators. *Burroughs v. Board of Trustees,* 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977); *Kosty v. Lewis,* 319 F.2d 744, 748-49 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 964 (1964). In *Burroughs* the court said "it was fundamentally unfair for the Trustees to apply the break-in-employment rule to employees such as Burroughs who had no notice of its existence and hence no reasonable opportunity to protect themselves from its impact. . . ." 542 F.2d at 1131. That reasoning applies equally here. The plaintiff alleges he would have sought employment elsewhere if he had been informed of the break-in-service rule.[47]

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[47] *Daniel* at 1227.

In *Mitzner v. Jarcho,* 44 N.Y.2d 39, 403 N.Y.S. 2d 490, 374 N.E. 2d 388 (1978) (discussed above at pp. 29-30), the New York Court of Appeals likewise condemned the trustees' failure to inform the plaintiff of the break-in-service rule relied on by the trustees to disqualify him. This holding was in accord with the prior state law, under which it was clear that an employee had a common law remedy against a plan sponsor who misled him about his pension rights. In *Gediman v. Anheuser Busch, Inc.,* 299 F.2d 537 (2d Cir. 1962) the court, applying state law, established a strict standard of disclosure. The plaintiffs' decedent, who had been an employee of Anheuser Busch, wrote to the company to inquire about his retirement benefits. The company responded with a memorandum from its pension consultants that was literally accurate but which, the court held, was sufficiently (though unintentionally) misleading to warrant a recovery by the plaintiffs. As Judge Friendly wrote:

> "The failure of communication was that, although the memorandum warned Barsi [the employee] that, in choosing the lump sum, he would be taking a risk of some diminution in the event of death prior to May 1, 1958, it did not do this adequately. 'Would not be as much as' is not an apt description of the relationship of $32,780.44 to $79,690—in the language of the Restatement [of Torts § 552], the pension consultants did not 'exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting.' " 299 F.2d at 545.

The decision in *Gediman* was predicated on a relationship between the parties (the employee on the one hand, and the employer and its pension consultants on the

other) sufficient to justify an expectation of clear and accurate communication. *Id.* at 544. Plainly, the relationship between the plaintiff and the defendants in the instant case similarly implied a duty of complete disclosure, and the allegation that the defendants made "[m]isleading statements as to the continuity requirement of the vesting provision for the payment of a benefit" (Complaint ¶ 17(A)(2), 32a) makes out the same cause of action for "false representations either knowingly or carelessly made" that was upheld in *Gediman.* 299 F.2d at 541. In fact, it may be easier for the plaintiff to prove his case under the *Gediman* standard than to meet the requirements for recovery under the antifraud provisions, which probably include scienter, the "intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976) (footnote omitted).

Accordingly, if the plaintiff can prove the misrepresentations alleged in his complaint, he should prevail without resort to the federal securities laws.

CONCLUSION

In granting the plaintiff a cause of action under the securities laws, the Court of Appeals has unnecessarily extended the reach of those laws to pension plans generally. Adequately protected by other causes of action, the plaintiff and others in his position have no need for new rights under the securities laws. On the other hand, the Court of Appeals' decision would place on all pension plans, their sponsors and fiduciaries a costly and cumbersome burden of compliance with the vague and inappropriate disclosure requirements of the securities laws. In return, the participants in those plans would obtain nothing of value beyond what is already provided by ERISA.

It is respectfully urged, on behalf of professional fiduciaries, that this Court reverse the decision of the Court of Appeals.

Dated: May 22, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS AND BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ERISA Industry Committee (ERIC) respectfully moves this Court, pursuant to Supreme Court Rule 42(3), for leave to file the accompanying brief in this case as *amicus curiae* in support of the Petitioners and urging reversal of the decision of the Court of Appeals for the Seventh Circuit. In support of this motion, ERIC shows as follows:

1. This motion is necessitated by the refusal of the Respondent to consent to the filing of a brief by ERIC as *amicus curiae*.

2. The ERISA Industry Committee (ERIC) is a non-profit corporation, composed of 83 United States corporations and representing a cross-section of the nation's largest firms in such industries as automobile manufacturing, electrical manufacturing, retailing, steel, photographic equipment, metals, insurance, banking, telephone, pharmaceuticals, chemicals, petroleum, airlines, rubber, utilities, and various service industries. These corporations for years have maintained one or more retirement plans for the benefit of their employees, many of which plans have been negotiated with unions. In all, these 83 corporations sponsor over 750 retirement plans covering approximately 8.5 million participants (employees, retirees and other beneficiaries) which is more than 20 percent of all employees covered by private retirement plans.[1] Retirement plans sponsored by ERIC members

[1] Comprehensive data regarding private pension and welfare programs and persons covered by them is not available. The statistics cited herein regarding plans of ERIC members have been principally derived from the Plan Descriptions

pay benefits to some 1.5 million retirees and other beneficiaries. Plans with over 1,000 participants represent slightly over ten percent of defined benefit retirement plans, but cover over eighty percent of all participants in such plans; and plans with over 10,000 participants represent less than one percent of defined benefit retirement plans, but cover over one-half of all participants in such plans.[2] Most ERIC members sponsor plans with more than 10,000 participants and ERIC generally represents a cross-section of the employee benefit plan sponsors which provide the significant majority of all plan benefits.

(Forms EBS-1) filed with the Labor Department. It is generally accepted that there are somewhere between 30 and 45 million participants in private pension programs. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 383, 93d Cong., 1st Sess. 2-3 (1973); Statement of Gregory J. Ahart, Director, Human Resources Division, United States General Accounting Office, before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging at 2 (Feb. 27, 1978). Participants in pension plans sponsored by ERIC members are not less than 15% of all participants in private pension programs and might be as many as 25% of such participants. ERIC members sponsor nearly one-quarter of the five hundred largest retirement plans, ranked by assets. Derived from listing of the 500 largest plans, Pensions & Investments, Jan. 2, 1978 at 5. The 500 largest plans had assets as of December 31, 1976, of approximately $120 billion, according to this listing. *Id.* at 1.

[2] 2 PBGC Ann. Rep. 18 (1975-76). Defined benefit plans, which are the only plans subject to PBGC jurisdiction, account for about 20% of the estimated 470,000 pension plans, but cover about 75% of the estimated 30 million pension plan participants. Statement of Gregory J. Ahart, *supra* note 1, at 2.

Through ERIC, these companies coordinate their views and provide information and recommendations to government on how the private pension system functions, and on the impact of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 ("ERISA") on retirement plan participants and plan sponsors. This includes rendering assistance to courts in their deliberations on significant employee retirement plan issues of broad concern to employers. Indeed, ERIC filed a brief as *amicus curiae* with the Seventh Circuit in the case now before this Court and this Court granted ERIC's motion and accepted ERIC's brief as *amicus curiae* in support of the petitions for certiorari in this case (Order of February 21, 1978).

3. ERIC does not contend that the Plaintiff should not be granted his pension benefits on other grounds not before this Court. In that sense we take no position on the ultimate dispute between Plaintiff and Defendants. Rather, ERIC requests permission of this Court for leave to file as *amicus curiae* in order to address the novel legal proposition now before the Court stressing its impact upon employers such as those represented by ERIC.

4. As decided by the court of appeals,[3] this case stands for the proposition that an employee's participation in a retirement plan, which covers him automatically at no cost to him, is subject to the antifraud provisions of the Securities Acts of 1933 and 1934. As a consequence, the failure to provide

[3] *Daniel* v. *International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3512 (Feb. 21, 1978).

an employee with certain information, never before thought to be material, has and wil render unions, employers, plans and plan administrators liable for massive money damages. Although the Seventh Circuit's decision involves only a claim against the Plaintiff's union and its retirement fund, that decision does raise the prospect of similar liability for employers.

5. Because no employer, union, trustee, plan administrator or, indeed, the Congress or Securities and Exchange Commission ever has understood that the antifraud provisions apply generally to such retirement plans, the Seventh Circuit's decision raises the prospect of such persons becoming subject to claims for billions of dollars and may encourage extensive vexatious litigation under the securities acts. Further, the decision may severely disrupt collective bargaining in a manner contrary to our nation's labor policy and will create significant administrative problems for retirement plan administrators.

6. No employer is involved as a party in this case. Accordingly, the interests of employers concerned with the administration of retirement plans may well be unrepresented in this Court's consideration of the case unless our request to file the accompanying brief is granted.

WHEREFORE, it is respectfully moved and requested that the ERISA Industry Committee (ERIC) be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE PETITIONERS

The ERISA Industry Committee (ERIC) hereby submits this brief in Case Nos. 77-753 and 77-754 urging reversal of the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on August 20, 1977.

INTEREST OF *AMICUS CURIAE*

A statement describing ERIC and its interest in this case is set forth in the preceding motion requesting leave to file this brief *amicus curiae*.

SUMMARY OF ARGUMENT

This case involves the question of whether an employee's participation in an involuntary, noncontributory retirement plan is, under the Securities Acts of 1933 and 1934, a security which is sold to the employees in the normal course of their employment.

It might be possible by wooden logic and literal interpretation to cast an employee's interest in a retirement plan as a "security" covered by the securities acts, but that result would conflict squarely with this Court's decision in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975) where economic reality rather than superficial linguistic analysis was employed as the keystone for defining a "security" covered by the securities acts. In addition, it is clear that Congress never intended that an employee's interest in a retirement plan be a "security" covered by the securities acts.

In 1958, Congress enacted a statute which required employers to disclose information to employees covered by retirement plans. Thus, Congress initially proceeded in its regulations of pensions in much the same way as it had earlier regulated securities transactions under the securities acts by requiring disclosure while declining to set substantive minimum standards. That effort failed, because many employees were prevented from obtaining anticipated benefits by overly strict plan requirements, not lack of disclosure.

Congress then changed direction, and in 1974, following nearly ten years of study, enacted ERISA, which set certain substantive minimum standards for private retirement plans while requiring that specific information be provided to employees and the government at specified times. However, in considering these new standards and disclosure requirements, Congress was sensitive to the fact that this nation's private retirement system is a voluntary one and that no employer is required by law to provide retirement benefits to its employees. To insure that employers would continue to have the incentive to start, maintain and expand retirement plans, Congress carefully tailored ERISA's requirements so that they would neither be too costly nor overburden employers with administrative red tape.

The decision of the Seventh Circuit will require the payment of damages or retirement benefits even to an employee, who has not met reasonable eligibility requirements which conform to ERISA's minimum standards, if his plan fails to make currently unknown disclosures required by the securities acts. The Seventh Circuit has thus clearly disregarded ERISA's goal of strengthening the private pension system by preserving employer incentives to start and continue retirement plans. Since almost no plans have made the disclosures held to be material by the Seventh Circuit, affirmance of its judgment could

impose liability of between $23.8 billion and $39.6 billion on retirement plans, employers, and unions threatening their financial destruction as well as the job and retirement expectations of millions of present workers.

With potential claims of billions of dollars, extensive and costly litigation will result, further decreasing the incentives to maintain and expand the private pension system. Adding to this concern is the lack of any case or statutory guidance to what must be disclosed regarding any involuntary, noncontributory pension plan.

The lower court's ruling, if affirmed, would also negate ERISA's broad preemption of state law by permitting the states to regulate interests in retirement plans as "securities," placing unwarranted and unnecessary administrative burdens on plan sponsors.

Further, the Seventh Circuit's conclusion that the securities acts apply to retirement plans as if employment decisions were investment decisions affronts common sense, ignores the economic reality of the employment relationship, and disregards the basic distinction between capital and labor in our industrial society.

Even if the securities acts themselves, prior judicial opinions and the subsequent ERISA legislation would permit affirmance of the decision of the circuit court, the serious adverse consequences of such a decision on collective bargaining and basic labor policy militate against such a course.

The Seventh Circuit's opinion creates such a threat of litigation and liability that any prudent employer who bargains retirement benefits with a union will feel compelled to attend any meeting of employees set to ratify the collective bargaining agreement in order to insure that the employees are given full and accurate information and are made aware of how much higher their current wages might be but for the proposed retirement plan coverage. Such action, however, will substantially undercut the union's role as the exclusive bargaining agent for all employees, a role which is essential to effective labor-management relations in our country and a role which this Court has defended against lesser attacks in the past.

Finally, if a union which bargains retirement benefits is to be held liable for damages and is to be subjected to lawsuits such as the one now before this Court, it is not unreasonable to assume that unions will simply decline to bargain about retirement plans. Such a step would clearly be adverse to employee interests and is inconsistent with our national labor policy.

ARGUMENT

I. Introduction

The Plaintiff in this case, John Daniel, worked 22½ years as a member of Local 705 of the Teamsters Union and was covered during that period by a union-negotiated Teamster retirement plan which required 20 years of unbroken service by a covered employee before he became entitled to retirement benefits. When Daniel retired he did not qualify for benefits because he had been laid off for a short

period of time some 16 years prior to his retirement. Daniel then commenced the present suit to obtain retirement benefits from his union for himself and for a class of employees who have participated in Teamster pension funds.

Although Daniel's complaint alleges various causes of action which, if proven, may support the relief he desires, only the two counts involving the antifraud provisions of the securities acts are before this Court. These two counts allege that the defendants have violated the antifraud provisions of the Securities Acts of 1933 [1] and 1934 [2] and consequently are required to pay the Plaintiff his full retirement benefits. In support of this claim, Daniel contends that his union misled the employees it represented by failing to disclose to them the various circumstances which would have precluded them from receiving retirement benefits, the actuarial grounds upon which the funds were based, and the actuarial likelihood that a participant would not receive any pension benefits at all.

Defendants moved to dismiss these two counts but the trial court denied the motion, and the court below affirmed. *Daniel* v. *International Brotherhood of Teamsters*, 410 F.Supp. 541 (N.D. Ill. 1976), *aff'd*, 561 F.2d 1223 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3512 (Feb. 21, 1978). In so doing, the Seventh Circuit ruled that an employee's interest in

[1] 15 U.S.C. § 77(a), *et seq.* (1970).

[2] 15 U.S.C. § 78(a), *et seq.* (1970).

a noncontributory,[3] involuntary [4] retirement plan is a "security" for purposes of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The court below also held that an employee accepts an "offer of sale" of a "security" (an interest in a retirement plan) and, accordingly, acquires a right to full disclosure of all material information concerning that plan when (1) the employee commences employment with an employer who offers a retirement plan; (2) the employee votes with his fellow workers to accept a collective bargaining agreement negotiated by his union representative which provides for a retirement plan; or (3) the employee continues to work for his employer. 561 F.2d at 1242, 1243, 1249. The Seventh Circuit determined that the "material" information to be disclosed on each of those occasions must include, at least the actuarial probability that a participant actually will receive pension benefits and factors such as risk of loss, breaks in service, death before retirement age and plan termination that can cause a member to be deprived of benefits. 561 F.2d at 1228-29, 1248. If all material information is not provided to an employee, the court below ruled that the employee may maintain a cause of action for money damages, which Plaintiff asserts may include the full payment of otherwise unearned retirement benefits.

It is not difficult to understand and appreciate the Seventh Circuit's reaction to Daniel's failure to re-

[3] The Teamster plan is "noncontributory" in that all contributions are made by employers, and employees are neither required nor permitted to contribute to the plan.

[4] The Teamster plan is "involuntary" in that participation in the plan is a condition of employment.

ceive retirement benefits. Six salient aspects of this case, however, place it in proper perspective.

First, Daniel's complaint seeks relief on grounds other than those now before this Court, so that it is by no means necessary for him to prevail here in order to obtain the relief he seeks.

Second, Daniel did not contribute his money to the retirement plan, nor did he choose to be covered by the plan. Instead, contributions to the plan were made by his employer and the plan automatically covered him simply because he worked there.

Third, this case does not involve only Daniel, but instead is a class action seeking retirement benefits for a large number of Teamster-represented employees. In addition, as we show below, Daniel's suit affects all of this nation's private retirement plans.

Fourth, although the case before this Court involves alleged violations of the antifraud provisions of the securities acts, Daniel's basic claim does not involve "fraud" in the popular sense, but, instead, alleges a failure to provide certain information presumably required by the securities acts, but at a time when no one, including the Securities and Exchange Commission, believed that the securities acts required disclosures to retirement plan participants. 561 F.2d at 1226-27. *See Robinson* v. *UMW Health and Retirement Funds*, 435 F.Supp. 245, 247 (D.D.C. 1977).

Fifth, this case is not a suit to require disclosure of information to retirement plan participants; it is a suit for money damages in the form of retirement benefits. The courts below have not granted requests for information; they have set the stage for money

damage claims that may bankrupt retirement plans, unions and employers nationwide.

Sixth, national policy as expressed in the Employee Retirement Income Security Act of 1974 ("ERISA") prevents a loss of benefits, such as Daniel experienced, from occurring in the future.

In fulfilling its task of deciding "which of the myriad financial transactions in our society come within the coverage" of the securities acts this Court should give due consideration to these observations. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975). Furthermore, the Seventh Circuit's failure to properly accommodate settled principles of labor law and established interpretations of the securities acts, as well as the direct conflict between that court's decision and congressional policy embodied in ERISA, must inform the Court's judgment and compel a reversal of the lower court.

II. Application Of The Securities Acts To Involuntary Non-contributory Pension Plans Is Inconsistent With Policies Underlying ERISA And Has Substantial And Destructive Implications.

We believe that all Congress has said and done from its early deliberations regarding retirement benefit plan regulation through the enactment of ERISA clearly establishes that Congress proceeded with a clear understanding that the securities acts neither did nor should control, apply to, or affect involuntary, noncontributory retirement plans.[5]

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[5] We do not suggest, as the Seventh Circuit thought, that ERISA "repeals" the application of the securities acts to re-

Indeed, the consideration of ERISA, regarded as the most sweeping retirement plan legislation ever adopted, involved the study, investigation, hearings and debate of four committees of Congress, as well as three Cabinet departments, and input from countless employee organizations, corporations and individuals. Yet, during this entire legislative and executive effort dealing with all aspects of employee participation in retirement plans, there is no hint that Congress ever intended or believed that the securities laws were generally applicable to such plans and merely were being supplemented by this complex and detailed new law.[6]

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tirement plans. 561 F.2d at 1246. Rather, we contend that this Court properly may look to what Congress said and did in enacting ERISA in 1974 as an indication that Congress never intended the earlier securities acts to cover retirement plans in the first place. *See Pipefitters* v. *United States*, 407 U.S. 385, 411-13 (1972); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). Indeed, when it suited the Seventh Circuit's purposes to recognize that subsequent legislative action can be a guide to determining earlier legislative intent, the court did so in this case. 561 F.2d at 1237 n. 26 and accompanying text.

[6] The Interim Report of Activities of Private Welfare and Pension Plan Study ("Interim Report") marked the beginning of the deliberations of ERISA by Congress and was adopted as a "complete description of the federal regulation affecting the administration of private [pension] plans . . . ." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973). The Interim Report states that:

> Pension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 . . . , unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. A

> voluntary contributory plan is one to which both the employee and the employer contribute and in which employees voluntarily participate. If the plan's investment in the employer's securities exceeds the employer's contribution, both the employer's securities and the interest in the plan must be registered under the Securities Act with the SEC.

S. Rep. No. 634, 92d Cong., 2d Sess. 96 (1971). *See also*, ERISA Leg. Hist., Vol. I at 587, 589; Vol. II at 2348, 2350, 3377, 3470; Vol. III at 4748. All citations to ERISA legislative history shall be the separately bound legislative history: Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976) [herein cited as "ERISA Leg. Hist."].

Indeed, this same understanding existed when Congress considered the bills which led to the adoption of the Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309 (1970) (repealed by Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1031(a)(1) (Supp. V 1975) ("WPPDA"). *See* S. Rep. No. 1734, 84th Cong., 2d Sess. 60 (1956); S. Rep. No. 1440, 85th Cong., 2d Sess. 9, *reprinted in* [1958] U.S. Code Cong. & Ad. News 4137, 4145. One such bill, S. 1122, would have vested enforcement responsibility in the SEC, but the SEC professed lack of expertise. Hearings on S. 1122 Before the Subcomm. on Welfare and Pension Plans Legislation of the Senate Comm. on Labor and Public Welfare, 85th Cong., 1st Sess. 119 (1957).

Statements of the legislative sponsors of ERISA since the circuit and district court decisions in this case have affirmed anew their understanding that the securities acts never were intended to cover retirement plan interests generally. Statement of Congressman Dent, 174 Daily Labor Rep. (BNA) at A-6 (Sept. 7, 1976); Letter from Senator Williams to SEC Chairman Williams (Dec. 13, 1977), 168 Pens. Rep. (BNA) at R-19—R-22 (Dec. 19, 1977); Statements of Senator Williams and Senator Javits in sponsoring S. 3017, 85 Daily Labor Rep., Special Supp. (BNA) at 2-3, 8 (May 2, 1978).

Further, contrary to the assertion of the Seventh Circuit, the antifraud provisions of the securities acts cannot be read as complementary to the requirements of ERISA.[7] 561 F.2d at 1248. The argument that the securities laws fill a gap left by ERISA in that they require disclosure prior to an "investment decision," *e.g.*, a decision to accept employment or vote to ratify a collective bargaining agreement, while ERISA permits disclosure to be made up to 90 days after an employee becomes a plan participant[8] (561 F.2d at 1248-49) simply will not withstand analysis. That argument is based upon a misreading of the history of retirement plan regulation in this country and is directly counter to the objectives of the Congress as reflected in legislation regulating retirement plans.

National policy and the public interest favor the institution and continuation of private retirement plans. The decades following the conclusion of the

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[7] *See generally* the excellent analysis in Comment, *Application of the Federal Securities Laws to Noncontributory, Defined Benefit Pension Plans*, 45 U. of Chi. L. Rev. 124 (1977).

[8] In recent testimony before the Senate Human Resources Committee, Subcommittee on Labor, SEC Chairman Williams conceded that disclosure in the form of a summary plan description as required by ERISA within 90 days after employment was as adequate as pre-employment disclosure. Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Comm. on Human Resources, 95th Cong., 1st Sess. 113-114 (1977) (Statement of Chairman Harold M. Williams). In addition, if disclosure under the securities laws were desirable, the registration requirements, which are the core of securities law disclosures, also should apply. However, as noted by the Seventh Circuit, the SEC maintains that 96% of all pension plans are exempt from registration. 561 F.2d at 1250 n. 61.

Second World War witnessed a constantly accelerating growth of private retirement plans, both in the number of plans and the extent of coverage. Employers willingly established and made contributions to such plans. Employees, solely by reason of their employment and continued service, became participants in such plans. These employees developed certain hopes and expectations of future retirement income and designed their life styles accordingly. Thus, the basic hope for substantial retirement income became an expectation of the American worker which Congress deemed worthy of protection.

On the other hand, our American retirement plan system, other than Social Security and similar statutory programs, was born, flourished and continues as a voluntary system in which employers are free to provide or not to provide for the retirement of their employees. In order for such a voluntary system to continue, there must be incentives for employers to provide retirement benefits. One such incentive is the employer's desire to retain employees, thus requiring some length of employee service before an employee receives his benefit or is free to move on and retain his vested retirement benefit. Another incentive is that an employer may establish a retirement plan which will provide benefits for longer service employees at a relatively low cost and with a minimum of administrative red tape. Throughout its deliberations leading to the enactment of the Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309 (1970) (repealed by Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1031(a)(1) (Supp. V 1975) and, ultimately, ERISA, Congress was acutely aware of the need to

strike a balance between these competing considerations. The entire structure of the safeguards established by Congress for retirement plans indicates a clear appreciation that, although certain standards specifically designed to protect retirement plan participants were necessary, it was just as necessary to retain incentives to encourage employers to institute and continue such plans.

Congress' first major effort at regulating the private retirement plan system was the WPPDA which required that certain information be disclosed to retirement plan participants—a relatively slight burden on employers. Congress, thus, chose the same kind of regulation that it had earlier applied to the sale of securities when it enacted the Securities Acts of 1933 and 1934.

But Congress' first effort did not work. Indeed, in enacting ERISA, Congress made the express legislative judgment that a system of disclosure such as that embodied in the WPPDA or the securities laws was an inadequate and inappropriate remedy to the problems of the private pension system. As the Senate Report accompanying S. 4 found:

> After a comprehensive investigation of abuses in the administration and investment of private fund assets, Congress adopted the Welfare and Pension Plan Disclosure Act of 1958. The policy underlying enactment of this Act was purportedly to protect the interests of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. . . .
>
> Experience in the decade since the passage of the above amendments has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. . . .

ERISA Leg. Hist., Vol. I at 590.

Thus, disclosure had not prevented plan participants like Daniel [9] from losing accrued pension benefits because of a short break-in-service. As the Senate Report further noted:

> The fact that statutory rules exist says little as to their efficacy in adjusting inequities that

[9] The entire legislative history is replete with examples closely paralleling the facts now before this Court. *See, e.g.*, ERISA Leg. Hist., Vol. III at 3584, 4656, 4749-51, 4790. The avowed central purpose of ERISA was, and is, to bring relief to employees whose expectations (as opposed to technical rights under existing retirement plans) had proven to be only false hopes. *See, e.g.*, 29 U.S.C. § 1001(a) (Supp. V 1975); ERISA Leg. Hist., Vol. I at 90-92, 1267; Vol. II at 1599, 3474; Vol. III at 4282-83, 4657. Significantly, on two separate occasions in which the need for retirement benefit protection to be afforded by ERISA was being debated in Congress, Senator Bentsen urged its adoption as a step necessary to protect American working men and women from the following:

> > Another example of unreasonable vesting requirements involves the participants of a union-administered pension plan in Chicago. Each local within this union administers its own pension plan. Under the terms of these plans, a worker must remain within the same local for 20 years in order to acquire any vested rights. Sometimes a slight shift in jobs—perhaps from a loading dock to the weighing station—involves a shift in union locals and a complete loss of all pension rights for an employee with less than 20 years on the first job.
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> ERISA Leg. Hist., Vol. II at 1634, Vol. III at 4792.

> are visited upon plan participants, as evidenced by the hearings before this Committee. In almost every instance, participants lose their benefits not because of some violation of federal law [the disclosure requirements of the WPPDA], but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. . . . Thus, under present law, accumulated pension credits can be lost even when separated employes are within a few months, or even days, of qualifying for retirement.

Id. at 591.

To remedy these problems,[10] ERISA provided *substantive* standards regulating participation, vesting, the computation of service, breaks-in-service and accrual of benefits.[11] The legislative decision to protect the interests of pension participants through substantive standards meant disclosure could be restricted to specific items necessary for the enforcement of those substantive standards.

But in deciding what substantive standards and specific disclosures would be required by ERISA,

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[10] What Congress perceived as the other major problem of the pension system—inadequate funding—also was dealt with through substantive regulation. ERISA established minimum funding standards which include controls on the actuarial methods to be used, 29 U.S.C. §§ 1081-86 (Supp. V 1975); 26 U.S.C. § 412 (Supp. V 1975), and created the Pension Benefit Guaranty Corporation which guarantees the payment of minimum benefits to a participant if the plan is terminated before vested benefits are fully funded. 29 U.S.C. § 1301, *et seq.* (Supp. V 1975).

[11] 29 U.S.C. §§ 1052-54 (Supp. V 1975); 26 U.S.C. §§ 410-12 (Supp. V 1975).

Congress had to strike a balance between protecting employee retirement expectations and maintaining incentives for employers to start, continue and expand retirement plans and benefits. Without the latter, fewer and fewer workers would be covered by private retirement plans. The key incentives were (1) maintaining reasonable costs for employers who sponsor and pay for private retirement plans for their employees, and (2) holding administrative red tape, record keeping and documentation to a minimum so as not to overburden plan sponsors and administrators.

These congressional concerns were underlined by Representative Ullman, now Chairman of the House Ways and Means Committee:

> I want to emphasize that these new [ERISA] requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation [ERISA] is designed.

ERISA Leg. His., Vol. III at 4673.

The House Committee on Education and Labor in reporting ERISA legislation stated:

> The Employee Benefit Security Act as reported by the Committee is designed to remedy certain

> defects in the private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the Committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analysed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.

ERISA Leg. Hist., Vol. II at 2348. *See also*, ERISA Leg. Hist., Vol. II at 1601, 1645, 1648, 1649, 2352-56, 3493; ERISA Leg. Hist., Vol. III at 4797.

In the Senate floor debate on the Conference Report, Senator Nelson clearly delineated the careful balance struck by Congress in enacting ERISA:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

ERISA Leg. Hist., Vol. III at 4800.

Indeed, in early debate upon the proposed legislation, Senator Williams responded to Senator Hartke's efforts to impose more stringent and costly requirements upon pension and benefit plans by facetiously asking Senator Hartke if he was proposing an amendment requiring all employers to provide pension benefits. Senator Williams went on to note:

> Mr. President, until the Senator does impose upon employers the mandate to have pension plans, I would think that all of the provisions that the Senator would offer, put together, would just kill off any attitude on the part of the employers who do not have any pensions to come on in.

ERISA Leg. Hist., Vol. II at 1776.

Further, since the passage of ERISA, Congress has been attentive to the increased costs and administrative burdens created by that legislation and various members have expressed their concern about the adverse impact of ERISA upon the start of new plans and the continuation of existing plans. For example, the House Small Business Committee recently published the results of a questionnaire sent to small businesses which intended to terminate existing retirement plans. Some 79 percent of those businesses indicated that ERISA had an effect upon their decision. Of those businesses 92 percent were motivated, at least in part, to terminate plans because of the increased costs mandated by ERISA. House Small Business Comm. ERISA Questionnaire Results, 160 Pens. Rep. (BNA) at A-2—A-3, R-11—R-13 (Oct. 24, 1977).

Senators Williams and Javits recently have introduced legislation, S. 3017, to correct some of the ad-

verse effects of ERISA on retirement plan starts and terminations. In doing so, Senator Williams stated:

> It is my view that private retirement plans are and must continue to be a critical component in America's system of providing retirement income. Yet, even after 25 years of spectacular growth of these plans in the years following the Second World War, private pension plans in 1974 covered only about half of the private sector, non-agricultural work force. Since ERISA's enactment in 1974, growth of the private system has slowed, and the past 3½ years have been a time of an increased incidence of terminations, and a decreased incidence of new plan starts, accompanied, however, by steady growth of the size of the work force.

85 Daily Labor Rep., Special Supp. (BNA) at 3 (May 2, 1978).

In sum, a critical objective of ERISA was and is to permit retirement plans to be operated at low cost with a minimum of administrative burdens,[12] so that

[12] In support of S. 3017, Senator Javits has said:

> By making ERISA easier to live with, these amendments should encourage employers to maintain their existing plans and to establish new plans. I believe, however, that further encouragements and incentives are necessary in order to expand the numbers of workers covered by private pension plans.
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> . . . .
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> My bill's most far-reaching change in ERISA's reporting and disclosure sections is to grant the new Commission authority to exempt any employee benefit plan from any of the existing paperwork requirements or to modify any of these requirements.
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> . . . .
>
> This new authority will give the Commission needed flexibility in tailoring reporting and disclosure requirements to particular situations. The Commission will be able to exercise its discretion to reduce unnecessary paperwork which adds to the cost of plan administration and may not be essential to protecting the interests of participants and beneficiaries.
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> . . . .
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> My bill also eliminates a number of requirements which appear not to be cost-justified. The summary annual report, which must be distributed to participants each year and which must disclose, among other things the plan's assets and liabilities as well as its annual receipts and disbursements, is eliminated because it is too costly in light of the information it provides.
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> . . . .
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> [T]he application of the securities laws to interests in employee benefit plans creates the potential for the imposition of large unforeseen liabilities, the termination of certain pension plans, the imposition of disclosure requirements which duplicate those of ERISA, and the addition of another body of law and another regulatory agency to an already crowded legal landscape.
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> 85 Daily Labor Rep., Special Supp. (BNA) at 5-9 (May 2, 1978).

there is a continuing incentive for employers to start, and expand retirement plans and benefits. The consequences of the Seventh Circuit's judgment, however, emasculates this clear and sound objective of Congress, for that judgment has created substantial disincentives to retirement plan development.

The theory on which the judgment of the Seventh Circuit rests, though focused on Daniel's plight, logi-

cally cannot be restricted to the facts of this case, to the broad class of participants in Teamster pension plans or even to employees who lost their pension interests prior to the effective date of ERISA. Employers, unions and Congress have conducted their affairs in the belief that the securities acts do not apply to involuntary, noncontributory pension plans. It is reasonable to assume that there are now in existence no retirement plans where the kind of disclosure which Daniel and the Seventh Circuit believe the securities acts require was made to employees at the time they voted to ratify a collective bargaining agreement, or were hired. This means that every retirement plan participant in the nation has at least a claim to benefits similar to Daniel's.

Moreover, even those employees who are protected by ERISA and who do not have a claim to benefits under its substantive provisions will have a claim against private pension plans and their sponsors. Thus, an employee terminated after five years of service—a term too short for the vesting of benefits to be required under ERISA—would have a claim under the Seventh Circuit's decision if all material facts concerning his potential pension benefits were not disclosed when he was hired or voted on the ratification of a collective bargaining agreement. Further, significant future liability may develop for failure to meet the basically unknown disclosure requirements of the securities acts as they apply to retirement plans. *See* pages 26-27, 28-31, *infra*.

Labeling such concerns a "parade of horribles" attributable to the zeal of advocates, the Seventh Circuit advised that "plan liability . . . is still limited

by a number of factors." 561 F.2d at 1250. This is not correct. The Seventh Circuit held the failure to disclose the actuarial probability that a participant will receive a pension to be a material omission.[18] Positive proof of reliance is not required for recovery in such cases. *Affiliated UTE Citizens* v. *United States*, 406 U.S. 128, 153-54 (1972). Moreover, statutes of limitations are not likely to reduce potential liability significantly in light of the fiduciary relationship between the sponsors, trustees and administrators of a plan and plan participants. That relationship may result in application of the federal "equitable tolling doctrine" until disclosure of the facts giving rise to a participant's potential cause of action or until the date he could begin receiving benefits—usually age 65. Indeed, the district court noted the applicability of that doctrine in this case. 410 F. Supp. at 544-45.

A conservative analysis of available data indicates that this present potential liability is staggering and, if it becomes reality by affirmance of the lower court's decision, could destroy the American private retirement plan system.

A study prepared by George B. Buck Consulting Actuaries, Inc. for the Department of Labor, indicates potential liability to be between $23.8 billion and $39.6 billion if all terminated non-vested partici-

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[18] Almost no plans have made such disclosures in the past. George B. Buck Consulting Actuaries, Inc., Report to the Secretary of Labor—*Potential Effect of Daniel*, unpublished study prepared under Contract J-9-P-7-0064 at II-2 (Mar. 20, 1978), available through Public Disclosure Room, Dept. of Labor, Pension and Welfare Benefit Programs, Room N4677, 3d Street & Constitution Ave., N.W., Washington, D.C. 20216.

pants are entitled to a pension and the applicable statutes of limitations runs from the participants' normal retirement date.[14] The study does not project the additional billions of dollars in liability that no doubt exist for presently employed workers who may someday receive no retirement benefits.[15]

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[14] *Id.* at III-1—III-3. The study estimates that this liability would be reduced to between $8.1 billion and $13.5 billion if the applicable statutes of limitations were to run from the date of termination of employment.

[15] If this Court sustains the Seventh Circuit, it should give serious consideration to applying its holding prospectively only. As this Court noted in *Los Angeles Dept. of Water & Power* v. *Manhart*, 46 U.S.L.W. 4347, 4352 (April 25, 1978), "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." That conclusion certainly applies here, for Congress recognized that substantive regulation of retirement plans would impose new costs on the private pension system; costs which might jeopardize the continued existence of the very system it was striving to protect. Indeed, Congress made an express legislative decision not to make retroactive ERISA's break-in-service and vesting rules, 29 U.S.C. § 1053 (Supp. V 1975), which now preclude a person who, like Daniel, incurs a short break-in-service from losing his pension. The decision to limit ERISA to prospective application was the result of a clear compromise between the desire to remedy the problems of the private pension system through substantive regulation and the recognition of the need to do so without destroying its financial stability. *See Manhart, supra.* As Congressman Thompson stated on the floor of the House:

> I believe we have reconciled the competing interests of participants and pension plan sponsors in a way that speeds the protection of the new standards without creating undue financial dislocation or immediate disruption of existing pension plans. By way of explanation, I would draw the attention of my colleagues to the provisions dealing with the effective dates for the vesting, participation and eligibility provisions contained in part 2 of title I. Under the conference substitute the provisions with respect to participation and vesting will apply to new pension plans in plan years beginning after the date of enactment of the conference report. For pension plans in existence on January 1, 1974, the general effective date of the participation and vesting provisions is to be plan years beginning after December 31, 1975.

ERISA Leg. Hist., Vol. III at 4664. By granting Daniel the pension he seeks by retrospective application of the securities laws, this Court would destroy that compromise, in disregard of the command of the legislature.

[16] The recent comments occasioned by a district court's review of an attempt to render unions liable for failure to police job site safety are relevant here:

If such a liability were imposed upon present retirement plans, many would be bankrupt, thus denying anticipated retirement benefits to all employees. Further, the lower court's decision raises the possibility of imposing that liability upon private companies which could jeopardize their very existence and the jobs and retirement expectations of millions of presently employed workers. Even more clearly, if such liability were imposed upon the nation's unions —as the Plaintiff herein seeks—they would be destroyed.[16]

> Union funds are derived from its members and only the largest unions may be potentially able to absorb the type of loss involved in this case. While unions may seek insurance coverage, the cost must be borne by the membership. Unions do not have finite limits of liability as do employers under workmen's compensation, nor can unions

If the decision of the Seventh Circuit is affirmed, the national policy of encouraging the expansion and creation of a retirement plan by making it possible for employers to provide benefits at a reasonable cost will be dealt a further blow by the cost of litigation which will result. With potential claims of billions of dollars, extensive litigation expense will confront defendant employers, unions and retirement plan administrators. If such suits are commenced as class actions, the potential liability realistically raises the specter of bankruptcy for employers, unions and retirement funds, thus increasing the motivation to settle even the seemingly most groundless claim. Nor is this mere speculation. The Plaintiff herein commenced his suit against the International Teamsters Union, all local Teamster unions, all trustees of all Teamster pension funds and all the officers of all Teamster unions, and did so on behalf of every Teamster member in the country who has participated in a Teamster pension fund.

Adding to these concerns is the lack of any statute or case law defining what must be disclosed regarding an involuntary, noncontributory retirement plan in order to meet the requirements of the securities

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pass along such a loss to the public as may an employer. Moreover, the result is readily apparent, if unions could be held liable in cases such as this—there would be no negotiation on safety matters. To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy.

House v. *Mine Safety Appliances Co.*, 417 F.Supp. 939, 946 (D.Idaho 1976).

acts.[17] For example, the Seventh Circuit held in this case that a plan must disclose "the actuarial probability, here perhaps as low as 8% . . . , that a member actually will receive pension benefits. . . ." 561 F.2d at 1229. It is not clear whether this refers to probability that a participant becomes eligible for a benefit or that he actually receives it. An employee who becomes eligible for a benefit, but dies in employment may not receive a benefit. Nor is it clear whether a uniform probability may be used for a plan as a whole or whether probability must be individualized and, if so, on what basis—type of job, geographic location, age or sex, etc. It is clear that in contrast to the carefully defined disclosure requirements of ERISA,[18] the development of disclosure requirements under the securities acts on a case-by-case basis will involve massive litigation.

Even in the absence of a national policy of encouraging the creation and expansion of retirement plans, the increased likelihood of antifraud litigation is a legitimate matter to be considered in construing the securities acts. In *Blue Chip Stamps* v. *Manor Drug*

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[17] What is "material" must be determined on a case-by-case basis. *See, e.g., SEC* v. *Shapiro*, 494 F.2d 1301, 1306 (2d Cir. 1974).

[18] *See, e.g.*, 29 U.S.C. §§ 1021-31 (Supp. V 1975); 29 C.F.R. § 2520.102-2, § 2520.102-3. It is clear that in enacting ERISA Congress did not intend that employers be confronted with an amorphous requirement to disclose all "material" information. Indeed, ERISA does not require disclosure of the "actuarial probability . . . that a member actually will receive pension benefits . . ." as would be required by the decision of the Seventh Circuit. 561 F.2d at 1229.

Stores, 421 U.S. 723 (1975), this Court recognized that:

> There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.
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> . . . .
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> [I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.

421 U.S. at 739-40. Further, with respect to discovery, the Court stated:

> But to the extent that it [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Yet to broadly expand the class of plaintiff who may sue under Rule 10b-5 would appear to encourage the least appealing aspect of the use of the discovery rules.

421 U.S. at 741.

In addition to spawning massive litigation, if affirmed, the decision of the Seventh Circuit negates the preemption of state law and elimination of in-

consistant and overlapping state regulation which is one of ERISA's key incentives to the expansion of the private pension system. The legislative history of ERISA indicates that Congress deliberately rejected a statutory approach that would have defined the areas of federal preemption of state law and, instead, enacted a broad preemption provision with only limited exceptions as an incentive to those sponsoring pension plans.[19]

On the House floor, Representative Dent characterized this approach in the following terms:

> Finally, I wish to make note of what is to many the crowning achievement of the legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants

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[19] As first presented to the House of Representatives, the proposed revision of the Welfare and Pension Plans Disclosure Act, H.R. 2, 93d Cong., 1st Sess. (1973), contained a preemption provision that delineated the areas in which the Act would supersede state law to those in which its provisions "may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans." ERISA Leg. Hist., Vol. I at 50-51. Conference Committee action in June, 1974, however, resulted in a change of thrust by which ERISA § 514(a), 29 U.S.C. § 1144(a) (Supp. V 1975), now sets forth the general rule that the provisions of Titles I and IV of ERISA supersede *all* state laws relating to *any* employee benefit plan, and then lists specific exceptions, including the provision of § 514(b)(2)(A) that preemption does not apply "to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." ERISA Leg. Hist., Vol. III at 4357.

by eliminating the threat of conflicting and inconsistent State and local regulation.

ERISA Leg. Hist., Vol. III at 4670. Senator Williams addressed the Senate in similar terms. ERISA Leg. Hist., Vol. III at 4745-46.

If, however, participation in an involuntary, noncontributory pension plan is an "investment contract" and therefore a "security," any state whose Blue Sky laws include an "investment contract" within the definition of a "security"[20] will be able to regulate pension plans in any manner not repugnant to the federal securities laws.[21] Since ERISA

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[20] To date, 33 states, Puerto Rico and the District of Columbia have adopted the Uniform Securities Act, whose definition of "security" in § 401(1) includes "investment contract." Most, if not all, of the other states also include "investment contract" in their definition of security.

[21] Section 18 of the Securities Act of 1933, 15 U.S.C. § 77r (1970), and Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb (1976), carefully and specifically save the jurisdiction of the states to regulate any security or person insofar as it does not conflict with or is not repugnant to the provisions of the federal securities laws. *See, e.g.*, *Crosby* v. *Weil*, 382 Ill. 538, 48 N.E.2d 386 (1943).

One state official, Willie R. Barnes, California Commissioner of Corporations, in the course of urging the Congress to permit greater state regulation in the area of employee welfare benefit plans, stated that *Daniel* had opened the way for a state to use its securities laws to regulate such plans. Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Comm. on Human Resources, 95th Cong., 1st Sess. 650, 681-83 (1977) (Statement of Willie R. Barnes).

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preemption does not extend to state securities laws, 29 U.S.C. § 1144(b)(2)(A) (Supp. V 1975) (514(b)(2)(A)), a state could establish extensive disclosure requirements inconsistent with those of ERISA and other states, thereby substantially increasing plan administrative costs. Given Congress' view that securities laws had only limited application to pension plans, this would permit the exception to swallow up the rule. The federal courts will then have undone the "crowning achievement" of the legislation passed by Congress in exposing sponsors of pension plans to "the threat of inconsistent State . . . regulations."

III. The Seventh Circuit's Decision Conflicts With The Realities Of The Employer-Employee Relationship And With Settled Labor Law Principles, Threatens Serious Disruption Of The Collective Bargaining Process And Is Contrary To National Labor Policy.

A. The Lower Court's Decision Ignores The Economic Realities Of The Employer-Employee Relationship And The Collective Bargaining Process.

The decision below casts the applicant for employment who takes a job and an employee who retains employment in the role of an investor under the securities laws. Nothing could be more foreign to the nature of the employment relationship. Employees are not investors and do not enter into investment relationships by accepting or continuing their employment. They supply labor, not capital, to the employing enterprise with one incidental aspect of the employment relationship possibly being participation in a retirement program paid for by their employer. Participation in such a retirement program is contingent upon the fact of employment alone.

The Seventh Circuit's securities law analysis employs a "literal approach" [22] and is squarely in conflict with *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975). Writing for the majority in *Forman*, Mr. Justice Powell rejected the Second Circuit's use of this "literal" approach and clarified the thrust of the definition of "security" in the 1933 Act as follows:

> In providing this definition Congress did not attempt to articulate the relevant economic criteria for distinguishing "securities" from "nonsecurities." Rather, it sought to redefine "the term 'security' in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of the security."

421 U.S. at 847-48. Taking as a starting point the fact that the securities acts were passed to eliminate serious abuse in "the *capital* market of the enterprise system," the Court in *Forman* noted that an "investment contract" is in reality nothing other than an "instrument commonly known as a security," and concentrated on "economic reality" rather than superficial linguistic analysis. 421 U.S. at 849 (emphasis added). Using that framework, the Court ruled that the "stock" purchased by occupants of a cooperative apartment project was not a security subject to regulation under the federal securities laws stating:

> Well-settled principles enunciated by this Court establish that the shares purchased by respondents do not represent any of the "countless and

[22] *See SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946).

> variable schemes devised by those *who seek the use of the money of others* on the promise of profits" . . ., and therefore do not fall within "the ordinary concept of a security."

421 U.S. at 848 (emphasis added).

Unlike the shares purchased in the *Forman* case, Daniel's participation in a retirement plan was not labeled "stock." It is beyond argument, moreover, that participation in a noncontributory pension fund is not an "instrument commonly known as a security." As Judge Gesell, in *Robinson* v. *UMW Health and Retirement Fund*, 435 F.Supp. 245, 247 (D.D.C. 1977), observed:

> Yet until the 1975 [District Court] decision in *Daniel* (which predated *Forman*) no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws.

Using the *Forman* economic reality analysis, it is clear that participation in a noncontributory retirement plan cannot be characterized as a security. Employees are not investors and are not entering into investment relationships by accepting or continuing their employment. They enter into an employment relationship, one aspect of which may be that if they contine to work for their employer for a certain number of years they will have a right to income at retirement. Indeed, this Court recently recognized that retirement plan coverage runs with the job and that employees normally do not make a decision to become or remain employed based upon the conditions of

their retirement plan. Thus, in *Los Angeles Dept. of Water & Power* v. *Manhart*, 46 U.S.L.W. 4347, 4351 n. 30 (April 25, 1978), this Court dismissed the contention that a gender-based distinction in retirement plan contributions was required in order to prevent male employees from withdrawing from the plan or their employment by stating: "[Y]et the Department points to no 'adverse selection' by the affected employees, presumably because an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market." To seize upon and mischaracterize one aspect of the total employment relation in order to label it (participation in a noncontributory pension plan) an "investment contract" and therefore a "security" is to do violence to the underlying economic reality.

Further, an analysis of retirement plans themselves indicates the folly of characterizing them as securities. As this Court recognized in *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 593-94 (1977):

> [T]he "true nature" of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment. Moreover, because of the vesting requirement and the use of payment formulas that depend on earnings at the time of retirement, both the cost to the employer and the payment to the employee for each year of service depend directly on the length of time the employee continues to work for that employer.[23]

Thus, an employee under a noncontributory retirement plan does not choose to take part of his wages and invest them with the employer in the hope of making a profit; retirement income is conditional deferred compensation in the sense that it is given only after a fixed number of years of service. An investor in securities, on the other hand, is not provided with additional compensation for services rendered. Quite the contrary, the investor supplies capital, not labor, to a business enterprise. By characterizing participation in a retirement plan as a security, the Seventh Circuit's decision obliterates the fundamental distinction between capital and labor upon which the American economic system is based.

Moreover, retirement plan participation in the context of ratifying a collective bargaining agreement cannot in any realistic sense be characterized as a

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[23] Even ERISA has not changed this system; it simply has imposed reasonable requirements on the length of time it takes for the employee to attain a "vested" right. As was observed in House Report No. 533: "[ERISA] presumes that promised pension benefits are in the form of a conditional deferred wage. While popular attention focuses on the deferred wage aspect of pensions, the Act recognizes that the pension promise is conditional upon completion of minimum periods of service." ERISA Leg. Hist., Vol. II at 2360.

"sale" under the securities acts. The lower court's opinion assumes that employees pay for or "buy" retirement benefits because they voluntarily (by their vote to ratify a union-negotiated agreement) give up present wage increases in exchange for the employer's contribution to pensions. But that conclusion is at odds with the nature of collective bargaining for a number of reasons.

First, even union-represented employees do not have a choice as to what wages and retirement benefits their employer will pay. The American retirement system is a voluntary system in which employers are free to provide or not to provide retirement benefits. Nothing in the national labor policy supporting collective bargaining requires that any employer provide retirement benefits; all the National Labor Relations Act requires is that employers bargain about retirement programs, not that they be provided. *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).[34]

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[34] The term "bargaining in good faith" . . . is a word of art. . . . As applied to a particular term and condition of employment such as pensions, it would mean simply . . . that an employer must discuss it with an open mind—if it is brought up. It would not mean that an employer has to offer a pension program in general or a particular pension proposal, or even accept the concept of pensions at all. It surely does not require that an employer agree to any pension proposal at all.

ERISA Leg. Hist., Vol. III at 3540.

Thus, an employee vote to drop a retirement program may be rejected by an employer who insists upon providing retirement benefits to retain long-term employees. Or that vote may be accepted but yield little or no additional cash wages, for a dollar paid into a retirement program has a different value to an employer than a dollar paid in cash wages because of different tax consequences, social security levies and overtime pay requirements.

Second, bargaining agreements cover many components of an employment relationship other than retirement benefits and wages.[35] Collective bargaining negotiations typically are conducted in sophisticated relationships by means of "package" proposals. These packages deal with many items under discussion.

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[35] The provisions of a collective bargaining agreement may cover, in addition to retirement arrangements, such subjects as union security; check-off of union dues; seniority rights; job protection; provisions for layoff and recall from work; wages, special overtime, call-in, shift and reporting pay; the employer's right to subcontract work; the employer's right to discipline or discharge employees; a definition of management's rights; vacations; holidays; cost of living pay adjustment provisions; grievance and arbitration procedures; nondiscrimination pledges; union hiring hall procedures; hospitalization insurance protection; life insurance protection; severance pay; no-strike and no-lockout commitments; matters covering employee safety; leaves of absence; procedures for job assignments and job bidding; incentive and bonus plans; break periods; parking privileges; eating facilities; apprenticeship and training programs. *See Manual for Drafting Union Contracts* (Prentice Hall 1969).

When a final proposal is hammered out and submitted for ratification, it is presented as an entire package. To assume, as the Seventh Circuit did, that employees then separate wages and retirement benefits from that package and consider them in a vacuum is unrealistic because it assumes that employees have little interest in such employment conditions as seniority protection, holidays, vacations, extra overtime compensation, cost of living wage escalators, and insurance benefits.

Finally, the lower court's decision also is premised on the assumption that unions and employees in the ratification process make decisions based upon a rational evaluation of the substantive work-related proposals before them. Nothing in the law [36] or human nature lends required support for that assumption. Thus, for example, employees may vote to accept an agreement simply because they cannot afford to strike,[37] or vote to reject the agreement and strike because they are irritated about something unrelated to the bargaining agreement.[38]

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[36] "The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values." *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 488-89 (1960).

[37] *See NLRB* v. *Granite State Joint Board*, 409 U.S. 213, 217 (1972).

[38] *See Ready Mixed Concrete, Inc.*, 200 NLRB 253 (1972), in which a union picketed to put the employer out of business because of what it believed to be a breach of faith by the employer which resulted in a heart attack suffered by the union's secretary-treasurer.

In sum, nothing about the employment relationship or the collective bargaining process supports the conclusion of the court below that employees are securities buyers and investors when they acquire or retain employment or when they vote to ratify a union-negotiated agreement providing for involuntary, noncontributory retirement plan participation.

B. The Decision Of The Court Below Conflicts With Labor Law's Exclusivity Principle And Threatens To Disrupt The Collective Bargaining Processes.

The lower court's decision is in direct conflict with national labor policy. The Seventh Circuit determined that at least one occasion on which a "sale" of a "security" (a retirement plan) is made to union-represented employees is when those employees vote "whether or not to accept the collective bargaining contract containing . . . [a] pension fund and whether to ratify subsequent agreements governing the level of employer contributions into the fund. . . ." 561 F.2d at 1243. Accordingly, the lower court ruled that because the ratification process results in employees choosing to accept or reject retirement plan coverage instead of higher wages, they must be provided with material facts relating to the retirement plan before they vote.

This determination derogates from the cornerstone of the national labor policy—the principle of union bargaining agent exclusivity.

Under that principle, once a union is chosen by employees to represent them, it is that union, and only that union, which may bargain with an employer over employment terms. Employees no longer may bargain individually or in groups with their em-

ployer, and for good reasons. By combining into one group and designating the union as their sole negotiator, employees pool their economic strength and may more effectively seek improvements in their working conditions. Further, as long as the union remains the sole employee voice with their employer, that employer may not splinter the cohesive unit of employees by granting different benefits to different interest groups. From the employer's perspective, it need deal with only a single set of wage and benefit demands thus facilitating ultimate agreement and reducing the threat of strikes which adversely effect its business and the nation's economy. In sum, both in theory and in practice, the exclusivity of the union bargaining representative has been the key to an effective national labor policy.

This Court not only has endorsed the principle, but also emphatically has rejected attacks on it from many quarters. *See, e.g., Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). For example, this Court has held that when employees have duly authorized a union to represent them for collective bargaining, the union becomes their sole and exclusive agent in dealing with the employer for and on behalf of employees represented by it. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944). As this Court has remarked, "only the union may contract the employee's terms and conditions of employment. . . . The employee may disagree with many of the union decisions but is bound by them." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

Accordingly, an employer violates its good faith bargaining obligation imposed by Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158 (a)(5) (1970), when it bypasses the exclusive bargaining agent without its consent and bargains directly or individually with the employees it represents concerning wages, hours and other conditions of employment. *NLRB* v. *Insurance Agents' Internat'l*, 361 U.S. 477, 484-85 (1960); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944); *United Steelworkers of America* v. *NLRB*, 536 F.2d 550 (3d Cir. 1976), *on remand*, 227 NLRB 1005 (1977); *NLRB* v. *General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). Indeed, employees who attempt to bargain directly with their employer in derogation of their exclusive bargaining representative may be discharged lawfully. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

Consistent with this formulation of labor policy, this Court also has ruled that employer insistence on a contractual right to require that certain procedures be followed by employees before their exclusive representative may call a strike or refuse an employer's offer of a new bargaining agreement also contravenes the employer's good faith bargaining obligation by improperly injecting the employer into internal relations between employees and their bargaining representative. *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). In those cases, moreover, where the union has established a contract ratification process in which employees vote to determine whether or not the union will reach an agreement with the employer, the employer may not

insist that its bargaining proposals be submitted to an employee vote. *Houchens Market of Elizabethtown, Inc.* v. *NLRB*, 375 F.2d 208 (6th Cir. 1967). If proposals are presented to employees for ratification, the employer may not even be present at the ratification meeting, because it is settled labor law that employers are precluded from intruding upon procedures by which employees decide to accept or reject a proposed contract. *See, e.g., Mon River Towing, Inc.* v. *NLRB*, 421 F.2d 1, 8 (3d Cir. 1969); *Amalgamated Meat Cutters & Butcher W.* v. *NLRB*, 276 F.2d 34 (1st Cir. 1960); *Nassau & Suffolk Contractors' Ass'n*, 118 NLRB 174 (1957). Finally, no union is required to establish a contract ratification procedure for the employees it represents, and employees have no right to insist that their union do so.[29] *Houchens Market of Elizabethtown, Inc.* v. *NLRB*, 375 F.2d 208 (6th Cir. 1967); *Cleveland Orchestra*

[29] Even if a union has established a ratification procedure, its purpose under labor law principles is not to bring employees into the bargaining process but rather, it exists as a mechanism by which the union decides whether or not to enter into an agreement with an employer. *Houchens Market of Elizabethtown, Inc.* v. *NLRB*, 375 F.2d 208 (6th Cir. 1967). Thus, a union spokesman with express or apparent authority to enter into an agreement with an employer must sign a bargained-for agreement binding all represented employees, even though he or she claims that the agreement must first be submitted to employees for ratification; even when the union's constitution requires such prior ratification; and even where the employees, in fact, have voted and rejected the agreement. *National Elevator Industry, Inc.*, 185 NLRB 769 (1970), *enforced*, 465 F.2d 974 (9th Cir. 1972); *Associated Bldg. Contractors of Evansville, Inc.*, 143 NLRB 678 (1963), *enforced in relevant part*, 334 F.2d 729 (7th Cir. 1964).

Comm. v. *Cleveland Fed. of Musicians*, 303 F.2d 229 (6th Cir. 1962).

By these and similar decisions, the courts and Labor Board have maintained unions as exclusive employee representatives and have established collective bargaining as an effective instrument of our national labor policy.[30]

Wholly apart from the fact, discussed above, that voting to ratify a collective bargaining agreement including retirement plan benefits, does not constitute an investment transaction or the purchase of a security, the lower court's decision will require serious disruption of collective bargaining relationships by forcing employers to intrude upon internal union procedures and to bargain directly with employees in derogation of the exclusive bargaining representative.

As a direct consequence of the lower court's decision, no prudent employer, faced with the prospect of damage claims resulting from a union's failure to disclose fully all material aspects of a retirement plan to employees,[31] can rely safely upon the union to

[30] This is not to suggest that individual employees have no rights. Indeed, they may sue their employer for breach of their contractual rights and may sue their union if it has breached its duty to represent all employees fairly, impartially and non-discriminatorily. *See, e.g., Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Bryant* v. *International Union*, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *House* v. *Mine Safety Appliances Co.*, 417 F.Supp. 939 (D. Idaho 1976).

[31] Although the Seventh Circuit made no such finding, employer liability for failure of a union to disclose all material facts may be based upon the theory that he aided and abetted

make the required disclosures. Thus, the employer must at least attend any union ratification meeting to insure that proper disclosures are made and that nothing is misrepresented to employees. If the lower court's decision is correct, the employer will be required to discuss with the assembled employees the trade-offs associated with the decision to offer specified levels of cash wages and retirement benefits, *e.g.*, whether more wages would be paid if no retirement benefits were provided and, if so, how much more. In sum, the employer will have to reopen the bargaining process and deal with individual employees in an effort to provide them with the information they need to make an informed decision.

The justifications advanced by the court below to minimize the impact of this result on the bargaining process cannot withstand analysis and demonstrate a logical inconsistency fatal to the court's reasoning.

First, the circuit court suggested that because the sale to employees which triggers the need for disclosure ". . . would *normally* occur when an employee decides to accept or continue a job . . . ." 561 F.2d at 1249 (emphasis added), there will be no adverse effect on bargaining because those employee decisions are unrelated to bargaining. The difficulty with the

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in the sale of the security (the retirement plan), or may be based upon analogous theories. Accordingly, any employer must conduct his bargaining in a manner calculated to protect itself from potential damages under the securities acts. *See, e.g., Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *In re Caesars Palace Securities Litigation*, 360 F.Supp. 366 (S.D.N.Y. 1973).

court's cavalier conclusion is that just because decisions to accept or continue employment trigger the requirement of disclosure does not mean that a ratification vote also does not trigger that same requirement. Indeed, the court recognized that fact by its use of the word "normally." Further, if a decision to accept or continue in a job, which does not involve an employee vote on specific employment terms, triggers a requirement of disclosure, than *a fortiori* the employee ratification vote also must trigger disclosure. Finally, the Seventh Circuit found that a sale is triggered at the time employees vote on a union negotiated agreement. 561 F.2d at 1243.

Second, the court discussed employee ratification votes in order to establish that employees voluntarily buy pensions. 561 F.2d at 1243. However, because the court also found that a sale may occur under the securities acts even without volition, the court's finding of volition in the ratification vote may be said to be superfluous and, accordingly, disclosures need not be made prior to such a vote. Such an argument overlooks the fact that disclosure has to be "triggered" by some event whether or not that trigger involves volition, otherwise no one will ever know when to make the required disclosures. Accordingly, if, as discussed above, an employee's acceptance or retention of a job is such a trigger, surely a contract ratification vote also must trigger a sale.

In sum, even if employee decisions to accept or continue employment trigger the antifraud provisions and even if volition is not required, the antifraud provisions and their required disclosures still are triggered by an employee ratification vote with the consequences discussed above.

C. The Seventh Circuit's Decision Also Conflicts With Other Goals Of National Labor Policy.

The lower court's decision also may lead to disruption of the labor policy's basic goal of lessening labor strife. *See* 29 U.S.C. § 141 (1970); *United Steelworkers of America, AFL-CIO* v. *NLRB*, 530 F.2d 266, 275 (3d Cir.), *cert. denied sub nom. Dow Chemical Co.* v. *United Steelworkers of America*, 429 U.S. 834 (1976). The time that will be required to comply with security law disclosure rules will complicate orderly bargaining and contribute to strife. For example, if in support of its demands leading to an eventual agreement, a union's membership strikes an employer in part because of a dispute about retirement benefits, it is likely that the work stoppage may be prolonged following a bargaining table agreement reached between the employer and the union because of the complexity of modern retirement plans and the actuarial, financial and legal analyses necessary to comply with disclosure requirements prior to a ratification vote. Nothing could be more disruptive of stable labor-management relations and the free flow of commerce.[32]

[32] The recent decision of this Court in *Federal Maritime Comm.* v. *Pacific Maritime Ass'n*, 46 U.S.L.W. 4169 (Mar. 1, 1978), in no way detracts from the discussion above. That case involved the claim by the Pacific Maritime Association ("PMA") that agreements bargained with the International Longshoremen's and Warehousemen's Union did not have to be filed for approval with the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814 (1970). The major contention of the PMA was that such a requirement would disrupt collective bargaining and labor peace for no union-management agreement could be implemented until the Commission approved it. This Court rejected that contention, but on grounds which reinforce, rather than detract from, the adverse effects of securities acts' coverage of collectively bargained retirement plans.

Thus, this Court noted that not all collectively bargained agreements would have to be filed with the Commission (*e.g.*, single employer-union agreements). Further, agreements dealing only with mandatory collective bargaining subjects (wages, hours and working conditions of employees within the bargained-for unit) would be routinely approved. Others could be quickly approved conditionally by the Commission. Accordingly, this Court concluded that no extensive delay harmful to the institution of collective bargaining would result from a requirement that some agreement be filed and approved by the Commission.

On the other hand, applying the securities acts to negotiated retirement plans has an impact on every contract containing retirement plan coverage even though the latter is a mandatory bargaining subject. Thus, in every instance employers will seek to attend union ratification meetings and fully explain the retirement plans. In addition, every such ratification meeting will be delayed while lawyers, actuaries and accountants try to determine every fact, calculation and assumption which must be revealed—for there is no such thing as quick, predisclosure, conditional approval by a governmental agency which protects employers and unions from liability under the antifraud provisions of the securities acts. As this Court recently observed: "The court should have taken into account the difficulty of amending a major pension plan, a task that cannot be accomplished overnight." *Los Angeles Dept. of Water & Power* v. *Manhart*, 46 U.S.L.W. 4347, 4352 n. 36 (April 25, 1978).

The Seventh Circuit's decision also may discourage unions from bargaining about retirement benefits. Any union that bargains for retirement plan benefits exposes itself to potential damage claims if it does not disclose all material facts to employees. Because no one knows what facts the courts ulti-

mately may decide are "material," [83] the only way unions may completely protect themselves is to decline to bargain with employers concerning retirement benefits.[84] To encourage such action by unions would deprive employees of the collective strength of their representative in pension bargaining. As the Sixth Circuit correctly concluded in an analogous situation: "[S]uch . . . would simply deter unions from engaging in the unfettered give and take negotiation which lies at the heart of the collective bargaining agreement . . . . Such result would not serve the interest of . . . [employees] and would retard rather than advance the goals of the National Labor policy." *Bryant* v. *International Union*, 467 F.2d 1, 5, 6 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). *See also House* v. *Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976).

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[83] *See* note 17, *supra*.

[84] The removal of retirement benefit agreements from a contract ratification process might not insulate unions from liability under the lower court's theories, which also require disclosures of retirement plan material facts when an employee accepts or retains a job. Thus, the only way a union can completely avoid liability under the securities acts is to avoid bargaining about pension benefits. This emphasizes the fallacy of the lower court's argument that its decision will have no adverse impact on the collective bargaining process.

IV. Conclusion.

The decision of the Seventh Circuit in *Daniel* is directly at odds with congressional policy for it disrupts the delicately balanced provisions of ERISA which protect the plan participant without discouraging the growth and development of the private pension system. The decision further threatens serious disruption of national labor policy.

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit is in error and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

v.

JOHN DANIEL, *Respondent*.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners*,

v.

JOHN DANIEL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 42(3) of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae*. Petitioners have consented to the filing of this brief; respondent has not.

INTEREST OF THE NCCMP

Multiemployer plans were formed in construction and other transient trades or industries where workers are generally employed too briefly by any one employer to earn benefits in that employer's plan. Such plans are created and funded pursuant to collective bargaining agreements and receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization, formed after enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of government regulations under ERISA and other laws affecting multiemployer plans. Fifty trade unions and multiemployer pension plans (but not the particular unions or plans involved in this case) are affiliated with the NCCMP, and its plans are fairly representative of all the nation's multiemployer plans, covering in the aggregate 7.5 million employees. While the decision below has far-reaching consequences for pension plans generally, the consequences are particularly adverse for multiemployer plans, for the reasons set forth in the accompanying brief.

The NCCMP urges reversal of the judgment below, but in no way approves of unduly restrictive continuity-of-service provisions. Such provisions are not common in multiemployer plans. The NCCMP's concern is

that affirmance of the ruling below—that an employee covered by a negotiated, noncontributory, involuntary, defined-benefit pension plan "purchases securities" by commencing and continuing employment—would have far-reaching, adverse consequences upon its pension plans.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including: (a) the particularly adverse impact that the court's holding below would have on collectively-bargained multiemployer plans; and (b) the fundamental differences between coverage under a negotiated, noncontributory, involuntary, defined-benefit pension plan and interests which this Court has characterized as "securities" within the meaning of the securities laws.

The NCCMP therefore moves for leave to file the accompanying brief as *amicus curiae*.

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Dated: May 22, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

v.

JOHN DANIEL, *Respondent*.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners*,

v.

JOHN DANIEL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to reverse the holding below [1] that a worker covered by the typical collectively-bargained defined-benefit pension plan is a "purchaser" of a "security" within the meaning of the securities laws.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth *infra*, pp. 27-32, the NCCMP submits that the decision below will have particularly significant adverse effect upon multiemployer plans. The NCCMP is concerned that affirmance of the lower court's ruling may cause the termination of many multiemployer plans, which are more difficult to create than single-employer plans. The lower court's ruling would in effect retroactively expand the number of workers eligible for pension benefits. It would also greatly increase the plans' administrative and litigation costs by adding securities laws exposure to the extensive existing requirements administered by the Departments of Labor and the Treasury.[2] All additional

[1] *Daniel* v. *International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977), App. 209a.

[2] The dual administration of ERISA (by the Departments of Labor and the Treasury) has already been a source of conflict and confusion, resulting, inter alia, in legislative proposals to divide jurisdiction into discrete areas, or to put all administrative responsibility into a single government agency. *See, e.g.*, S. 901, 95th Cong., 1st Sess. (1977); H.R. 4340, 95th Cong., 1st Sess. (1977), *summarized*, Pens. Plan Guide (CCH) ¶ 23,268 (1977). Treble administration (including the Securities and Exchange Commission) can only exacerbate an already difficult situation.

costs must ultimately be borne by workers covered by multiemployer plans and inevitably will cause a reduction in accruals of future benefits, or even a curtailment of coverage.

II. THE NATURE OF MULTIEMPLOYER PLANS

Multiemployer plans were originally developed in industries in which job changes are frequent and there is little continuity in the employer-employee relationship. For example, employees in the construction industry are generally hired for a specific project, and their employment terminates when the job is finished. In other industries, competitive conditions, business failures, or recurring layoffs prevent the establishment of a stable employer-employee relationship. In such situations, a multiemployer plan—which provides an employee with credit for service with a number of employers—may be the only vehicle for providing meaningful pension rights.

The multiemployer plan involved in this proceeding, and the typical plan affiliated with the NCCMP, have the following common characteristics: (i) they are established and maintained pursuant to the collective bargaining process; (ii) they are involuntary in that there is no individual choice whether to participate—all employees subject to the relevant provisions of the collective bargaining agreement are covered (within the limits of the plan's eligibility requirements) in the plan; (iii) they are noncontributory in that the employers make all payments to the plan; and (iv) they provide a "defined benefit" in that an employee who meets the plan's eligibility and vesting requirements is entitled at retirement only to a specific monthly benefit in a fixed amount.

A financially sound plan requires a proper actuarial relationship between employer contributions and em-

ployee benefits. Although contributions of employers in defined-benefit plans most often vary with the time worked or the units produced by covered employees, contributions are not made for the accounts of particular employees. No employee has any legal title or interest in the employer's contributions to a defined-benefit plan, or (apart from his possible pension eligibility under the rules of the plan) in the assets of the plan itself.[3] Indeed, the defined benefit levels supportable by a given level of contributions are invariably based on the actuarial assumption that some number of workers ultimately will die, move, or transfer to other industries and thus will never qualify for pension benefits, and that benefits will be paid only to employees with a long-term relationship with employers served by the multiemployer plan.

III. SUMMARY OF REASONS FOR REVERSAL

1. Coverage under a negotiated, noncontributory, involuntary, defined-benefit pension plan does not involve the "issuance of a security" within the meaning of the securities acts as consistently interpreted by this Court. The lower court erred in holding that such coverage involves an "investment contract." Under *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946), and *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), the concept of an "investment contract" for the purposes of the securities laws contemplates an inducement to investors to participate in the capital markets. These pension plans established by collective-bargaining agreements contain no such inducement.

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[3] *See* Article 13 of the Amended Trust Agreement (as amended) of the Local 705 Pension Fund Trust Agreement, App. 64a.

Moreover, like ordinary annuities and unlike securities, the benefits received under these pension plans are defined in advance and do not vary with the success of any investment program. Economic reality compels the conclusion that a worker who takes a job requiring coverage under a defined-benefit pension plan is not thereby "investing" in a "security."

2. A balancing of public policy considerations is required before the courts extend the judicially-implied private right of action under Rule 10b-5. The applicable public policy considerations here point strongly to the conclusion that the extension of such right by the lower court was inappropriate. Allowing employees to sue pension plans under the securities laws would (a) lead to particularly vexatious litigation, the outcome of which would turn on hazy issues of historical fact, often capable of proof only by oral testimony; (b) produce results inconsistent with the careful balancing of competing equities which Congress struck in enacting ERISA; and (c) create exposure so large as to threaten destruction of many pension plans, particularly multiemployer plans, and in any event to defeat the legitimate expectations of millions of workers.

IV. REASONS FOR REVERSAL

The lower court reached out to apply the federal securities laws in an attempt to correct what it perceived to be an egregious wrong committed against Mr. Daniel.[4] The court did not stop to consider whether the unprecedented result it reached was really necessary, i.e., whether there were remedies under com-

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[4] The restrictive continuity-of-service requirements applied to Mr. Daniel are not commonly found in other multiemployer plans.

mon law[5] and federal labor law[6] as Mr. Daniel claimed. In ruling that he was entitled to sue under the antifraud provisions of the securities laws, the court exposed all pension plans to damage suits for breach of duties of disclosure under the securities acts—duties no one ever supposed they had. The court's decision confirms the ancient wisdom that "hard cases make bad law," *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

A. There was no "investment contract"

The lower court improperly held that this case involved the "purchase" of a "security" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. The term "security" is defined in the 1933 Act to mean

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[5] For example, the New York Court of Appeals recently applied principles of contract and trust law to ensure grant of a pension to a worker who, because of a one-year break-in-service, was denied benefits after 28 years of service. *Mitzner* v. *Jarcho*, No. 76 (N.Y. Feb. 22, 1978).

[6] Plaintiff pleaded alleged facts and claimed entitlement to relief under two separate provisions of the labor laws: (1) section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), which requires that pension funds be established for the "sole and exclusive benefit of the employees," *see, e.g.*, *Lugo* v. *Employees Retirement Fund*, 366 F. Supp. 99, 102 (E.D.N.Y. 1973) ([a] plaintiff who places in issue the exclusionary eligibility requirements of a trust fund places in issue the question whether the fund is a section 302 trust fund"), *aff'd*, 529 F.2d 251 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976); and (2) the duty of fair representation required of unions by section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), *see, e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

> "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. § 77b(1).[7]

Coverage under pension plans of the type involved in this case—collectively bargained, noncontributory, involuntary, with defined benefits—is not a "security" in any conventional sense. The court below held, however, that such coverage constitutes an "investment

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[7] The definition of security in the 1934 Act is similar:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." 15 U.S.C. § 78c(10).

contract." That term is not defined in the securities acts, but *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946), held that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."

We shall show that coverage under a plan such as that at issue here lacks essential elements of the *Howey* test: the worker makes neither an investment decision nor an investment, and the worker does not participate in the plan in expectation of profits.

1. There was no investment decision.

In a noncontributory, involuntary pension plan, the worker makes no investment. The employer makes the contributions, as required by the collective bargaining agreement.[8] The court below nevertheless concluded that the employees were purchasers of securities on the theory that the employer's contribution was constructively made by the employees. 561 F.2d at 1231-33, App. 222a-25a. Even under this analysis, however, there is no investment.

The court's reasoning ignores the teaching of this Court that economic realities must be considered in applying the *Howey* test. As stated in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (1975):

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

[8] Most multiemployer plans share with the plan described in *Connolly* v. *PBGC*, No. 76-2777, slip op. at 4 (9th Cir. May 4, 1978), the feature that "[p]ension credits are earned even if the employer fails to contribute the full amount of his obligation." This is further evidence that no individual employee makes an investment.

As a matter of economic reality, a worker whose terms of employment are established in labor-management negotiations does not act in any respect as an "investor" when he accepts or continues employment. The fact that the terms of his employment require that he be covered by a noncontributory pension plan, does not make him an investor in the "capital market." While the worker has legally protected interests—under common law, federal labor law and the Employee Retirement Income Security Act of 1974, 88 Stat. 829 ("ERISA")—these interests are not the interests of "investors."

In cases in which the Court has held a financial interest to be an investment contract—and therefore a security—as a matter of economic reality the person acquiring the interest made an investment decision. *See, e.g., SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 348-49 (1943); *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-300 (1946); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). In each of these cases it was critical that there was a scheme to induce persons to invest in the particular enterprise involved as opposed to other recognized methods of participating in the capital markets—for example, by purchasing stocks, bonds or mutual fund shares. Indeed, in each instance the interest sold as an investment contract was *advertised and sold*

as an investment. In *Joiner*, for example, the Court held that in determining whether an investment is a security one must consider

> "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this [the 1933 Act], it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U.S. at 352-53.

Similarly, in *Howey*, the Court noted that the sellers were

> "offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; *they are attracted solely by the prospects of a return on their investment.*" 328 U.S. at 299-300 (emphasis added).

See also Tcherepnin v. *Knight, supra,* 389 U.S. at 338-39; *SEC* v. *United Benefit Life Insurance Co.,* 387 U.S. 202, 211 (1967).

The essential facts here bear no resemblance to those in which investment decisions have been found: jobs are not advertised as opportunities to invest in the capital market;[9] the union negotiates all job-related

[9] Booklets or other materials describing pension plans can hardly be considered "promoters' offerings." The individual does not customarily even receive such materials before or at the time that he decides to accept employment covered by the plan, and that practice was endorsed in ERISA.

issues, including terms of the pension plan. The employee has no choice but to be covered by the plan if he accepts employment.

2. There was no expectation of profit

When an individual acquires an investment contract, he subjects his capital to risk in the hope of receiving dividends, interest, or appreciation. An employee who is covered by a noncontributory, defined-benefit pension plan, however, has no capital at risk and no expectation of dividends, interest, or appreciation. His only expectation is receipt of the defined benefits provided under the plan if he meets the eligibility requirements. To be sure, the plan's assets will be invested by the trustees of the plan. However, the benefits an individual employee may ultimately receive do not depend upon the results achieved. Even if the plan's investment program were unusually successful, the recipient would not be entitled to increased benefits. If, on the other hand, the investment program were not successful, the employee would still be entitled to the same defined benefits.[10]

The Seventh Circuit nonetheless reasoned that an employee covered by a pension plan has an expectation of "profits" in that (a) the plan's assets are invested, and (b) the pension benefits received by the employee could exceed the amount which his employer contributed by reason of his employment. 561 F.2d at 1231-34, App. 226a-28a. These factors are not "profits" in the sense this Court has deemed relevant in determining whether financial interests are

[10] ERISA requires that contributions meet funding standards which have the objective of ultimately funding the defined benefits, and benefits may be guaranteed by the Pension Benefit Guaranty Corporation. See Title IV of ERISA.

securities. *SEC* v. *Variable Annuity Life Insurance Co. of America (VALIC)*, 359 U.S. 65 (1959); *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967). Under these cases, the decisive factor in applying the *Howey* test is whether the benefit to be received varies with the success of the plan's investment program. The analysis in these cases points strongly to the conclusion that coverage under a defined-benefit pension plan is not a "security."

The issue in *VALIC* and *United Benefit Life* was whether variable annuities are "securities" even though ordinary annuities are not.[11]

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[11] Ordinary annuities are expressly exempted from registration by section 3 (a) (8) of the 1933 Act, 15 U.S.C. § 77c(a)(8). Congress declared that its intention was merely to

> "[make] clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act. The insurance policy *and like contracts* are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the act would lead, *even without the specific exemption*, to the exclusion of insurance policies from the provisions of the act, but the specific exemption is included to make misinterpretation impossible." H.R. Rep. No. 85, 73d Cong., 1st Sess. 15 (1933) (emphasis added), *cited in VALIC*, 359 U.S. at 74 n. 4 (Brennan & Stewart, JJ., concurring).

Furthermore, the "[Securities and Exchange] Commission has taken the position that insurance or endowment policies or annuity contracts issued by regularly constituted insurance companies were not intended to be securities, and that in effect § 3(a)(8) is supererogation." 1. L. Loss, *Securities Regulation* 497 (2d ed. 1961) (footnote omitted).

The Court has specifically agreed with Professor Loss' conclusion that section 3(a)(8) was superfluous. *Tcherepnin* v. *Knight*, *supra*, 389 U.S. at 342 n. 30:

> "Congress specifically stated that 'insurance policies are not to be regarded as securities subject to the provisions of the act,' [citation omitted], and the exemption from registration for insurance policies was clearly supererogation."

Therefore, ordinary annuity contracts are not "securities" for purposes of federal securities regulation. To the extent that defined-benefit pension plans are in economic reality "like contracts," they too are not "securities."

Under an ordinary annuity contract an individual makes payment to the issuing company, in a lump sum or on a periodic basis, in return for which the issuing company typically promises to make periodic payments during the individual's retirement years. As in the case of defined-benefit pension plans, the payments received by the individual are at a fixed level defined in advance in accordance with actuarial assumptions, including an assumed rate of return on the annuity company's investments. The total amount that the individual will ultimately receive depends on how long he lives. In contrast, variable annuities—which, unlike defined-benefit pension plans, permit the periodic payments received by the individual to depend on investment results—have been held to be securities.

In explaining why it was rational for Congress to subject variable annuities to regulation under the securities laws while leaving ordinary annuities to regulation by state insurance authorities, the concurring justices in *VALIC* stated that:

> "This congressional division of regulatory functions is rational and purposeful in the case of a traditional life insurance or annuity policy, *where the obligations of the company were measured in fixed-dollar terms and where the investor could not be said, in any meaningful sense, to be a sharer in the investment experience of the company.* In fact, one of the basic premises of state

regulation would appear to be that in one sense the investor in an annuity or life insurance company *not* become a direct sharer in the company's investment experience; that his investment in the policy or contract be sufficiently protected to prevent this." 359 U.S. at 77-78 (Brennan & Stewart, JJ., concurring) (emphasis added).

The *VALIC* Court stated:

> "While all the States regulate 'annuities' under their 'insurance' laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. . . ." 359 U.S. at 69.

The Court held in *VALIC* that a variable annuity is a security because the benefits received vary with investment performance, not because of actuarial risk that as a result of early death the annuitant will receive little or no benefit. The Court said:

> "Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. . . . It is this feature, common to both, that respondents stress when they urge that this is basically an insurance device.
>
> "The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of

> what the portfolio of equity interests reflects—which may be a lot, a little, or nothing." 359 U.S. at 70-71 (footnotes omitted).[12]

Nothing, therefore, more clearly dramatizes the error of the court below than the fact that the disclosure required by the court was not related to market performance but only to the actuarial risk of nonvesting.

Moreover, even if, *arguendo*, a defined-benefit plan could be said to include some element of "profit," it would not follow that there is a "security" within the meaning of the securities laws, because in economic reality any profit would be an incidental aspect of the entire "transaction." The Court so held in *Forman*, in determining that shares of stock in a housing cooperative were not "securities." In that case it was conceded that the housing cooperative could earn income from commercial leases that would result in reduction of the rental payments to be paid by the tenant-shareholders. The Court said:

> "The short of the matter is that the stores and services in question were established not as a means of returning profits to tenants, but for the purpose of making essential services available for the residents of this enormous complex. By statute these facilities can only be 'incidental and appurtenant' to the housing project. [Citation omitted.] Undoubtedly they make Co-op City a more attractive housing opportunity, but the possibility of some rental reduction is not an 'expec-

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[12] The annuity involved in *United Benefit Life* was similarly held to be a security because the benefits which the annuitant would receive upon retirement were not defined in advance, but instead were variable, depending directly and importantly on the success of the annuity company's investment activities. *See* 387 U.S. at 210-11.

tation of profit' in the sense found necessary in *Howey*." 421 U.S. at 856-57 (footnotes omitted).

Economic reality compels the conclusion that a worker who takes a job which provides coverage under a defined-benefit pension plan is not thereby "investing" in a "security."

B. Public policy militates against extending private rights of action under the securities laws

Even accepting the lower court's conclusion that an employee "purchases" a "security" simply by taking a job, it does not follow that he may sue under Rule 10b-5.[13]

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[13] Section 10(b) of the 1934 Act provides:

> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person
>
> in connection with the purchase or sale of any security."

Plaintiff in the court below also alleged a cause of action under section 17(a) of the 1933 Act which similarly does not by its terms provide for a private right of action.

The private right of action under Rule 10b-5 is a creature of the judiciary, not of Congress.[14] This Court said in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977):

> "Congress did not expressly provide a private cause of action for violations of § 10(b). Although we have recognized an implied cause of action under that section in some circumstances, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, [404 U.S.] at 13 n.9, we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act. *Piper* v. *Chris-Craft Industries, Inc.*, [430 U.S.] at 41. *Cf. J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431-433 (1964)."

Extension of the private right of action under Rule 10b-5 to new classes of claimants therefore turns on (i) whether such extension is necessary to fulfill Congress' purposes in passing the securities acts; and (ii) a judicial balancing of the "policy considerations" involved, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737, 749 (1975). Extension of a private right of action under the federal securities laws, is not neces-

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[14] As this Court has made clear, federal courts should not automatically imply private rights of action under statutes that specify violations but provide no express private remedies. *Cort* v. *Ash*, 422 U.S. 66 (1975).

sary in this case. As discussed above, *supra* pp. 8-9, 6, Congress' purpose in enacting the federal securities laws was to regulate the capital markets, not non-contributory, defined-benefit pension plans; and, Mr. Daniel claimed relief under both common law and labor laws. As we now show, extension of a private right of action is unwise as a matter of policy, since it would have substantial adverse effects upon pension plans and would be inconsistent with ERISA.

1. Extension of private rights of action would lead to vexatious litigation

The Court stated in *Blue Chip* that Rule 10b-5 litigation presents a significant "danger of vexatiousness different in degree and in kind than that which accompanies litigation in general" and noted "the possibility 'that unduly expansive imposition of civil liability will lead to large judgments payable in the last analysis by innocent investors for the benefit of speculators and their lawyers,'" 421 U.S. at 739, quoting Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), 404 U.S. 1005 (1971).

Here, there is no less a likelihood that large lawsuits would be commenced against collectively-bargained pension plans. Millions of workers have suddenly been transformed into holders of "securities" of pension plans, some of whom, like Mr. Daniel, "purchased" those "securities" over 20 years ago. The circumstances under which these "securities" were "sold" to persons who may now lay claim to disappointed pension expectations will make such persons and the plans which covered them fair game for class action specialists. It is the plan participants and beneficiaries, however, who must ultimately bear the costs

of that litigation, since pension plans exist solely for their benefit.

The specific "disclosure" required by the holding of the lower court—"the actuarial probability . . . that a member actually will receive pension benefits"—is itself likely to be challenged as misleading.[15] A study recently commissioned by the Department of Labor[16] on the potential effect of the lower court holding (hereinafter "Department of Labor Study") concluded that

> "any statement provided to a participant about his individual probability of receiving a pension and probably be [*sic*] false and misleading, since it is virtually impossible to provide accurate information on this subject."[17]

The likelihood that a given employee will receive pension benefits not only turns on such factors as the vitality of the industry (especially in the case of multi-employer plans) and the health of the individual employee, but also depends in large measure upon whether that employee chooses to remain employed in the industry or go elsewhere. Thus, while actuarial assump-

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[15] *See* F. Cummings, *The Daniel Case—Disclosure or Mandatory Oddmaking*, Pension World, November 1977, at 37. Mr. Cummings describes the party making the disclosure required by the Seventh Circuit as "a new kind of oddsmaker—a 'vesting bookie' . . . ." *Id.*

[16] Grubbs, Report to the Secretary of Labor—Potential Effects of *Daniel* (March 20, 1978) (hereinafter "DOL Study").

[17] DOL Study at I-5. Moreover, it is far from clear what actuarial assumptions should be made. Unanswered questions include whether the probability should be based on assumptions derived from the experience of all participants, or that of different subgroups based on categories such as age, sex, job classification, etc.; whether the probability is that of achieving 100 percent or some lesser degree of vesting; and whether the probability is only for new entrants into the plan or for existing participants as well. DOL Study at IV-5.

tions concerning "turnover" of employees may be useful in calculating the future liabilities of a pension plan and the contribution rate necessary to fund such liabilities, individual "turnover" is subject to a number of factors, some of which are solely within the knowledge and control of the individual employee. Aggregate actuarial data will thus be misleading rather than informative with respect to the probability that an individual employee will remain in the plan long enough to qualify for a benefit. Under the lower court's decision, however, a person who failed to meet the eligibility requirements of virtually any pension plan in the country could demonstrate a failure to disclose this "actuarial probability" and seek relief under Rule 10b-5.[18]

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[18] The SEC suggested in its *amicus* brief to the court below (pp. 5, 58) that pension plans will be affected by the decision below only if they engaged in actual fraud. It is true that *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), established that a defendant did not violate Rule 10b-5 unless he acted with "scienter," a "mental state embracing intent to deceive, manipulate, or defraud," *id.* at 193 n.12. In its pretrial brief in *SEC* v. *National Student Marketing Corp.*, Civ. Action No. 225-72 (D.D.C.), dated December 6, 1976, however, the SEC contended that even in private damage cases under *Hochfelder*, " 'scienter' may be proven without evidence of specific intent to deceive but by evidence of 'gross negligence' or other knowing conduct." SEC Brief at 165. Citing *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976); *Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982 (7th Cir. 1976); and *McLean* v. *Alexander*, 420 F. Supp. 1057 (D. Del. 1976), the SEC contended that this modified negligence standard has been the lower courts' response to the *Hochfelder* definition of the culpability necessary to establish a violation of Rule 10b-5. SEC Brief at 165. *See also, e.g., Franke* v. *Midwestern Oklahoma Development Authority*, 428 F. Supp. 719, 725 (D. Okla. 1976). Furthermore, the SEC contends that it need not prove scienter at all in injunctive actions. SEC Brief at 164-65. Yet an injunction might include rescissionary and collateral relief in the nature of money damages, *see, e.g., SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

Furthermore, extension of a private right of action under Rule 10b-5 to the pension plan context would not be limited to failures to disclose the actuarial probability of receiving a benefit. Even assuming, *arguendo*, that meaningful disclosure of actuarial probability can be readily made, the disclosure issues that could be presented in litigation are many. Any alleged failure to disclose or any misstatement concerning size and timing of benefits, investment policies or any other matter that bears on the value of the worker's "investment" might provide grist for the Rule 10b-5 class action mill. If the potential employee is truly making an investment decision to purchase a "security," presumably the "issuer" of that security would be required to disclose to him adequate information concerning the investment policies of the pension plan, its financial soundness, the financial soundness of employers having a contractual obligation to contribute to the plan and similar matters. Insofar as we are aware, no noncontributory pension plan has made such disclosure to potential beneficiaries.[19]

This Court also noted in *Blue Chip* that extending the private right of action under Rule 10b-5 to defrauded offerees of securities would confront courts and juries with "many rather hazy issues of historical

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[19] It is noteworthy that in *SEC* v. *Shenker*, Civ. Action No. 77-1787 (D.D.C. 1977), the SEC further expanded its view of the application of the antifraud provisions to employee benefit plans, by moving from the concept of disclosure about terms and conditions of participation in a plan to the investment policies and fiduciary conduct of plan officials—welfare plan officials as well as those of a pension plan.

fact, the proof of which [would] depend almost entirely on oral testimony." 421 U.S. at 743. The nature of this proof, the Court indicated, might subject defendants to a kind of legalized blackmail, forcing settlements even in groundless cases. Such dangers are equally apparent here. Retroactive application of a "failure to disclose" rule (back to 1955 in Mr. Daniel's case [20]) necessarily involves "hazy issues of historical fact," the resolution of which depends on oral testimony as to what the worker was told when first employed. Indeed, the lower court's conclusion that a "sale" was involved relies, in part, on Mr. Daniel's affidavit

> "that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension." 561 F.2d at 1243, App. 245a.

The court also found that

> "[w]hen an employee decides to retain his job his decision results in his continuing to give value in the future in his further acquisition of interests in the pension fund." *Id.*

Proof that these actions involved "investment decisions" will almost always depend on the claimant's oral testimony concerning his state of mind years ago. As this Court said with respect to similar "state of mind" proof in *Blue Chip*:

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of his

[20] *See* 561 F.2d at 1227, App. 212a.

> claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." 421 U.S. at 746 (footnote omitted).

2. Extension of private rights of action would destroy the balance Congress struck in ERISA between remedying past inequities as to some workers and reduction of future benefits to others

ERISA was enacted after a thorough investigation and study of problems in the pension plan area.[21] Congress considered the extent to which it should provide retroactive relief to persons who had failed to meet harsh eligibility requirements in the past. It was mindful, however, that correction of inequities would involve charges to be borne by the plans, and therefore had to be balanced against the inequity of defeating the legitimate pension expectations of other workers. The compromises incorporated in ERISA now threaten to be vitiated by Rule 10b-5 suits which in effect

[21] As the Ninth Circuit stated in a recent opinion, "ERISA is the product of several years of legislative effort to improve the American pension system . . . a complex piece of legislation which addresses itself to many problems." *Connolly* v. *PBGC*, No. 76-2777, slip op. at 5 (May 4, 1978).

seek the very retroactive relief that Congress determined should not be granted.

The balancing of competing equities which Congress fashioned is illustrated by the exceptions Congress provided to the general rule that all service with the participating employer, whether before or after the enactment of ERISA, must be credited for vesting purposes. For example, service prior to January 1, 1970 need not be counted unless an employee has at least three years of service after December 31, 1970.[22] A plan may also disregard service before the effective date of ERISA if such service would otherwise have been disregarded under the rules of the plan with regard to breaks in service.[23]

These exceptions were deliberately enacted "[t]o keep the operation of the minimum vesting requirement reasonable and to avoid imposing undue burdens on plans. . . ." [24] With respect to workers such as Mr. Daniel, Congress' determination to balance the competing interests involved is set forth in unmistakable terms:

> "[I]t does not appear to be desirable to provide for retroactive vesting for employees who have already terminated their service with the employer, since this would create a substantial unexpected cost for the plan (thereby possibly jeop-

[22] ERISA § 203 (b) (1) (E); I.R.C. § 411 (a) (4) (E). The cited provisions do not permit disregard of service which the pre-ERISA plan terms required be counted.

[23] ERISA § 203 (b) (1) (F); I.R.C. § 411 (a) (4) (F).

[24] House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 20 (1974). *See also* House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 20 (1974); 120 Cong. Rec. 4297 (1974) (remarks of Mr. Ullman).

> ardizing the size of benefits for employees still covered under the plan). . . ." [25]

Allowing private suits under Rule 10b-5 would thus upset the balance which Congress so carefully struck in ERISA. Furthermore, that balance in ERISA proceeds from Congress' understanding that the securities laws were inapplicable (*see* Teamsters International Petition at 33-41), an understanding which is now "part of the arch on which the new structure rests," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963). This is another sound policy reason why the Court should reject the lower court's extension of private rights of action.

3. Extension of private rights of action would require disclosure inconsistent with the type of disclosure which Congress, in passing ERISA, deemed appropriate

The ERISA disclosure requirements [26] are a direct response to testimony by one worker after another that he had been unaware of the provisions and rules of his plan. Even when plan documents and explanatory materials had been provided, they were generally in-

[25] House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 56 (1974); House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 57 (1974). *See also* 120 Cong. Rec. 19199 (1974) (remarks of Mr. Ullman).

[26] ERISA sections 101 through 110 and 1031 through 1034 detail the disclosure and reporting required of pension plans. In some cases, this disclosure takes place directly to plan participants, in other cases, to the Department of Labor or the Treasury Department. For the most part, however, those reports made to government agencies rather than plan participants are themselves public information. ERISA § 106 (a). Lengthy disclosure and reporting regulations have been promulgated by the Labor Department. *See* 29 C.F.R. § 2520.102-1 *et seq.* and § 2520.103-1 *et seq.*

comprehensible to plan participants. As one worker testified:

> "You see, all of these pensions are done up by corporation lawyers and against people, say working people with a high school education, and as everybody knows, there's no competition." [27]

Another worker said:

> "Senator, I have here books on the pension plan that ain't worth a quarter because I can't understand it. I don't know anything about it, and I defy any trustee of our plan to explain this to me. . . ." [28]

Congress therefore required that the document summarizing and describing the plan "be written in a manner calculated to be understood by the average plan participant. . . ." ERISA § 102(a)(1). It would require an amazing feat of draftsmanship, however, to make disclosures which would comply with ERISA section 102(a)(1) and yet suffice to avoid Rule 10b-5 liability—particularly in the case of complex actuarial assumptions. As corporate counsel are well aware, assurance against liability under Rule 10b-5 requires disclosure of all information which might reasonably be deemed "material" in light of this Court's opinion in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).[29] The complex and detailed disclosure that

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[27] *See* 120 Cong. Rec. 29934 (1974) (remarks of Sen. Williams).

[28] *See id.*

[29] There are no definitive guidelines in the antifraud area of the securities laws. Rule 10b-5 itself is written in broad, general terms. The SEC has not utilized rulemaking power to clarify its requirements, *cf. SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting) (Holding Company Act), but has instead relied on case-by-case adjudication, where courts have interpreted the requirements of the rule

would be required under the decision below is the very type of disclosure that workers complained about,[30] and that Congress was determined to prevent in ERISA.

4. Affirmance of the decision below would threaten the stability and cause termination of many multiemployer plans

In the circumstances set forth above, administrators and employers are understandably concerned over their plans' potential liability. Indeed, the NCCMP has been advised that some employers and plan administrators, concerned over the implications of the decision below, have already declined to approve new bene-

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"flexibly," *e.g.*, *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973), "broadly," *e.g.*, *Garner* v. *Pearson*, 374 F. Supp. 591, 595 (M.D. Fla. 1974), and "liberally," *e.g.*, *Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609, 637 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976). The establishment of definitive guidelines is contrary to the policy of the SEC. In responding to a request from Senators Williams and Javits as to what disclosure the SEC believed is required of pension plans under the lower court's decision, the Chairman of the SEC responded, *inter alia*: "[T]he efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required. . . ." Memorandum submitted under cover letter of December 7, 1977 to Honorable Harrison A. Williams, Chairman, Committee on Human Resources, United States Senate, by Harold M. Williams, Chairman, SEC.

[30] Even the more sophisticated investor in the traditional securities markets may find such disclosure too complex or lengthy to understand. However, there are analysts and investment counselors to whom such documents are understandable and meaningful. One who purchases securities on a broker's recommendation or on the advice of an investment analyst may well have benefited from such disclosure. There are no parties analogous to analysts and investment counselors in the pension plan context.

fits or increases in existing benefits.[31] Furthermore, concerns about potential liability and additional costs and regulation brought about by the applicability of the securities law [32] are likely to result in a significant curtailment in the provision of pension benefits,[33] which neither ERISA nor any other federal law requires employers to provide.

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[31] In one case currently being litigated, a contributing employer contends that the plan's alleged failure to make the disclosures required by the decision below vitiates his obligations under the collective bargaining agreement and entitles him to a refund of all contributions previously made. *Western Washington Laborers-Employers Health & Security Trust Fund* v. *Universal Utility Contractors, Inc.*, Civ. No. C77-710M (W.D. Wash).

[32] There is no basis for the finding of the court below that interests in pension plans are "securities" for antifraud purposes but are not subject to the registration provisions of the securities laws. It is axiomatic that the registration provisions are applicable to all securities absent a statutory exemption. At the most, the legislative and administrative history discussed by the Seventh Circuit, 561 F.2d at 1237-1241, App. 258a-59a suggests an exemption from the registration provisions only for the "securities" of pension plans whose funds are maintained by a bank or in a separate account by an insurance company. The assets of multiemployer plans—such as the members of the NCCMP—are generally *not* managed by banks or insurance companies, with the result that their "securities" would be subject to the full panoply of registration requirements of the securities laws.

[33] According to a Pension Benefit Guaranty Corporation ("PBGC") study, "Analysis of Single Employer Defined Benefit Plan Terminations, 1976," PBGC Publication No. 505, approximately ten percent of the plans covered by Title IV of ERISA (relating to plan termination insurance and contingent employer liability) terminated in the two calendar years following its enactment. *Id.* at 2. Of those plans terminating in 1976, 20 percent cited ERISA as the reason for termination, and another 15 percent cited ERISA as one of several

The Department of Labor Study discussed above, *supra* p. 19, concluded that the potential exposure of pension plans under the lower court's holding may approach $40 billion.[34] This Court recognized recently in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4352 (U.S. 1978), that significant changes in rules governing pension plans which create major unforeseen contingencies should not lightly be adopted:

> "Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing—more than $400 billion were reserved for retirement benefits at the end of 1977 and reserves are increasing by almost $50 billion a year. These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer forsees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and,

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reasons. *Id.* The House Small Business Committee recently surveyed the plans that notified the PBGC between June, 1976 and April, 1977 of an intent to terminate. Of those responding, 87.3 percent indicated that ERISA had some effect on the decision. *See* Pension Rep. (BNA) R-11 et seq. (Oct. 24, 1977).

[34] DOL Study at I-4. The assumptions of this study were based on an "element of conservatism." *Id.* at A-14. An actuarial study prepared by Martin E. Segal Co. for the NCCMP indicates that agregate damages may be nearer to $100 billion.

ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." (Footnote omitted.)

The NCCMP fears that the adverse effects of the holding below will be especially significant for multiemployer plans. The plan termination and contingent employer liability provisions of ERISA presently allow employers contributing to multiemployer plans to withdraw from participation more easily than those contributing to single-employer plans. An employer's withdrawal from a single-employer plan normally results in plan termination, imposing substantial ERISA-related liability on the employer. In contrast, an employer's withdrawal from a multiemployer plan (by "bargaining out"—*i.e.*, not agreeing in the next collective bargaining agreement to continue contributions to the plan), will generally not cause a plan termination,[35] and the employer may well escape all liabil-

[35] In most cases, ERISA does not even require such withdrawal to be reported. When a "substantial employer" (an employer accounting for 10 percent or more of the plan's contributions over two consecutive years out of the three years preceding withdrawal (ERISA § 4001(a)(2)) withdraws from a plan, the plan administrator must notify the PBGC. ERISA § 4063(a)(1). (It is not yet clear whether the simultaneous or concerted withdrawal of two or more employers, accounting for 10 percent or more of the plan's contributions only in the aggregate, constitutes the "withdrawal of a substantial employer.") The withdrawing employer must post a bond or pay an amount into escrow as surety against contingent liability in a later plan termination, but if no termination occurs in the five years following withdrawal, the withdrawing employer has no ultimate liability. ERISA § 4063(c)(2). If the withdrawal causes a "reportable event" under ERISA § 4043(b), the administrator must report such event to the PBGC. ERISA § 4043(a).

ity under ERISA.[36] Indeed, the termination of a multiemployer plan will generally impose no ERISA liability on contributing employers where the benefits of multiemployer plan participants are not insured under Title IV of ERISA.[37]

The ease with which employers may withdraw from multiemployer plans is of particular significance in considering the impact of extending Rule 10b-5 rights of action, given the unique role of these plans and the difficulties which have beset their creation and maintenance. Economic conditions in those industries which have multiemployer plans were generally not favorable to their formation. While workers have managed to secure the creation of such plans through collective bargaining, those plans have had to be carefully nurtured.[38] The plans are still attempting to adjust to the complex regulatory environment created by ERISA.

[36] A termination in the five years following withdrawal will generally impose liability, but such liability will decrease to zero over this five-year period.

[37] PBGC Opinion No. 75-9 states: "Under Sec. 4082(c) of the Act, the Corporation generally does not pay benefits of multiemployer plan participants guaranteed under Title IV; and thus there is no employer liability with respect to multiemployer plans which terminate prior to January 1, 1978." (ERISA has since been amended so that the date when PBGC insurance becomes mandatory for multiemployer plans is now July 1, 1979.) ERISA allows the PBGC to provide insurance under certain conditions prior to the date when such insurance is mandatory. ERISA §§ 4082(c)(2), (3) and (4).

[38] A recent study by the PBGC found that "approximately one-eighth of all multiemployer plans, covering one-fifth of participants in such plans, are experiencing significant financial hardship which may result in plan termination." "Potential Multiemployer Plan Liabilities Under Title IV of ERISA," reproduced in Pens. Plan Guide (CCH) ¶ 23,036 (1977).

The added burden of compliance with the securities laws, never contemplated, may well be too much for their fragile underpinnings. Thus, extension of securities regulation to pension funds would threaten the very existence of multiemployer plans—the only vehicle that exists in many industries for providing pension and welfare benefits to workers and their dependents.

CONCLUSION

For the foregoing reasons, the NCCMP urges that the Court reverse the judgment of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978
Nos. 77-753, 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Brief Amicus Curiae of the Gray Panthers in Support of the Respondent John Daniel.

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in support of the Respondent John Daniel. In support of this motion, the Gray Panthers show as follows:

1. The parties in this action have refused to consent to the Gray Panthers filing an amicus curiae brief in support of Respondent John Daniel.

2. The Gray Panthers is a national organization whose membership is composed of both young and old persons throughout the United States who seek to reform and improve various institutions and laws that affect the lives of senior citizens. Among the major concerns of the Gray Panthers is assuring that older Americans receive all their entitled benefits from private pension plans.

3. The views of amicus Gray Panthers are particularly important because it is the only organization offering its views in this case which represents the interests of plan participants. Amicus is in fact a unique elderly organization because its members include persons currently employed in work covered by private pension plans, retired workers who have been denied pension benefits and retirees now receiving pensions. Numerous other organizations have sought to participate in this action as amici curiae in support of the Petitioners, however, all of these amici have a strong self-interest in the current structure of the pension industry. Amicus ERISA Industry Committee (ERIC) and National Association of Manufacturers (NAM) are composed of corporations who sponsor private pension plans and receive favorable financial and tax benefits for their plans. Amicus American Academy of Actuaries are some of the principal employees of the pension industry. Amicus AFL-CIO, although a labor organization, also has strong attachments to the pension industry because its leaders are the trustees of numerous private pension plans. Labor unions' interests are essentially those of management rather than that of rank and

file workers. Renfrew, "Fiduciary Responsibility Under the Pension Reform Act," 32 BUS. LAWYER 1829 (1977). The Gray Panthers feel it is critical for the views of plan participants—the consumers of the pension industry—to be heard by this Court.

4. Amicus Gray Panthers further believes that its views are supplemented and aided by the knowledge and experience of its counsel at the National Senior Citizens Law Center. Attorneys from the Law Center have had extensive involvement with the private pension system solely on behalf of pension consumers. National Senior Citizens Law Center has represented individual workers and classes of workers in attempts to gain benefits from dozens of major private pension plans governed by the Taft-Hartley Act and thus similar in structure to the plan negotiated by petitioner Local 705. In addition to litigation, Law Center attorneys were actively involved in the congressional deliberations surrounding the passage of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq*. This experience has given amicus' attorneys a unique perspective on the impact of this decision on other federal labor statutes and policies.

5. Amicus Gray Panthers was, because of its members' unique position as pension consumers, allowed to participate as amicus curiae in support of Mr. Daniel in the proceedings below in the Court of Appeals. Further, the specific views of amicus Gray Panthers on federal labor policy and the integration of the securities laws, ERISA and the Taft-Hartley Act were adopted by the court below.

6. This Court also allowed amicus Gray Panthers to file a brief in opposition to the Petitions for Writs

of Certiorari. Amicus Gray Panthers has been informed by the Clerk's office of this Court that said filing did not necessarily permit amicus' filing of a brief on the merits. Amicus' previously filed brief concerned itself solely with the petitioners' arguments on the effect of the decision below on federal labor policy. The accompanying brief does not repeat those arguments which the Gray Panthers still feel are pertinent and important. Rather, amicus now seeks to address other related questions concerning the nature of the pension benefits which have been specifically discussed in the briefs of the parties and amici who support them.

Similarly, these additional arguments, not previously presented to the Court, will not repeat arguments to be made by the respondent but instead will offer the unique perspective of the amicus organization.

WHEREFORE, it is respectfully moved and requested that the Gray Panthers be granted leave to file the accompanying brief as amicus curiae.

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BRIEF AMICUS CURIAE OF THE GRAY PANTHERS.

Interest of the Amicus.

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Introduction and Summary of Argument.

The primary legal issue which must be resolved in this action is whether pension benefits are protectible interests within the umbrella of the federal securities laws. Since this is a difficult question of first impression, it has tended to cause the parties and supporting amici to undertake a sophisticated analysis of the nature of pension benefits and the various forms of investments. Lost in this maze is the ultimate objective sought by Mr. Daniel—disclosure of critical information concerning his pension benefits. Respondent simply asks for an opportunity to make rational plans—rather than uninformed judgments—about his retirement income needs.

This case, then, cannot be decided in a vacuum or merely on abstract principles and theories. Instead, it must be grounded in the "economic realities" of the everyday life of American workers and the importance they place on retirement benefits. Like Mr. Daniel, these workers rightfully expect to receive pensions at retirement and need important information in order to assure their security in old age.

The various briefs of the petitioners and the amici who support them, labor strenuously to evade the thrust of Mr. Daniel's very simple request. It is puzzling and more than a little disturbing that the petitioners

(Mr. Daniel's own pension plan and his own union), as well as most of the pension and business community, have gone to such lengths to deny that participants in pension plans should be told information concerning their plans' operations. Why is the pension industry afraid to tell Mr. Daniel how his pension plan is designed and how it operates? Why should Mr. Daniel be kept in the dark about the likelihood of his receiving benefits when he retires?

Amicus Gray Panthers strongly believes that persons who participate in pension plans, whose toil and dollars have created a huge financial empire, have a right to know the basic facts which underlie its operation. Amicus submits that only with the clear knowledge of necessary facts can American workers make rational choices to prepare for their retirement. Affirming the decision of the Court of Appeals below is only one step in assuring that workers are not caught by surprise at age 65.

Amicus' view of the importance of disclosing information leads it to totally disagree with the contentions of the petitioners herein. In the present brief, however, Amicus addresses itself to three of the petitioners' contentions, all of which relate to characterization of pensions and how the pension system operates:

1. The nature of pension benefits and of employees' interest in those benefits. Amicus will demonstrate that pension benefits, contrary to the petitioners' claims, are part of a worker's compensation and, under recent decisions of this Court, interests entitled to substantial legal protection.

2. The relationship of the disclosure requested under the securities laws to other federal pension laws.

Both petitioners have claimed that Congress' passage of additional pension legislation indicates a desire to remove pensions from the province of the Securities Exchange Commission. Amicus maintains, as it did in the Court of Appeals, that the nature and timing of the disclosure sought by Respondent was not intended to be within the purview of other pension laws; rather, the disclosure called for by the securities laws complements the requirements of other federal legislation.

3. The availability and usefulness of the information to be disclosed to plan participants. Amicus will show, in opposition to the arguments of the petitioners and amicus American Academy of Actuaries, that there is a large amount of relevant, material and understandable data concerning Mr. Daniel's eligibility for benefits which could be disclosed to him. Further, amicus maintains that such data is not misleading, but useful and important to pension participants.

ARGUMENT.

I.

Employees Such as Respondent John Daniel Have a Protectible Interest in Pension Benefits.

Petitioner International Brotherhood of Teamsters (hereinafter, "IBT") premises much of its analysis of the nature of pension benefits on the theory that pension participants do not have an enforceable "interest" in benefits. Instead, IBT contends such benefits are merely a "contingent expectancy", IBT Brief at p. 40, in which employees have no guaranteed interest. *See also* IBT Brief at pp. 33, 37, 41, 42, 52 and 61. While stopping short of reverting to the nineteenth century notion that pensions are gratuitous,[1] the IBT contends the Court of Appeals rested its analysis in large part on this misconception of pension benefits as deferred compensation.

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[1]The IBT does imply, however, that in the 1930's, when the securities laws were before Congress, pensions were certainly not viewed as compensation and "were generally regarded as gifts." IBT Brief at p. 61. While some people may have still held to the gratuity theory at that time, the idea of pensions as a portion of wages is not merely a product of post-World War II philosophy. Even early in this century commentators recognized that employees have an important stake in the receipt of pension benefits:

> In order to get a full understanding of old-age and service pensions, they should be considered a part of the real wages of a workman. There is a tendency to speak of these pensions as being *paid* by the company, or, in cases where the employee contributes a portion, as being *paid* partly by the employer and partly by the employee. In a certain sense, of course, this may be correct, but it leads to confusion. A pension system considered as part of the real wages of an employee is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system.

Albert deRoode, "Pensions as Wages," THE AMERICAN ECONOMIC REVIEW, vol. 3 (June 1913), p. 287.

The Court of Appeals did base its decision on its view that pension benefits were a part of an employee's wages—albeit a unique form of such wages. Relying on its earlier landmark decision of *Inland Steel Co. v. National Labor Relations Board,* 170 F.2d 247 (7the Cir. 1948), *cert. den.* 336 U.S. 960 (1948), the appeals court held that pension benefits consisted of "putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck." *Daniel v. International Brotherhood of Teamsters, etc., et al.,* 561 F.2d 1223, 1232 (7th Cir. 1977).

The Court of Appeals found that this form of compensation, even if termed a "contingent expectancy", created for employees a distinct and protectible interest in pension benefits. Therefore, Judge Cummings concluded that

> a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer. is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future.

Id., at 1233.

The Seventh Circuit's view of the employee's "protectible interest" in pension benefits is consistent with the recent views of the nature of pension benefits expressed by this Court. *See Alabama Power Co. v. Davis,* 431 U.S. 581, 98 S.Ct. 1185 (April 3, 1978); *City of Los Angeles Dept. of Water and Power v. Manhart,* ....U.S. ....., 98 S.Ct. 1370 (April 25, 1978), and *Allied Structural Steel Co. v. Spannaus,* ..... U.S. ....., 46 U.S.L.W. 4887 (June 28, 1978).

All of these cases have required this Court to construe the nature of pension benefits in light of various statutes and constitutional provisions. In each case, the Court premised its holding on the principle that pension benefits are deferred compensation in which employees have a protectible interest and on which they "are entitled to rely. . . ." *Allied Structural Steel, supra,* at p. 4890. Like the Court of Appeals below, this Court has accepted the economic reality that pensions are a key element of an employee's wages and certainly, as Mr. Justice Stewart declared, an "*additional form of compensation*" (emphasis supplied). *Id.*

This Court's recent discussion of the nature of pension benefits is not limited to the context of the *Allied Structural Steel* case. In *L.A. Dept. of Water & Power v. Manhart, supra,* this Court was required to analyze pensions under the auspices of a separate enactment, the Equal Pay Act. This time Justice Stevens, speaking for the Court, held that "pension benefits and the contributions that maintain them are 'compensation' under Title VII [citations omitted]." 98 S.Ct. at 1377 n.22.[2]

Petitioner IBT, while not discussing the above cases, attempts instead to buttress its contrary contingency

[2]The Court, in reaching that conclusion, referred to an earlier decision from the Fifth Circuit, *Peters v. Missouri-Pacific R. R. Co.,* 483 F.2d 490, 492 n.3 (5th Cir. 1973), *cert. den.* 414 U.S. 490. In turn, the *Peters* court holding that retirement plans are within the scope of Title VII, relied on the Seventh Circuit's decision in *Bartness v. Drewrys USA, Inc.,* 444 F.2d 1186, 1188-1189 (7th Cir. 1971), *cert. den.* 404 U.S. 939. Not surprisingly, the Seventh Circuit's views of pension benefits as compensation covered by Title VII in *Bartness* are bottomed on the case of *Inland Steel Co. v. NLRB, supra.* Thus, the ruling in *Manhart* is not only consistent with but also directly supported by the same case (*Inland Steel*) that the Court of Appeals below relied on for its view of pensions as deferred compensation.

theory on this Court's earlier decision in *Alabama Power v. Davis, supra,* and in particular on the Court's suggestion that in some respects pensions are "predominantly rewards for continuous employment." 431 U.S. at 594. According to IBT, this statement evidences this Court's rejection of the theory that pensions are a form of compensation.[3]

IBT's reliance on *Alabama Power, supra,* is misplaced. To the contrary, Mr. Justice Marshall, writing for a unanimous court, found that pensions are, in fact, compensation within the meaning of a number of federal statutes, 431 U.S. at 592. Developing this view, Justice Marshall pointed out that "pension benefits have some resemblance to compensation for work", 431 U.S. at 592, and that "future benefits [pensions] may be traded off against current compensation", *id.* Not surprisingly, these observations prompted Justice Marshall explicitly to underscore the continuing validity of *Inland Steel, supra,* 431 U.S. at 592 n.16.

This endorsement of the deferred compensation account of pension benefits is especially significant in the context of the statute under consideration in *Alabama Power.* The issue before the court was whether pensions were an incidence of seniority under the Military Selective Services Act. Employees absent from work for military service would not be entitled to pension credits if retirement benefits were mere gratuities or contingent expectancies; rather, employees had to have some right to expect pension payments in

[3]The Court of Appeals below was certainly cognizant of the *Alabama Power* decision and discussed it at footnote 43, 561 F.2d at 1244-45. The Seventh Circuit used the occasion to reject the petitioner's arguments and to point out that *Alabama Power* also accepts the deferred compensation analysis of interests in a private pension plan. *Id.*

order for those payments to be incidents of seniority. Such payments, this Court held, were part of the direct rewards of work. Congress thus intended that employees who were unable to work because of military service would retain their right to receive them. Plainly, then, pensions were important, real and protectible interests, deriving from an employee's service to his employer.

Thus, *Alabama Power,* as well as *Manhart* and *Allied Structural Steel,* recognize that pensions are in reality a unique form of compensation. An employee's interest in that compensation is not only an important enough interest to be protected by the Military Selective Service Act and the Contract Clause of the Constitution, but is also "a sufficient interest to constitute a security." *Daniel v. International Brotherhood of Teamsters, etc., supra,* at 1233.

II.

A. Holding That Mr. Daniel Has Stated a Claim Under the Securities Laws Is Consistent With the Intent of Congress.

Petitioners IBT and Local 705 contend (IBT Brief, pp. 67-135; and Local 705 Brief at pp. 27-44) that the decision of the Court of Appeals in this case is directly contrary to the prior intent of Congress. They maintain that this intent is not demonstrated by the legislative history of the securities laws, but instead devolves from the later congressional enactment of the Welfare and Pension Plans Disclosure Act (hereinafter WPPDA), 29 U.S.C. §301, *et seq.*, and the Employee

Retirement Income Security Act (hereinafter ERISA), 29 U.S.C. §1001, *et seq.*[4]

Relying on statutes passed 25 and 40 years after the securities laws to determine congressional intent in 1933 or 1934 is certainly stretching the analysis beyond its limits. Petitioners' contentions merely reemphasize that this issue—whether pensions are securities under the federal securities laws—is one of first impression.

Further, petitioners do not point to any legislative statements, even during the discussion of the WPPDA and ERISA, that directly speak to the question raised by respondent John Daniel. Instead, they contend that because the issue was not directly addressed,[5] and

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[4]Local 705 also looks to the legislative history of Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5). (Local 705 Brief at pp. 27-29.) There is no doubt that this additional statute was intended to place structural controls on some union negotiated pension plans, but Local 705 cannot seriously claim that §302(c)(5) was designed as a disclosure statute.

[5]Petitioners do allege that Congress did consider at least tangentially the relevance of pensions to securities laws when it considered whether the S.E.C. should administer the WPPDA. See, for example, IBT Brief, at pp. 71-72. That discussion illustrates nothing about the nature of pension benefits or whether such benefits are securities. If anything, it supports Daniel rather than IBT because it does illustrate that when Congress considered who should administer the law it assumed that the S.E.C. was a perfectly reasonable choice. The S.E.C. was considered presumably because many members of Congress assumed pensions were within the province of the S.E.C. See the comments of Sen. MacNamara quoted at p. 32 of the Local 705 Brief.

The S.E.C. was rejected in favor of the Department of Labor, not because of a conclusion about pensions *per se* but because Congress concluded that the Labor Department was a better administrative body to operate the kind of disclosure

(This footnote is continued on next page)

because Congress did enact separate pension legislation, it must have concluded pensions were not subject to securities law provisions.

Silence by Congress on the question does not support petitioners' contentions. Amicus, as do all parties, recognize that the issues of this case were not directly and comprehensively addressed prior to this lawsuit. However, merely because the issue is raised at a late date does not deprive it of its validity.

But even if petitioners' syllogism is conceded, their assumptions as to Congress' purposes in enacting the foregoing pension statutes are not valid. The purpose of Congress in adopting WPPDA was not to provide pension beneficiaries with information which is similar to that demanded under the securities laws. Rather, Congress had a different, complementary agenda.

In *Malone v. White Motor Corp.*, ... U.S. ...., 98 S.Ct. 1185 (1978), this Court had an opportunity to review the legislative history of the WPPDA. After thorouly discussing the congressional intent and reviewing the legislative history, the Court concluded that the intent of the act was to provide information to (1) evaluate the administrative efficiency of a pension plan and (2) to assure that the plan's assets were sufficient to pay the promised benefits. .... U.S. ...., 98 S.Ct. at 1191-

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required under the new law because pensions were part of the collective bargaining process (WPPDA). Thus, Congress recognized the dual but complementary interest of two government agencies in disclosure of information. *See* Legislative History of the Welfare and Pension Plan Disclosure Act of 1958, as amended by Pub.L. 87-420 of 1962, at 77; *cf. Malone v. White Motor Corp.*, ... U.S. ....., 98 S.Ct. 1185 (1978).

93. Not surprisingly, the primary purpose of this information was to assure recipients (and the federal government) a means to check corruption within the pension industry. *Id.*

These purposes are a far cry from the securities disclosure sought by Mr. Daniel. WPPDA was only intended to provide Mr. Daniel with assurance that the pension fund was not wasting his money or spending it improperly. It was not designed to disclose either the operation of the eligibility structure of the plan or the likelihood of a worker's receiving benefits at retirement. The nature of the disclosures in these two laws were entirely different, although certainly not contradictory. Congress could not have assumed when requiring the anti-corruption disclosure of WPPDA that it was substituting or replacing other information required under the securities laws.

Similarly, ERISA's enactment in 1974 does not reflect congressional intent on the scope of the securities laws. While the nature of the information disclosed to beneficiaries pursuant to ERISA is more expansive than that under the WPPDA, it is not directed at the same problems as the securities laws.

The material which must be disclosed under Mr. Daniel's claim is information which is necessary to evaluate the wisdom of an investment into a pension plan. In essence, respondent seeks the actuarial assumptions upon which the plan is designed. This information would allow an employee to determine whether it was worthwhile to invest his wages in a pension plan or

evaluate the likelihood of his receiving a return on his investment.

ERISA disclosure, on the other hand, attempts first to accomplish the same purposes as the WPPDA; thus, Congress repealed WPPDA when it passed ERISA, 29 U.S.C. §1031(a).[6] Secondly, ERISA provides, once the participation (or investment) into the plan is accomplished, information on what additional work must be done to generate benefits and what is an individual's current benefit status. ERISA does not require information on what goals and expectations underlie the pension plan; rather, it is a practical update of the current value of one's investment and what additional contributions are necessary to secure an adequate return through retirement benefits. Thus, the securities disclosure is "complementary to the requirements of ERISA", which is probably what Congress intended, as it makes "good sense". *Daniel, supra.*

To a large extent, petitioner IBT acknowledges (see pp. 83-84 of the IBT Brief), the important differences between the respective disclosure schemes called for by ERISA and by the securities laws. Instead, the IBT argues that the Court's error was in "holding that it makes 'good sense' " to construe the two statutes in complementary fashion. IBT Brief at p. 84. Petitioner suggests that the Court has substituted its judgment for that of Congress.

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[6]The Court of Appeals below also pointed out that Congress placed in ERISA a savings clause, 29 U.S.C. §1144(d), which "provides that ERISA shall not be construed to supersede any federal law or rule thereunder." *Daniel v. International Brotherhood of Teamsters, etc.*, 561 F.2d at 1246. Consequently, contrary to the implications suggested by the petitioners, Congress seems to have made some explicit decisions in ERISA to void some disclosure laws (WPPDA—because ERISA provided similar remedies), and retain others (Securities—because ERISA did not duplicate or replace them).

On the contrary, as amicus has shown, a reasonable account of Congress' activity in the pension field shows an intent to produce a complementary relationship with the securities laws. Petitioner's conclusions result from the false premise that separate federal pension legislation must mean that Congress found pensions to be exempt from the anti-fraud provisions of the securities laws. However, as shown above, such an assumption cannot be made and, affirming the Court of Appeals' interpretation of the securities laws is consistent with the intent of Congress and with "good sense." *Daniel,* 561 F.2d at 1248, *supra.*

III.

The Actuarial Information Sought by Respondent Daniel Is Available and Useful to Pension Participants.

Both petitioners in conjunction with amicus American Academy of Actuaries (hereafter Actuaries) have tried to persuade this Court that the Court of Appeals rested its decision at least in part on false assumption about the nature and availability of actuarial assumptions. Petitioners attack both lower courts' reliance on statistics concerning the likelihood of employees receiving benefits at retirement developed by Congress during its pre-ERISA studies.[7] Their briefs contend first that actuarial information of that sort is not readily available to pension plans and second, that even what is available should not be disclosed because it is misleading.

The arguments on these points are the prime examples of the petitioners' and their supporters' extreme attempts to hide information at their disposal from plan partici-

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[7]See Interim Report of Activities of Private Welfare and Pension Plan Study, S.Rep. No. 92-634, 92nd Cong., 2d Sess. (1972) cited at 410 F.Supp. 551 and 561 F.2d at 1227.

pants. More important, such contentions are merely smoke-screens to divert this Court from the limited issues raised by the procedural posture of the present action.

The only question before this Court is whether respondent Mr. Daniel has stated a claim under the anti-fraud provisions of the securities laws. Whether he has in fact proved a violation of those laws remains to be seen—as neither the district court nor the Court of Appeals has had an opportunity to consider those issues.

Consequently, neither the content of the information to be disclosed, nor whether such information was in fact material, or possessed by the defendants below was before the lower courts at this stage. Petitioners, by seeking interlocutory review in this matter, have chosen to present this case to appellate courts before all relevant factual information was developed. They cannot now be permitted to exploit the bare record produced by this choice to defeat Mr. Daniel's claim. Amicus recommends that this Court not mire itself in the difficult analysis of the scope of disclosures that are demanded by the securities laws, but once having decided that Mr. Daniel has alleged a valid securities claim this Court should remand the case to the district court to address those issues.[8]

[8]Local 705's incredible attempt to introduce new evidence in the form of an actuarial report in its brief to this Court illustrates amicus' position. See Local 705 Brief, pp. A1-A39. The fact is that Local 705 realized that the record below did not contain a factual basis for their arguments on the nature and effects of disclosure. They are presenting to this Court evidence admittedly not introduced before and to be considered *for the first time* in the Supreme Court. Even if this evidence is relevant, then it should, as amicus suggests, be considered first by the district court so that an adequate record can be developed.

Since petitioners and amicus Actuaries have raised these subjects, amicus Gray Panthers feels compelled to briefly point out the inaccuracies, invalidity and limitation of their arguments. The first contention which must be addressed is the claim that the information required to be disclosed "is not the type of information which a plan actuary uses." Local 705 Brief, at p. A4. In essence, the Actuaries and petitioners have suggested that the kind of material information which the Court of Appeals wanted Mr. Daniel to have was not in reality available to the pension trustees.

Amicus Gray Panthers cannot agree with this assertion. Actuaries and pension plan designers certainly do intend that the pension plan will have a specific impact on participants. Since the system thrives on participant forfeitures, without knowing at some level how many forfeitures are involved, neither the actuary nor the trustees can determine the financial soundness of the fund.

Dan M. McGill, a noted expert on plan design in his important treatise, *Fundamentals of Private Pensions*,[9] states emphatically that

> . . . the first step in the valuation of a retirement benefit is the determination of the *probability that the participant in whose behalf the benefit has been credited will survive in service to early or normal retirement age.* McGill, *Fundamentals of Private Pensions*, at 312. (Emphasis supplied).

McGill then goes on to describe what he terms "decrements," which are the forces that determine the proba-

[9]Mr. McGill's book is generally accepted as one of the most important and influential books in the field. It has been cited with approval by petitioner IBT, amicus Actuaries, and the Court of Appeals below.

bility that an employee will in fact receive benefits. These primary decrements—death, disability, and termination for other reasons—are, according to McGill, predictable and should always be computed by actuaries.

Ironically, the actuarial affidavit attached to Local 705's Briefs demonstrates this point. In the appendix to that affidavit which illustrates the methodology used by Local 705's actuaries, they detail, as McGill suggests, their use of the termination rates and the "decrements" in order to determine how many persons will receive benefits. This information on the likelihood of receiving benefits translated to layman's terms is in fact the kind of material that the Court of Appeals considered should be disclosed.[10]

Petitioners and the actuaries do, in reality, concede that the information could be produced, but in turn deny its usefulness to Mr. Daniel, In sum, relying on the "Laws of Probabilities", they maintain that the nature of the facts requested will not aid employees but will mislead them.

It appears that petitioners are fearful that the information will be as dismal as the eight per cent rate of recovery noted in the congressional study and that the District Court was correct in suggesting that if employees knew that information they would not participate in a pension plan. 410 F.Supp. at 553. These

[10]Amicus does not contend that this kind of actuarial data is the only information which should be disclosed. Other material facts are in fact easier and simpler to obtain. For example, Mr. Daniel should have had available to him a simple statement which would reflect the direct impact of the break-in-service rule (the real villain in this case). Such a statement, indicating that no benefits were payable if an employee failed to work continuously for contributing employers in the next 20 years, would certainly have aided Mr. Daniel in evaluating the likelihood that he would receive a return on his investment.

contentions are, however, premised on a belief that the average American worker is so limited in general intelligence that he cannot recognize the inherent limitations of any mathematical projections. It is obvious that the applicability of general prognosis to any individual has its limitations, but that does not make such information useless or even misleading.

If an employee knows that the structure and eligibility conditions of a pension plan were designed so that only eight per cent of those whose compensation went into the fund would ever get a return, then that employee is perfectly able to weigh, based on his individual situation, whether he will be one of the eight per cent. He will be able to weigh the "risk" of the likelihood of a return on his investment. Certainly knowledge of these probabilities would have allowed Mr. Daniel to make a more rational and intelligent judgment about his retirement income. Such information would have, at a minimum, been more reliable than merely stating that benefits are recoverable after 20 years of work.

Conclusion.

Amicus Gray Panthers submit, as they have throughout this case, that the critical information required to be disclosed under the anti-fraud provisions of the securities laws must be made available to employees participating in pension plans. Pensions are, in economic reality, within the scope of the securities laws as they are protectible interests in the form of differential compensation. Further, contrary to the petitioners' contentions, Congress did not intend that disclosure about this unique form of security was subsumed by other pension legislation.

Finally, amicus reiterates that the information requested by Mr. Daniel is available and important to him. The disclosure requested is not misleading but is useful and relevant to an investment decision. Therefore, amicus Gray Panthers urges this Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF PROD, WOMEN'S LOBBY, INC. AND THE INSTITUTE FOR PUBLIC INTEREST REPRESENTATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*, AND BRIEF, IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF PROD, WOMEN'S LOBBY, INC. AND THE INSTITUTE FOR PUBLIC INTEREST REPRESENTATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

PROD, Women's Lobby, Inc. and the Institute for Public Interest Representation respectfully move this Court, pursuant to Supreme Court Rule 42(3), for leave to file the accompanying brief as *amici curiae* in support of the Respondent in this case. To identify the interests of the applicants and support this motion PROD, Women's Lobby and the Institute for Public Interest Representation state:

1. This motion is necessary because Petitioners have refused to consent to the filing of an *amici curiae* brief by PROD, Women's Lobby and the Institute for Public Interest Representation.

2. PROD is a nationwide rank-and-file Teamster reform organization. Also known as the Professional Drivers Council, PROD is a non-profit corporation supported by the voluntary dues of approximately 5,500 rank-and-file Teamsters. Among PROD's members are Chicago area Teamsters, including some affiliated with Local 705.

3. Chief among PROD's goals is to reform and democratize the Teamsters Union and to make the union's officials responsive and accountable to its membership. A major obstacle to such reform has been the cloak of secrecy behind which many Teamster officials have conducted their business both as union officers and as pension fund trustees. Administration of Teamster pension plans is one area where this problem has had devastating effects. John Daniel is only one of thousands of Teamsters who have been denied the opportunity to make informed and intelligent decisions about whether to become or remain participants in Teamster pension plans, and whether to ratify proposed collective bargaining agreements defining the terms of their pension plans. The type of disclosure called for by the court below is essential if individual Teamsters are to be able to make informed investment decisions for a secure retirement, and if the Teamsters membership as a whole is ever to root out the

corruption and mismanagement which has characterized Teamster pension plans for far too long.

4. Women's Lobby, Inc. is a non-profit corporation which ensures that the interests of women are heard when Congress considers legislation affecting women. As a women's rights organization, Women's Lobby has a longstanding interest in pension issues as is evidenced by its efforts supporting enactment of ERISA in 1974. Women now comprise 40.3 percent of the labor force, and many of these women are working in jobs covered by pension plans that may be affected by this case. These women, particularly those who take time away from work to raise children, need to be aware that, contrary to their expectations, pension plans do not work like social security and that many plans specifically depend upon forfeitures by women. They need this information before they begin to work so that they may plan their working careers.

Women not working outside the home tend to assume that they will automatically be the beneficiaries of their husbands' pension plans. Their husbands typically share this assumption and do not make adequate provision for alternative sources of income for their wives. When these women are widowed, they do not have the benefits they were counting on. Women have a particularly strong interest in making, and helping their spouses to make, informed pension investment decisions.

5. The Institute for Public Interest Representation ("the Institute") is a public interest law firm affiliated with the Georgetown University Law Center. For the past three years, the Institute has been active in the field of pension reform and has participated frequently in the development of regulations under the Employee Retirement Income Security Act of 1974 ("ERISA"), representing the interests of pension plan participants and beneficiaries. It has sought to assure that when federal

agencies charged with the execution of laws relating to pensions respond to such highly organized constituencies as labor unions and employers' associations, agency actions are not taken at the expense of employees' rights under ERISA. The Institute participated in the proceeding below in *Daniel* as an *amicus* before the court of appeals.

6. *Amicus curiae* briefs have already been filed with this Court in support of the position of the petitioners by the National Coordinating Committee for Multiemployer Plans ("NCCMP") and the ERISA Industry Committee ("ERIC"), among others. The NCCMP represents 50 trade unions and collectively bargained multiemployer pension plans and thus provides the Court with organized labor's perspective on this case. Similarly, ERIC represents 83 major United States corporations maintaining hundreds of pension plans in a wide cross-section of American industries and thus provides the Court with the perspective of employers on pension plan issues. The interests represented by the NCCMP and ERIC in this litigation are diametrically opposed to the interests of most of the 30 million employees covered by private pension plans.

7. PROD, the Women's Lobby and the Institute are concerned that absent their participation, the interests of present and prospective employees may not be fully represented before this Court. The interests of the petitioners, NCCMP, and ERIC are fundamentally inconsistent with those of plan participants. The respondent and *amicus* Gray Panthers are necessarily concerned primarily with the impact of the lower court's decision on retired workers such as themselves, not with the millions of current and future employees who stand to benefit from the Court's decision.

WHEREFORE, PROD, Women's Lobby and the Institute move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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Petitioners,

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---

BRIEF OF PROD, WOMEN'S LOBBY, INC. AND THE INSTITUTE FOR PUBLIC INTEREST REPRESENTATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

As stated in the accompanying motion for leave to file this *amici curiae* brief, PROD is a nationwide rank-and-file Teamster reform organization, Women's Lobby is a women's rights organization particularly concerned with federal legislation affecting the interests of women, and the Institute for Public Interest Representation ("the Institute") is a public interest law firm which has been concerned with protecting the rights of pension plan participants and beneficiaries. These organizations have a longstanding interest in pension reform and they are representing the interests of present and future pension plan participants who stand to benefit if the decision of the court below is affirmed.

SUMMARY OF ARGUMENT

This brief will not directly address the detailed statutory argument supporting Mr. Daniel's claim that his interest in the Local 705 Pension Fund is an interest in a security. Rather, we will show that application of the antifraud provisions of the securities acts is necessary to protect the very substantial interests of millions of pension plan participants and beneficiaries. A pension is often the largest single investment a worker makes and the value of that investment can mean the difference between a secure and dignified retirement and a poverty level subsistence. For this reason, workers must be able to make informed employment and contract ratification decisions which can have a substantial effect upon their financial security during retirement.

The brief will also demonstrate that application of the securities laws in order to protect these interests of workers is completely feasible and need not be unduly burdensome for pension funds, and that it will not impose excessive liability upon unions or employers despite their dire predictions of totally speculative consequences. No court has yet determined exactly what information would have to be disclosed, and it would be premature for this court to do so without a fully developed factual record. However, as this brief explains, there is no reason why the special nature of pension investments and employment relationships cannot be considered and accommodated so that the disclosure requirements would not be burdensome. Nor is there any reason why affirmance of the decision below will have the disastrous economic impact predicted by the unions and employers.

Finally, *amici* will explain how the application of the securities laws will complement, rather than conflict with, ERISA and national labor policy. ERISA was recognized by Congress to be only a partial solution to pension problems and was never intended to deny the protections of the securities laws to pension plan participants. ERISA was designed primarily to protect the interests of individuals only after they become participants in pension plans. The securities laws, on the other hand, were designed to protect the interests of individuals at the critical moment when they decide whether or not to make a particular investment. For that reason, the timing and content of the disclosure required by the two laws differ, and serve complementary, rather than overlapping or conflicting purposes. Similarly, arguments that application of the securities laws to collectively bargained pension plans conflicts with national labor policy are unfounded, since the decision below in no way undermines a union's exclusive authority to bargain on behalf of its members. It simply provides a remedy to workers whose unions intentionally mislead them about the pension plans they have negotiated, when the unions choose to submit those plans to them for their approval. The Court should therefore affirm the decision below and permit Mr. Daniel to have his day in court and attempt to prove that petitioners committed an intentional fraud which resulted in his loss of a pension.

ARGUMENT

Introduction

The court below held that an employee induced by an intentional misrepresentation or omission of material fact to accept participation in a pension plan has a remedy under the antifraud provisions of the Securities Acts of 1933 and 1934. The Seventh Circuit's opinion suggests that when an employer or, as in the present case, a union, offers a defined benefit pension plan to a prospective employee or member, the employer or union must disclose both the fact that there is a risk the employee or member will not receive the pension benefits, and the factors, such as breaks in service, death before retirement age, and plan termination, that can cause the employee or member to be deprived of his or her benefits.[1] The practical effect of the circuit court's opinion, if it is affirmed, will be that employers and unions will no longer be able to conceal from employees and prospective employees the fact that there is a substantial risk that many employees investing in pension plans will never receive their pension benefits.

Both unions and employers have a vested interest in withholding from employees information about the risk that they will not receive their benefits, however. Although employers contribute approximately $23 billion annually to private pension plans on behalf of roughly 30 million employees,[2] perhaps only as few as one-third to one-half of those employees will receive pension benefits as a result of these contributions.[3] By concealing these

[1] *Daniel* v. *International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 561 F.2d 1223, 1228-29 (7th Cir. 1977).

[2] Skolnick, *Private Pension Plans, 1950-74*, 39 Soc. Sec. Bull. 3, 4 (June 1976).

[3] "Over one-half of the work force covered by pension funds changes jobs well before the ten-year vesting standard imposed by ERISA. Because there is no legal mechanism by which workers

facts from employees, employers can mislead millions of workers into believing they are receiving compensation for their labor in the form of pension coverage they will never receive. Since defined benefit plans use the forfeited pension benefits of shorter service employees to subsidize the pensions of longer service employees, employers use these plans to induce employees to remain in service longer and to thereby create an experienced workforce with less turnover, at minimal expense to themselves. Similarly, concealing the risks of these pension plans from their members enables union leaders to mislead their membership into believing the union has obtained for them a much larger wage and benefit package than is actually the case.

Unfortunately, the interest of unions and employers in opposing the type of disclosure proposed by the court below is not revealed in the *amicus curiae* briefs of the National Coordinating Committee for Multiemployer Plans ("NCCMP"), representing organized labor, or of the ERISA Industry Committee ("ERIC"), representing employers. Rather, the NCCMP and ERIC briefs and other briefs seeking reversal attempt to use this Court's consideration of "policy considerations" in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), as an excuse to raise numerous arguments that are, as explained below, simply misleading and are intended to divert the Court's attention from the genuine issues in the case.

can transfer their accumulated employment time to other jobs, they lose all the deferred wages that have been set aside for them." J. Rifkin & R. Barber, *The North Will Rise Again: Pensions, Politics and Power in the 1980's* at 127 (1978) *citing* Bureau of Labor Statistics, *Coverage and Vesting of Full Time Employees under Private Retirement Plans, from the April 1972 Survey* (Sept. 1973) (hereinafter cited as Rifkin & Barber).

I. DISCLOSURE OF THE RISKS INHERENT IN PENSION PLAN INVESTMENTS IS NECESSARY TO ENABLE EMPLOYEES TO ACT INTELLIGENTLY TO PROTECT THEIR INTERESTS IN A SECURE RETIREMENT

A. An Employee's Interest In A Pension Plan Is An Investment of Great Value

The importance of pension funds to individual participants and beneficiaries can hardly be overstated. As a recent National Planning Association study noted, "it is only those retirees receiving pension benefits who are able to continue preretirement consumption levels during the retirement period." R. Clark, *The Role of Private Pensions in Maintaining Living Standards in Retirement* 23 (1977).

Pension plans are also of critical importance to individuals because of the substantial monetary investment they represent. More than four percent of a typical union member's total compensation goes into his or her pension fund. *Employee Compensation in the Private Nonfarm Economy, 1974*, Dep't. of Labor Bureau of Labor Statistics Bull. 1963(1975). An individual's pension fund investment is often the largest single investment of his or her lifetime. It is also likely to be the individual's only opportunity to participate in the capital markets system.

Because of "favorable tax provisions, . . . information, transaction and management economies and the greater capacity for portfolio diversification, pension funds represent the most efficient way for the average worker to invest in the securities market." N. Ture, *The Future of Private Pension Plans* 3 (1976). Pension funds are also the largest and fastest growing source of private investment capital. Private pension funds now have $279.6

billion in assets.[4] Together with public pension funds it is estimated that they own 25 percent of the equity in the nation's largest corporations.[5]

Respondents and their *amici* go to great lengths to argue that an individual's interest in an involuntary noncontributory defined benefit plan is distinguishable from other investments in the capital markets on the ground that the individual's investment is tied to his or her employment, is based on contributions made by an employer and results in a return based on forfeitures rather than on market risk.

What the Respondents and their *amici* fail to note is that all of these factors are the result of certain public policy, historical and practical considerations which do not affect the essential nature of the individual's investment. For example, the fact that an individual's investment in the capital markets is channeled through a pension fund tied to employment, rather than being invested directly by an individual in a mutual fund or similar voluntary savings vehicle is merely the result of public policy which recognizes that ever-increasing de-

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[4] Securities and Exchange Comm'n, *Statistical Bulletin* 6 (May, 1978). All pension plans, public and private, have a book value of over $500 billion. *Id.* at 8. As two commentators have pointed out:

> "That is more money than was spent on food, clothing, and shelter by all 215 million Americans last year. Pension funds are now larger than the combined GNP of the United Kingdom and France. . . . For a nation used to thinking of wealth in terms of private savings, it would probably shock most Americans to know that pension funds are now four times larger than the amount of all individual savings in the United States. . . ." Rifkin & Barber, *supra* at 84.

[5] *Pensions and Investments*, April 11, 1978. The value of stocks accumulated by private noninsured pension funds in the past twenty years exceeds the total accumulated during that period by the three other major institutional groups of investors—mutual funds, life insurance companies, and property and liability insurance companies. W. Greenough & F. King, *Pension Plans and Public Policy* 140 (1976).

mands on limited current income make forced savings the only effective means of providing an adequate income at retirement. Clark, *supra* at 11.

Similarly, the fact that pension fund contributions are typically made by employers, rather than employees, is the product of (a) tax laws which tax employee contributions to pension plans but not employer contributions, and (b) pressure by organized labor on employers to make contributions directly. M. Bernstein, *The Future of Private Pensions*, 19 (1964)[6]. The result is little different than if the employer compensated the employee with cash which the employee then invested in a pension plan.[7]

[6] Canada which has a pension system virtually identical to the U.S. system operates under a contributory arrangement. Department of National Health and Welfare, *Income Security for Canadians* 2-3 (1970). Senators Harrison A. Williams, Jr. and Jacob K. Javits introduced the "ERISA Improvements Act of 1978" (S. 3017) on May 1, 1978 which would, among other things, encourage contributory arrangements in this country.

[7] It can no longer be seriously contended that employees do not give "value" for pensions. It has been well-settled since *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), that in the case of collectively bargained plans, an employee's promised pension is "as much a part of his 'wages' as the money paid him at the time of the rendition of his services." Recognition that pensions are deferred wages rather than gratuities in the case of non-negotiated plans was somewhat slower in coming, but the issue was definitively resolved by the passage of ERISA. According to Senator Jacob K. Javits, co-sponsor of the legislation:

> ". . . I believe that [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that private pensions are a form of deferred wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short the 'gold watch' theory of pensions is dead for once and for all."

Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits, September 19, 1974.

This Court's recent decision in *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), does not require a different conclusion. When the

Finally, the fact that a pension plan operates on a "defined benefit" rather than "defined contribution" basis does not alter the fact that it represents an individual's very substantial investment in the capital markets. The "defined benefit" aspect of a pension plan is nothing more than a technique for achieving certain objectives over and above the basic investment return on which both defined benefit and defined contribution plans depend.[8]

Court there stated that "the 'true nature' of the pension payment is a reward for length of service," *id.* at 593, it was addressing a different question from the one now before the Court. In this case, the Court is asked to identify the value an employee gives when he or she makes the decision to invest in a pension plan by accepting a job covered by a plan or by ratifying a collective bargaining agreement defining the terms of a plan. The answer is not just that the employee gives the promise of long service in jobs covered by the plan, but also that he or she forgoes current compensation which would have been earned in the absence of a pension plan. The Court acknowledged this fact in *Alabama Power* when it noted that "future benefits may be traded off against current compensation." *Id.* at 592-93. The question before the Court in *Alabama Power* was entirely different. There, the Court had to determine which of these two components of the value given defined its overall character within the narrow context of the Military Selective Service Act. By concluding that "pension payments are *predominantly* rewards for continuous employment with the same employer," *id.* at 594 (emphasis added), the Court was by no means deciding that present compensation forgone was not also an important part of that value. Unlike the selective service laws, nothing in the securities laws requires that all the value given for a security be characterized as value of a single type. Petitioner in this case does not have to show that the value he gave when he invested in the Local 705 pension plan was exclusively or even predominantly present compensation forgone, but only that it was such at least in part. As the Court itself suggested in *Alabama Power*, classifications of pensions as wages or as rewards for long service for purposes of one statute do not necessarily control such classifications for purposes of others. *Id.* at 593 n.17.

[8] Defined benefit plans differ from defined contribution plans only in the fact that defined benefit plans have certain "advantages". These advantages include the ability of defined benefit plans to provide pension credit for years worked before plans come into effect and the fact that the plans can relate benefit levels to final, or

In short, as mechanisms for employee investment in the capital markets, there are fundamentally no differences between involuntary, noncontributory defined benefit pension plans and voluntary contributory defined contribution plans or other similar investment vehicles.

B. Employees Need Disclosure Of The Risks Inherent In Pension Plans In Order To Make Informed Investment Decisions

To make an informed investment decision a person considering an investment in a pension plan needs to be told not merely the profit he or she can expect to receive but also the risk of loss. This risk includes both the risks arising out of a fund's participation in the capital markets and the risks that may preclude the investor from benefiting from the fund's participation in the capital markets.

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career average pay. D. McGill, *The Fundamentals of Private Pensions*, 94-96 (1975). These "advantages" result in costs too great to be funded by the pension plan's investment return. Instead, they are paid for by a system of forfeitures. The existence of these forfeitures does not alter the essential nature of pension funds as investment vehicles heavily dependent on return from the capital markets.

There is the further fact that, contrary to the suggestions of petitioners and their *amici*, investment return has a very significant impact on the level of benefits received by participants in defined benefit plans. Actuaries compute "that for every one percent increase in return on the trust portfolio, a pension can pay out between 10 and 20 percent more in benefits." N. Levin, *Labor-Management Employee Benefit Plans*, 63 (1971).

It is, of course, possible for employers to use increases in investment yield to reduce their contributions, but the fact is that virtually all pension plans have been consistently able to raise benefits and have been able to do so largely because of their investment return. To take only one example, Local 705 points out that the "defined" benefit promised to someone working in 1950 was $75 a month. If this same person continued to work until 1976, his or her "defined" benefit would have increased to $425 a month. Local 705 Brief at 8-9.

For example, the investor needs to know that his or her investment may be affected by a substantial downturn. If a fund experiences severe losses and the employer maintaining the plan is unable or unwilling to increase contributions to make up for those losses, the employer always has the option of terminating the plan. *See* R. Pozen, *The Prudent Person and ERISA: A Legal Perspective*, FINANCIAL ANALYSTS JOURNAL, 30, 32-33 (March-April, 1977). Should the Local 705, or any other multiemployer plan terminate, the entire risk of loss would fall on the participants.[9] It is equally important that prospective purchasers know the non-market risks that can prevent them from receiving a return of their investment. Forfeiture provisions can effectively preclude individuals from benefitting from the market return that might otherwise be available to them.

Disclosure of risks of this nature has always been required by the securities antifraud provisions. The prospective purchaser of an investment in a pension fund is in no different a position than the individual offered stock in a company that owns a gold mine. If the offeror knows that there is no gold in the mine, the antifraud provisions require that this fact be disclosed. Disclosure is required to alert the prospective purchaser to the fact that the investment itself carries with it a risk that will make it impossible for the prospective purchaser to get a market return.

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[9] In the case of terminated single employer plans, participants are likely to lose all accrued benefits if they have not worked long enough to vest. If vested, their benefits are, as a general rule, partially insured.

C. Employees Make Investment Decisions When They Accept Offers of Employment and Ratify Collective Bargaining Agreements

While it may be true that 35 years ago workers did not make employment decisions on the basis of pension considerations, that is no longer the case. Employees today can expect a much longer life after retirement, and they are increasingly becoming aware that their social security benefits and personal savings are generally too small to support them adequately during that period.[10] In fact, the extent to which the employment decisions of older workers are influenced by pension benefits has become a matter of increasing concern. For example, a study prepared for the Department of Labor by the University of Maryland showed that "a promise of higher pension benefits can be more effective than higher wages in holding a worker to his employer", and concluded that the resulting diminution in labor mobility "may impair labor market efficiency and lead to loss of potential output." [11] As younger workers learn about the importance of pension benefits, they too are becoming concerned. This is particularly true for workers in high turnover industries such as trucking [12] and for many young working

[10] P. Shabecoff, *Life in a Rose-Covered Cottage Isn't Rosy on $2,485 A Year*, New York Times, June 25, 1978. "In 1975, the median income of men living on Social Security was $2,485 and of women, $1,699." *Ibid.*

[11] 186 B.P.R. A-21, 22 (May 1, 1978) (summarizing "Internal and External Labor Markets: An Analysis of Manpower Utilizaton").

[12] Many over-the-road drivers find they are unable to endure the unsafe and arduous working conditions in the industry for an extended period, finding it physically impossible to keep the pace of the standard 70-hour workweek. Transferring to a city or terminal job, even within the same company, may involve transferring from one local to another and from one pension plan to another resulting in forfeiture of pension credits. Moreover, in the Chicago area, for example, there are at least 21 Teamster pension plans covering

women who know their careers may be interrupted by the responsibilities of bearing and raising children. Such workers have a strong incentive to seek jobs with short vesting requirements or liberal portability or reciprocity provisions. This cannot be accomplished, however, unless the material facts about their pension plans are disclosed to these workers at the time these decisions must be made.

Employers and unions are well aware of employees' concerns with pensions. According to authorities cited by the court below, booklets prepared by employers describing pension plans are designed "to sell the plan to employees", and pensions are second only to wages as a reason for membership rejection of contract proposals, being well ahead of such factors as vacations, hours and overtime, working conditions, and seniority. 561 F.2d at 1227 n.5 and 1244 n.41, *citing* D. McGill, *Fulfilling Pension Expectations* 17 (1962); Simkin, *Union Membership Rejection of Contract Settlements*, Labor Relations Yearbook 334, 342 (1967). This point could not be made more effectively than by the resounding rejections last winter by the United Mine Workers' rank-and-file of several proposed contract settlements, in large part because of dissatisfaction with their pension and related health and welfare provisions.[13]

truck drivers, none of which have reciprocity with the Local 705 plan. Different plans cover newspaper drivers, bakery drivers, laundry drivers, construction material drivers, grocery drivers, milk drivers, soft drink drivers, and garage attendants.

[13] *See* Franklin, *Miners Reject Pact Proposed By Leader As Disruption Grows*, New York Times, Feb. 13, 1978, at 1, col. 1 (wage offers "generally acceptable" but pension provisions "a leading source of discontent"); Robbins, *West Virginia Miners Criticize Pension Plan in Proposed Contract*, New York Times, Feb. 26, 1978, at 1, col. 4; Clarity, *Miners Reject 'Pattern—Setter' Pact by 2-1 Margin*, New York Times, Feb. 27, 1978 at 17, col. 2 (complaints about pension inequalities); Franklin, *A 3d Coal Pact Set; 'Yes' Vote Expected*, New York Times, March 15, 1978 at 1, col. 1 (health and pension benefits central reason for earlier rejection).

Without the disclosure required by the securities acts, employees will be making these most critical investment decisions in an informational vacuum, or in an atmosphere of exaggerated claims and omissions of critical facts.[14] Provided with complete and accurate information, on the other hand, employees would be able to take any number of actions to protect their interests in a secure retirement. For example, they could choose not to make an investment or to terminate an investment in a pension plan by declining or leaving a job or by voting against ratification of a contract. Or they could try to influence their unions and employers to provide better plans or al-

[14] For example, in an article appearing in *The International Teamster*, the Union's official publication sent to all members, it was stated, "Currently, the Central States Pension Plan has reciprocity agreements with more than 100 other pension plans, meaning that a worker covered under another Teamster pension plan can change jobs and transfer previously earned pension credits into the Central States Pension Plan, so that he does not lose his pension or have to begin all over again." *Like Old Man River, Central States Pension Just Keeps Rolling Along*, The International Teamster, Oct.-Nov. 1976, at 13. Not mentioned is the fact that of the 230 Teamster pension funds there are 160 plans that do not have reciprocity with the Central States Pension Plan. In another article, Teamster President Frank E. Fitzsimmons claimed, "The plan is fully solvent and more than able to meet its obligations through the 20th Century. . . . I also assure our membership that members of the negotiating committee for our national freight agreement intend to negotiate increased employer contributions to the plan which should further increase benefits." *Message From Frank E. Fitzsimmons*, The International Teamster, Feb. 1978, at 2. Mr. Fitzsimmons failed to inform his membership, however, that it would take a $6 per person per week increase in employer contributions in the first year of the 1979 freight contract just to maintain benefits at their current levels. Central States Southeast and Southwest Areas Pension Fund, Summary Plan Description and Pension Plan, Effective Jan. 1, 1976. Negotiation of the 1979 contract has not yet even begun. If the increased employer contributions are not obtained, pensions will have to be cut by as much as $80 per month, according to recent congressional testimony by former Central States executive director Daniel J. Shannon. H.R. Rep. No. 95-35, 95th Cong., 1st Sess. p. 143, Hearings on March 14-15, 1978, before the Subcommittee on Oversight of the House Ways and Means Committee.

ternative arrangements such as employer-sponsored Individual Retirement Accounts.

II. DISCLOSURE UNDER THE SECURITIES LAWS IS PRACTICAL, MEANINGFUL, AND NOT UNDULY BURDENSOME

Despite the vehement protestations of petitioners and their *amici*, there is no reason to conclude that disclosure under the securities laws would be unduly burdensome and there is every reason to conclude that it would be extremely meaningful to employees. Before considering some of the alleged problems referred to by petitioners, it is important to recognize that there have been no rulings whatsoever by either of the courts below concerning the content of disclosures that would be required by the application of the securities laws to pensions. The case comes to this Court on petitioners' Rule 12(b), F. R.Civ.P., motions to dismiss which challenged only the technical legal sufficiency of Mr. Daniel's complaint which alleged, *inter alia*, that the securities acts applied in certain limited respects to pensions. There has been no trial on the merits and no finding as to the kind of disclosures that are required by the securities laws in this unique context. It is entirely inappropriate for the petitioners and their *amici* to be seeking reversal of the decision below on the basis of purported rulings that have not yet been made.

Nonetheless, the American Academy of Actuaries seizes upon the court of appeals' *dictum*, to wit, "when offering a defined pension plan to a member [defendants must] disclose the actuarial probability . . . that a member actually receive pension benefits. . . ." (561 F.2d at 1229) as its springboard for claiming that "actuarial probabilities", as it defines the term, would be costly to determine and misleading to employees.

The issue having been raised, the Court should know that in fact the disclosure contemplated by the court below would be neither costly nor misleading. All that would be required would be disclosure of, first, the fact that there is a risk of loss, second, the factors that contribute to the risk and finally, the extent of the risk, if known.

Disclosing the risk of loss would require nothing more than that the offeror qualify his or her offer by telling prospective employees or union members that there is a chance that they will not get the offered pension.

To put the prospective purchasers on notice of the factors contributing to the risk, the offeror could allude in summary fashion to the risks inherent in defined benefit plans. These include the fact that the employees may not work long enough or continuously enough to get a right to a pension, that they may die before retirement age or that the plan might terminate.

As for the "statistically determinable risk," there is no need whatsoever for the offeror to predict the subjective likelihood of a particular individual remaining with a job long enough to qualify for pension benefits. Important and meaningful information could be provided to individuals by simply telling them about the recent experience of the plan. For example, an employer or union official might state: "During the past five years, X percent of all workers who left employment covered by this plan left without a pension benefit." [15] In addition, if they wished

[15] This same 'look back' approach was followed by the Senate Labor Subcommittee when arriving at its conclusion, referred to by the court below, that as few as 8 percent of all participants in defined benefit pension plans would receive benefits. Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 92-634, 92nd Cong., 2nd Sess., at 15, 115-153 (1972). The figure produced by this approach is, strictly speaking, not an "actuarial probability"; it is, however, a probability based on turnover and mortality data used by actuaries.

to do so, employers or unions would be perfectly free to provide additional information qualifying that disclosure so long as it were truthful. For example, an employer could say: "Many of the people who left employment here over the last five years left because of layoffs caused by the recent recession. However, we have just been awarded several large, longterm contracts and we don't anticipate many layoffs in the foreseeable future." Most employees have their own rough idea of the state of their health or of the likelihood they will seek other employment elsewhere in the future. If they are provided with information of the type suggested here, they will be able to roughly evaluate for themselves how trends within that plan apply to them, and will therefore be able to make a much more intelligent decision whether or not to invest in a particular plan.[16]

Providing the information outlined here to employees need not be a great burden on employers or unions. Such data is readily obtainable from employers' employment records. Indeed, estimates of the likelihood that different categories of workers will lose their benefits and the reasons for such losses are the very foundation upon

[16] On the other hand, a trial court, after consideration of the facts relating to a particular plan and employment relationship, might find less detailed disclosure adequate to satisfy the requirements of the securities laws as applied to pensions. For example, it might suffice for an employer to tell a prospective employee, "there are no guarantees that you'll actually get a pension and if the pension plan is important to you, you'd better check out the plan literature to see what it takes to qualify." By the same token, the disclosure requirements unions must meet at the time collective bargaining agreements are submitted for membership approval may be equally minimal. It might even be determined that unions are under no affirmative duty to disclose information concerning pension risks unless they would be materially altered by the newly negotiated agreement. However, the issue of the exact nature of the notice to be given to the employee is not before the Court at this time.

which plan actuaries calculate contribution rates and benefit levels.[17]

Disclosure can be made in the same manner and at the same time that the offer of the plan or the change in the plan is made. Thus, a personnel officer explaining the terms and conditions of employment to a prospective employee would mention not only the level of benefits paid to employees who qualify for their pension benefits, but also the circumstances under which benefits could be lost and the percentage of departing employees who leave without vested benefits. Similar information would be presented by a union representative when a new collective bargaining agreement establishing or modifying a pension plan is presented to the membership for ratification.

III. DISCLOSURE UNDER THE SECURITIES LAWS DOES NOT DUPLICATE DISCLOSURE UNDER ERISA AND IS CONSISTENT WITH THAT STATUTE'S LANGUAGE AND LEGISLATIVE HISTORY

A. Even Under ERISA, Pensions Remain High Risk Investments

The passage of ERISA in 1974 did not eliminate the need for the type of disclosure described in the preceding section. ERISA, of course, is a major reform establishing important new standards and requirements for the creation and administration of pension plans. Nevertheless, despite the establishment of minimum participation and vesting standards and the creation of a termination in-

[17] This information would serve much the same purpose as the classic statement once attributed to law professors addressing first year students, "Look to the right of you. Look to the left of you. One of you will not be here next year." Such a statement does not take account of individual variables and it is only based on past experience, but it remains a good indication of the extent of the risk faced by the beginning law student. It is also far less misleading than not telling the student that there is a risk.

surance system, substantial risks remain that plan participants may never receive their pension benefits. For example, if an employee leaves covered employment before completion of the vesting period, usually ten years, he or she forfeits all contributions made to the plan on his or her behalf. Similarly, if he or she dies before reaching retirement age, all contributions may be forfeited.[18] Even if the employee had opted for a survivor's annuity for his or her spouse, the beneficiary usually will receive nothing if the employee dies before reaching early retirement age. If a plan terminates before an employee's interest has vested,[19] the employee loses all contributions made on his or her behalf, and if his or her interest has vested, he or she is insured in full only for benefits resulting from plan provisions in effect for five or more years. ERISA § 4022.[20]

Thus, even under ERISA, defined benefit pension plans remain a speculative, high risk investment and employees must have disclosure of the existence of risks inherent in the investment.

B. Disclosure Under The Securities Laws Does Not Duplicate Disclosure Under ERISA

The disclosure to employees required by the antifraud provisions of the securities acts is very different from that required by ERISA. There are critical differences with respect to who makes the disclosure, the timing

[18] One out of every six 45 year old males dies before reaching age 65. 1971 Group Annuity Tables.

[19] Over 1000 pension plans terminate each year for economic reasons. Dep't. of the Treasury, Dep't. of Labor, *Study of Pension Plan Terminations*, 1972, Final Report (Aug. 1973).

[20] As to benefits resulting from plan provisions added during the five years before termination, the employee is insured for only 20 percent of the benefit for each year the provision has been in effect. ERISA § 4022.

and manner in which the disclosure is made, and the content of the disclosure.

Under the securities laws, disclosure must be made by the person offering the security for sale, or that person's agent, and must be made at the time and place the offer is made. Applying these rules in the pension context, an employer offering a prospective employee an interest in a pension plan as an inducement to accept employment would have to disclose the risks associated with the plan at the time of the offer. Similarly, in the case of the sale by unions of a new or modified pension plan as part of a collective bargaining agreement, disclosure would have to be made by the union's bargaining representative at the time the agreement is offered for ratification.

Disclosure under ERISA is quite different. Under ERISA, it is the plan administrator, not the employer or the union, who is responsible for disclosure. More important, *no disclosure is made until long after the employee has accepted the offer of a pension.* Plan administrators need not furnish employees summary plan descriptions until 90 days after they become participants in the plan. ERISA section 104(b)(1). Workers over age 25 must generally wait one year before becoming plan participants and thus must wait 15 months after they have begun work and purchased an interest in a pension plan before receiving the plan description. Younger workers must wait even longer. An employee who begins work at age 17 will have to wait 8 years and 3 months before receiving information about the plan. ERISA section 202(a). Similarly, under ERISA notice of changes in plan provisions need not be furnished to employees until seven months after the end of the year in which they were adopted. ERISA section 104(b)(1)(B).

There are also important differences in the content of the disclosure required by ERISA and the securities

laws. The antifraud provisions of the securities acts require the disclosure of all material facts that a reasonable investor would consider important in making an investment decision. An investor in a pension plan would want to know not only that there is a possibility of profit but also that there is a risk of loss. Information concerning the nature of that risk, the factors contributing to it and, if known, the extent of its occurrence would have to be disclosed. Under ERISA, plan administrators only have to inform participants of the factors contributing to the risk and such information, by itself, is insufficient to alert ordinary employees to the very real existence of the risks of loss they may sustain.[21]

These differences in disclosure under ERISA and under the securities acts reflect the fact that these two statutory schemes are designed to serve very different pur-

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[21] As the court below recognized:

> "ERISA § 102(b) requires that summary plan descriptions include a statement of 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.' In theory, employees should be able to infer from this information in the plan description that there is a risk of loss, and perhaps the nature of that risk. The Department of Labor has interpreted the statutory language very narrowly, however, in proposed rules issued on June 9, 1975, 40 Fed. Reg. 24654, on which the Department has stated plan administrators may rely. 41 Fed. Reg. 16957 (April 23, 1976). Plan administrators are permitted to describe the benefits of the plan in positive language, leaving the employee to deduce the negatives implicit in the affirmative language."

561 F.2d at 1249 n.58. The final rules which were adopted by the Department of Labor on July 10, 1978, do not remedy this weakness in ERISA disclosure. 42 Fed. Reg. 37178 (July 19, 1977). Moreover, as the court below also acknowledged, most summary plan description booklets contain disclaimers of liability for incorrect information contained in the booklets, whereas waivers of liability in disclosure required by the securities laws would be ineffective. 561 F.2d at 1248 In fact, the experience of *amici* PROD, the Women's Lobby and the Institute has been that employees who have read their plan descriptions do not recognize the risks.

poses. The antifraud provisions of the securities acts are designed to protect the interest of an investor before he or she makes an investment decision, so that an enlightened decision can be made. ERISA, on the other hand, is not addressed to employees who are contemplating investing in a pension plan but rather to employees who are already on a job covered by a pension plan. The primary purpose of disclosure under ERISA is to prevent "disappointed expectations", to protect employees from losing inadvertantly, through ignorance of plan limitations, pension benefits in which they might otherwise acquire an interest.[22] It is not designed or intended to provide information to potential plan participants before they decide whether or not to commit themselves to a specific plan. Thus the time, purpose, and content of disclosure under the securities acts is different from that under ERISA, and application of the antifraud provisions of the securities acts will in no way duplicate disclosure under ERISA.

C. Application of the Antifraud Provisions of the Securities Laws to Pension Plans Is Consistent with the Language and Legislative History of ERISA

The petitioners have argued in essence that application of the antifraud provisions of the securities laws to pension plans is precluded by ERISA. It is of course a fundamental principle of statutory construction that "[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature

[22] The ERISA disclosure provisions were primarily aimed at forestalling repetition of "horror stories" such as that of the sign painter who worked under a plan for 16 years, left, continued to pay union dues and discovered only at retirement age that he had lost his pension only because he didn't know that the plan required that he put in a minimum of one hour a year in the sign industry. As he noted "had I been aware of this rule, common sense would compel me to put in the required one hour a year to retain my pension." R. Nader and K. Blackwell, *You and Your Pension* 31 (1973).

undertook to give expression to its wishes." *United States* v. *American Trucking Assoc.*, 310 U.S. 534, 543 (1940). The words Congress used in ERISA clearly demonstrate that, contrary to the assertions of petitioners, ERISA was not intended to supersede the disclosure requirements of the securities laws.

Section 514 of ERISA defines the effects of the Act on other laws, and § 514(d) specifically provides that the only federal laws that are preempted by ERISA are the Welfare and Pension Plans Disclosure Act and certain provisions of Title 5 of the U.S. Code, relating to administrative procedure. Beyond those two exceptions, "nothing in this title shall be construed to alter, amend, modify, invalidate, or supersede any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514(d). From the explicit language of the statute, it is therefore plain that Congress did not contemplate that ERISA would replace remedies provided to citizens under other federal statutes.[23]

According to this Court in *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976), a statute should be interpreted contrary to its plain meaning only when that interpretation is supported by a clear Congressional intent expressly delineated in unambiguous legislative history. Far from offering unambiguous support for the petitioners' contention, however, ERISA's legislative history indicates that Congress never actually considered the issue of the applicability of the antifraud provisions of the securities acts. There is therefore no legislative history to support petitioners' conclusion that

[23] Petitioners stress that the only federal statutes intended to regulate the day-to-day relationships between pension funds and their participants and beneficiaries were ERISA, the WPPDA, the Internal Revenue Code, and the Labor Management Relations Act. The point is undeniable. However, what is not mentioned is that the present case does not involve this relationship between employees and their pension funds. Rather, it involves a security, the sale of pension funds to prospective employees by employers and in

the clear language of the statute should be ignored.[24] Moreover, to the extent the legislative history does provide any guidance in this area, it tends to support respondent's position that Congress was aware that the securities law could apply to pension plans.[25]

The absence of any more extensive discussion in ERISA's legislative history of the applicability of the antifraud provisions of the securities laws to pension

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some circumstances by unions. It is equally undeniable that the securities acts were intended to cover transactions involving the sale of securities. Nor do the legislative histories of ERISA and the WPPDA cited by petitioners suggest that the Congress and the S.E.C. "viewed collectively bargained plans as being outside of the securities acts' milieu." Local 705 Brief at 27; *see generally* Local 705 Brief at 27-41, and I.B.T. Brief at 67-68. The "milieu" of the securities acts was simply not under consideration in any of the legislative proceedings referred to by petitioners.

[24] Petitioners argue that when the Congress was considering enactment of the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), 72 Stat. 997, 29 U.S.C. § 301 *et seq.*, the S.E.C. declined to offer its services to register welfare and pension plans and accept their annual financial statements because pension plans did not fall within its province. Contrary to this contention, however, the S.E.C. was not declaring that it lacked the authority to prevent fraud in the sale to employees of pension securities by employers or unions. The S.E.C. was simply stating that it was fully occupied with the 3,000 securities it already had responsibility for overseeing and that it might be overwhelmed by any additional responsibility for the estimated 135,000 to 500,000 welfare and pension plans.

[25] For example, one Senate interim report noted that while the Securities and Exchange Commission did not have direct regulatory authority over private pension plans, "certain provisions of the federal securities laws which it administers do apply to such plans." S. Rep. 92-634, 92d Cong., 2d Sess. 96 (1972). In addition, former Chairman of the SEC Manuel F. Cohen categorically stated before the Senate Labor Subcommittee: "Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute." Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 3598, 92d Cong., 2d Sess. 231 (June 21, 1972).

plans is easily explained. The problems Congress sought to alleviate with ERISA were the problems of employees who had worked for long periods for one employer or in one industry with the expectation of receiving a pension upon retirement. ERISA was not aimed at the problems of workers who were contemplating initial investments in pension plans or who were trying to evaluate proposed changes in their pension plans. The debate over ERISA focussed on the costs of imposing minimum participation, vesting, and funding standards and of establishing a pension insurance system. The disclosure provisions were the one area of ERISA upon which there was general agreement, and they were not debated at length.[26]

Congress was well aware that ERISA is only a partial solution to the problems in the pension field, and there is no support in the legislative history for a conclusion that the Act was intended to preclude all other remedies and causes of action relating to pensions. As Congressman Carl Perkins, Chairman of the House Education and Labor Committee, described the House version of ERISA:

> "[It is] a modest bill. It does not purport to solve every problem. . . . We do hope that we have provided relief for the worst inequities. Basically our effort is designed to protect the long service em-

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[26] A more practical explanation why the securities acts were not discussed in ERISA's legislative history may be that until very late in the development of the statute, pension issues were entirely in the hands of the labor committees of the House and Senate, which vigorously sought to preserve their exclusive jurisdiction and apparently resisted the claims of jurisdiction by other committees. Along these lines, it has been suggested by one observer that one reason organized labor and the pension industry have so strongly objected to the lower court's characterization of pensions as securities is that "The SEC is an effective law enforcement agency where the unions and the companies don't have an 'in'". Kramer, *Fight On Over Protecting Pension Fund Investors*, The Washington Post, May 25, 1978, at D-12, 17, col. 3.

ployee participating in and contributing to a pension plan who would otherwise lose it . . . ."

Legislative History of ERISA at 3369 (G.P.O. 1976).

The relationship between the remedies provided in ERISA and the remedies concerning pensions provided in the securities act is quite analogous to the relationship between the Civil Rights Act of 1968 and 42 U.S.C. § 1982, the Civil Rights Act of 1866. That relationship was discussed by this Court in *Jones* v. *Alfred H. Meyer Co.*, 392 U.S. 409 (1968), which held for the first time that § 1982 provided a remedy for housing discrimination in the private sector. The court ruled that the passage of the 1968 Act, which also provided a remedy for housing discrimination, did not preempt the older law. "The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." 392 U.S. at 416 n.20. The Court took this position despite "the fact that [§ 1982] lay partially dormant for many years." It held that "ingenious analytical instruments" could not be used to limit the application of § 1982 "even though its application to . . . the present context is without established precedent." Id. at 437.

The analysis offered by the Court in *Jones* is also applicable here. The present case may constitute the first occasion for a court to apply the disclosure requirements of the securities acts to the pension area, but short of a stronger indication of Congressional intent to the contrary, the mere fact that this remedy has previously lain dormant and that similar, but not identical, disclosure is required under a more recent statute do not warrant a conclusion that application of the securities acts to pensions has been precluded by ERISA.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH NATIONAL LABOR POLICY AND DOES NOT THREATEN INTERFERENCE WITH COLLECTIVE BARGAINING

Petitioners Local 705 and Louis Peick, and ERIC as *amicus curiae*, argue that the decision below conflicts with principles of federal labor law and threatens to disrupt the collective bargaining process. They contend that application of the antifraud provisions of the securities laws to union negotiated pension plans will undermine the principle that the union is the exclusive bargaining agent for its members and will cause employers to intrude upon internal union proceedings. None of these arguments can withstand close scrutiny.

The decision below does not require unions to submit collective bargaining agreements establishing or modifying pension plans to their members for ratification. It merely states that when such votes are conducted, the unions sponsoring them cannot intentionally misrepresent the provisions of the plan or omit material facts relating to the plans when they describe the plans, or plan modifications, to their members. The assertion that this holding "abrogate[s] the principle of *collective* bargaining . . . [and gives] the individual employee . . . unfettered authority over a mandatory subject for bargaining"[27] is a gross distortion. It is still the union alone that has the authority to initiate collective bargaining and to negotiate with management. No one, least of all the court below, is suggesting that individual union members now have the right to negotiate their own terms for their pension coverage.[28]

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[27] Local 705 Brief at 51 (emphasis in original).

[28] ERIC's fear that the decision below will require employers to attend ratification meetings and deal individually with employees and thereby override the union as the exclusive bargaining representative is without foundation. ERIC Brief at 42-44. Contract rati-

A union's exclusive right to bargain, however, does not always include the authority to bind the union's members to the agreement negotiated. Where a union constitution requires a vote of the membership to ratify a new collective bargaining agreement,[29] no agreement reached between the union and management becomes binding until it is voted upon and approved by the membership.[30] A proposed contract may be rejected by the

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fication procedures are followed only by those unions which have made an intra-union, constitutional commitment to their members to offer them the contract proposals negotiated by the union for their approval. Hence, it is the union, not the employer, which must report to the employees and make representations concerning the proposed agreement and which must accordingly disclose material facts concerning the effects the agreement would have upon their pension plan. No employer would be liable for a union's misrepresentation or omission of a material fact in describing to its members the pension provisions or plan modifications unless that employer consciously aided and abetted in the violation, with the required showing of scienter. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). Thus, while the decision below neither requires nor authorizes employers to attend union ratification meetings or to approve union contract literature sent with ballots, labor law does not forbid employers, contrary to ERIC's suggestion (Brief at 42), from communicating directly with their employees, in a non-coercive manner, about contract negotiations and proposed settlements. *See e.g., NLRB* v. *Movie Star, Inc.*, 361 F.2d 346, 349 (5th Cir. 1966); *Stokely-Van Camp, Inc.*, 186 NLRB No. 64, 76 LRRM 1166 (1970).

[29] Article XVI, section 4(a) of the Constitution of petitioner International Brotherhood of Teamsters, for example, provides in part: "Upon completion of [contract] negotiations . . . such contract shall be submitted to the membership covered by said *contract proposal* for their approval or rejection. *If* a majority of the votes cast by Local Union members voting approve such contract, it shall become binding and effective upon all Local Unions involved and their members." (emphasis added).

[30] The cases cited in the ERIC Brief at 42 n.29 do not weaken this point. Those cases involved union attempts to abrogate newly negotiated agreements though they had the authority to execute contracts, and had done so, without membership approval. Hence, they do not stand for the proposition that those unions which do not possess such authority, and do not represent to employers that they

membership for any number of reasons, including dissatisfaction with its pension provisions. Rejection does not mean the union is no longer the exclusive bargaining agent for its members; it simply means the union must reopen negotiations and seek an agreement more in line with its members' wishes.[31] These policies and practices are in no way affected by the decision below, except to the extent the membership is better informed on the issues on which it is voting.[32]

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are vested with such authority, may be required to execute agreements regardless of membership approval. In any case, Article XVI, section 4(b) of the Teamster constitution requires that "all employers negotiating contracts with [the various union conferences, divisions, committees or subordinate bodies] shall be provided with a copy of this Article at the time negotiations are started so they will have notice of the approval necessary for a binding contract."

[31] Nor will application of the securities laws to pensions disrupt the bargaining process. As explained in Argument II, *supra*, disclosure would not be unduly burdensome and need not delay the negotiation and ratification of agreements. Furthermore, many union constitutions, including that of the petitioner International Brotherhood of Teamsters, have procedures whereby striking members can be ordered back to work after contract negotiations have concluded but prior to actual ratification. Article XVI, Section 4(b). Any delay in ratification resulting from evaluation of pension plan modifications and preparation of disclosure materials would therefore not disrupt either the bargaining process or induce union members to engage in longer strikes.

[32] Local 705's position on this point gives the Court a glimpse of its unhealthy attitude towards the principles of union democracy. The union is willing to create the appearance of union democracy by permitting ratification votes in which the members voting are kept in the dark about key issues, but as soon as the possibility of meaningful disclosure on some of those issues was made real by the court's decision below, the union sounded the false alarm that national labor policy is threatened.

According to columnist Mike LaVelle of the Chicago Tribune, "Even more threatening to corrupt labor unions than federal agents going through financial records are rank and file members pushing democratic changes from below." LaVelle, *Teamsters to Vote on a Gag Rule*, Chicago Tribune, May 18, 1978. In a recent effort to further reduce union democracy in Local 705, petitioner Louis Peick

ERIC's suggestion that other remedies are available under the labor laws that could sufficiently protect union members' interests in their pension plans without application of the antifraud provisions of the securities acts, ERIC Brief at 43 n.30, is also in error. As long as complete and accurate disclosure of the terms of a pension plan is not required at the time they have to make investment decisions, union members may not realize until it is too late that they have been misled or only partially informed concerning their pension rights. Voting out the officers of the union and replacing them with new ones at that point is small compensation for the loss of a pension.[33] Finally, it cannot be argued that union members are protected from abuse by the generalized "duty of fair representation." Under that doctrine, a union owes its members little more than an affirmative obligation to refrain from treating any of them in a discriminatory or hostile way, *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and the doctrine offers union members only the most limited protection. *See* Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251 (1977).

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recently proposed new bylaws which "would allow the local to loan union funds with no collateral or interest and without membership approval; . . . set union salaries and expenses [sic] accounts without membership approval; appoint all union stewards, committee members, health, welfare and pension fund trustees, and all but four business agents without membership approval." *Id.* The proposed bylaws would also give the union's executive board the power to arbitrarily ban from membership meetings or remove from membership meetings any member whose presence might cause a disruption. "As one teamster member said, 'If you file a grievance and you want to complain about it at your next union meeting the executive board can simply bar you from the meeting. That sounds like Russia to me.'" *Id.*

[33] Under the Teamster constitution, members are given the right to elect only their local union officers and cannot effectively remove those higher ranking officials who negotiate area or industry agreements.

Accordingly, the decision below would not upset the union's role as an exclusive bargaining agent and would provide employees with vital protections not afforded by the labor laws.

V. PETITIONERS' PREDICTIONS OF CATASTROPHIC LIABILITY ARE TOTALLY UNFOUNDED

Petitioners and their *amici* make exaggerated and alarming predictions that retroactive affirmance of the circuit court's opinion will doom the Local 705 Pension Fund, the entire pension industry and possibly strike a near fatal blow to the national economy. These claims are unfounded and are made to the Court with the hope of distracting it from the more concrete legal issues presented by this case. Were there any basis for these claims, *amici* PROD, Women's Lobby and the Institute, who represent the interests of active workers whose pension investments would allegedly be jeopardized, would be among the first to protest.

In the first place, the district court has only held that Mr. Daniel's complaint states a cause of action under the securities acts. The court has not yet had occasion to define what the measure of damages would be in the event Mr. Daniel should prevail. Therefore, it is premature at this early stage of the litigation to speculate about the extent of liability either to the Local 705 Pension Fund, or to the pension industry. Until the nature of the securities' disclosure obligations of unions and employers can be refined, such speculation will at best be of little value, and at worst, be misleading. Only thereafter can the measure of damages be defined.

Nonetheless, petitioners and their *amici* seize this opportunity to engage in doomsaying in the hopes of distorting this Court's judgment concerning the legal ruling below. If potential liability is to be the tail that wags the legal dog, it might be wise for this Court to defer ruling until the scanty record now before it can be

developed more fully and the alarmist predictions made by petitioners and their *amici* can be tested by the adversarial process.

The dire consequences forecast by petitioners and their *amici* are founded on the results of the Hansen and Grubbs studies.[34] The enormous liabilities projected by those studies arise only after acceptance of certain fundamental premises such as an exceedingly lenient statute of limitations, a complete failure by the courts to balance the equities when awarding relief, and an assumption that all past and present participants would be able to demonstrate injuries arising from their reliance upon misrepresentations or omissions of material facts. The Grubbs study totally ignored the scienter requirement of *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), and, in effect, estimated the liability that would result if the vesting and break-in-service provision of *ERISA* were made retroactive, *not* the liability if the antifraud provision of the *securities laws* were applied to pensions retroactively. The Grubbs study—prepared, incidently, by an actuary, not a lawyer—implicitly recognized this fact when it stated:

> "Most terminated non-vested participants have not been led to expect that they were entitled to a pension. If liability exists only with respect to terminated participants who received information leading them to expect a pension, it does not apply to most terminated participants. In such a case, the potential liability would be a *very small fraction* of the amounts shown in Section III."

Grubbs, *supra*, at II-3 (emphasis added).

[34] D. Grubbs, *Report to the Secretary of Labor: Potential Effects of Daniel*, March 20, 1978 (prepared under Contract J-9-P-7-0064) (hereinafter cited as Grubbs); untitled study by A. S. Hansen, Inc. of potential effects of *Daniel* on Local 705 (Local 705 Brief at A1-A31).

Petitioners and their *amici* rely on the Grubbs and Hansen studies to urge this Court to follow *Los Angeles Department of Water & Power* v. *Manhart*, —— U.S. ——, 98 S.Ct. 1370 (1978), and make any ruling which might affirm the Seventh Circuit's decision purely prospective in effect. What they fail to point out, however, is that unlike the defendants in *Manhart* who were "conscientious and intelligent administrators of pension funds," 98 S.Ct. at 1381, the petitioners in this case may not have clean hands. If Mr. Daniel wins his case on the merits, he will have shown that the petitioners committed an *intentional* fraud.

Rather than making its ruling completely retroactive or completely prospective, the Court could reasonably strike a middle ground by making its ruling prospective for active and future employees, such as those represented by *amici* PROD, Women's Lobby and the Institute, and at the same time granting relief to Mr. Daniel and members of his class, those Local 705 members who can prove that they were defrauded.

Even if liability imposed upon petitioners were to be substantial—which is unlikely—the result would not be the collapse of the Local 705 pension fund. One of the advantages of defined benefit plans is that ERISA funding standards permit unfunded plan liabilities to be carried forward. Thus ERISA section 302 provides that unfunded past service liabilities may be amortized over a 40 year period. In addition, under section 303, the Secretary of Labor has the authority to waive minimum funding standards where at least 10 percent of the employers contributing to a plan would suffer substantial hardship. Section 304 permits the Secretary to extend the amortization schedules if there is a threat to the continued existence of a pension plan. Thus, the effects of liability on the plan could be spread over 40 years, with only limited negative impact at any one time.

At worst, the overall result for current and future members of Local 705 might be that increases in benefits would be delayed for a period of time. This would, however, be more equitable than to require retirees such as Mr. Daniel who worked long years in reasonable reliance upon material misrepresentations of fact to forfeit their hard-earned pensions.

There are also strong policy reasons for making this decision both prospective and retroactive against petitioners. As this Court has frequently acknowledged in its decisions prospectively overruling long-established judicial precedent, "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual." *Simpson* v. *Union Oil Co. of Calif.*, 396 U.S. 13, 14 (1969). *See also Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). While that rule has not been followed without exception, *see, e.g., England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), it is based in part on the importance of providing litigants with an incentive for seeking necessary changes in long-established principles of law. *See Stovall* v. *Denno*, *supra*, 388 U.S. at 301. As one respected commentator has observed:

> "The effective operation of the regular judicial process depends upon parties raising issues for decision and presenting (ordinarily through adversary argument) the consideration relevant to the wise resolution of those issues. The performance of these functions by litigants depends, not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment. When a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration."

Mishkin, *The Supreme Court 1964 Term—Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965).

CONCLUSION

For the foregoing reasons, PROD, Women's Lobby Inc. and the Institute urge this Court to affirm the judgment of the court below.

Respectfully submitted,

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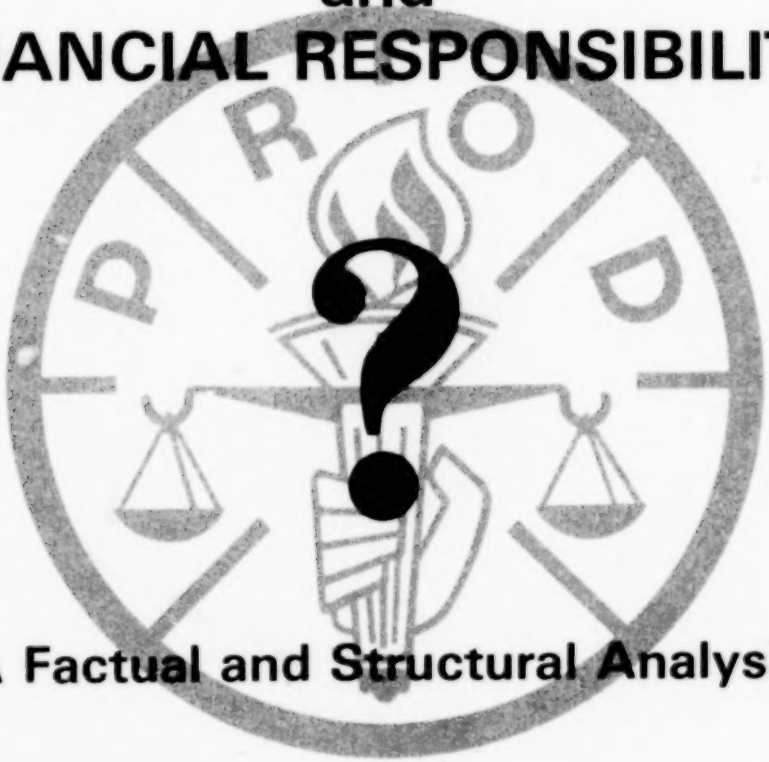
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A PROD Report

TEAMSTER DEMOCRACY and FINANCIAL RESPONSIBILITY



A Factual and Structural Analysis

May 1976

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May 1976

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FOREWORD

The International Brotherhood of Teamsters is this country's largest, wealthiest, most powerful and most controversial labor union. It is a "conglomerate" union representing 2.3 million workers in industries that range from trucking and food processing to bubble gum manufacturing; it also represents many employees in the public sector, including teachers and policemen. The Union's diversification and enormous growth in recent years is in part a result of the Union's "tough" reputation and willingness to raid other unions. It is also due in part to the Union's success in obtaining favorable wage settlements for its members employed in the trucking industry. These settlements have been possible largely because of the fact that the industry has had no difficulty obtaining increased rates from the Interstate Commerce Commission. The Union's growth has also occurred despite the Union's prominence in headlines reporting charges of corruption, financial mismanagement, connections with organized crime, and lack of democratic procedures.

One frequently hears echoes in the halls of government and in journalist circles that the Teamster rank and file is complacent. They are reported to tolerate mismanagement and corruption in their Union as long as they receive a large and regular salary. While this is undoubtedly true for many Teamsters, it is by no means a fair characterization of the Teamster majority. The recent disappearance of Jimmy Hoffa has rekindled interest in union reform among the rank and file who have pressured the PROD staff to provide them with information and assistance in making their Union's leaders accountable to the membership.

This report will document a disturbing pattern of financial abuse by the Union's leaders. It analyzes the legal, constitutional and political barriers that separate the leadership of the International Union from the rank and file. With a few exceptions, the financial information contained in this Report has been drawn from the Union's own LM-2 and D-2 annual financial reports filed with the U.S. Department of Labor through calendar year 1974. However, because the government requires only very sketchy information on these forms from unions, and because unions can easily distort or conceal facts when filing their annual reports, the information contained in this Report is no more complete or accurate than the underlying reports filed by the Teamsters Union. Therefore, it is probably safe to say that we have only begun to scratch the surface.

The principal obstacle encountered when compiling the information in this Report was the fact that the Teamsters Union is splintered into

many hundreds of organizational entities — there are 800 Locals alone — each of which must file a separate set of annual financial reports with the government. Because officers in the Teamsters Union frequently hold numerous different positions in different Union organizations in what is a rather complex organizational pyramid, one cannot begin to piece together the Teamster financial, jigsaw puzzle until he has located, digested and assembled the splintered information in these many financial statements. To say the least, the task was enormously time consuming.

No working Teamster could ever have undertaken such a task himself. Not only would he not have had sufficient time to devote, he would not have been able to locate a sufficient number of the Union's financial reports. The reason is simple. While each Union entity must make these reports available for inspection by its membership at its own particular headquarters, there is only one place in the country where all of the hundreds of Teamster reports reside under one roof — the U.S. Department of Labor in Washington, D.C. As a result, the Congressional objective when enacting the Landrum-Griffin Act and requiring unions to provide their members with full financial disclosure has been circumvented by the Teamsters Union. Meaningful information about their Union is simply not readily available to the Teamster rank and file.

If the sheer enormity of the research effort required to develop an elementary understanding of the Teamsters Union were not a sufficient deterrent to the Union's members, fear would be. The Union's "tough" reputation is not a mirage; it has been earned. Many members have seen some of their "elected" officials and business agents in action; many have been on the receiving end of some sort of "behind-the-woodshed" discipline for stepping out of line. While the disappearance of Hoffa has provided them with increased incentive, it has also driven home the fact reported recently by veteran labor columnist John Herling: "If it could happen to Jimmy Hoffa, it could happen to the least of them."*

Apart from the fear of bodily harm, most members have a more immediate fear for the loss of their livelihood. Many Teamster officials enjoy cozy relationships with executives of the companies for which their members work. These same officials also control both the members' access to, and often the outcome of, the grievance machinery which is the rank and file's only tool for overriding a pretextual or discriminatory discharge which may have been requested by their legally certified representatives. Moreover, once they find themselves on the streets, they often find they cannot find any other employment with employers who have Teamsters' contracts. Stop and

*Syndicated column appearing in the *Washington Post*, September 21, 1975, p. C-7.

reflect. Being a member of a democratic union headed by honest, respectable leaders is a luxury; holding a job is a necessity.

Under these circumstances, it is wrong to suggest that the Teamster rank and file is complacent and willing to tolerate abuse and corruption. To a Teamster, the Union looks immobile and its leaders seem to be totally invulnerable. As t'·'s Report will show, the members' view is not unfounded. In the Teamsters Union, power does not reside in the rank and file; it has been seized and held captive by the Union's leadership who frequently manipulate it for their own benefit. The Union's constitution has been carefully designed to insulate the Union's top leaders from the reach of all with the possible exception of the law enforcement agencies.

In Part I, we analyze the political structure of the International Brotherhood of Teamsters (IBT) as a product of the Union's constitution. We identify the key provisions in that instrument which vest near dictatorial authority over the Union and its membership with the IBT leadership. In Part II, we use numerous illustrations of financial abuse to demonstrate how certain Teamster officials manage to live in the lap of luxury. In Part III, we offer a number of suggested reforms and a very brief explanation how they may be pursued by the rank and file and those Teamster officials whose primary concern is to benefit the membership and strengthen, by reforming, the Union. In Part IV, we present a series of short profiles on more than two hundred of the Union's principal officers which include their salaries, allowances and expenses from Teamster sources. Throughout the Report, we offer constructive suggestions for both strengthening and enforcing applicable laws.

The final chapter to this Report will ultimately have to be written by the Teamster rank and file, responsible Union officials, their lawyers, the Congress and government law enforcement agencies. PROD stands ready to help.

Washington, D.C.
May, 1976

A.L.F., J.C.S.

PART I

THE MYTH
OF TEAMSTER DEMOCRACY

CHAPTER 1

The Union's Organizational Nuts and Bolts

To understand allegations of financial mismanagement, corruption and lack of accountability within the International Brotherhood of Teamsters, one must first understand the structure of the nation's largest labor union. A cursory glance at the Union might lead one to believe that the Union's rank and file do actually hold the reins of power and should therefore bear responsibility for their officials' actions. However, examination of the Union's Constitution reveals that the rank and file really has very little democratic authority to control the Union's high officials.

Although considerable autonomy is vested in the Union's Locals, Local officials can easily be made to toe the International Union's line. Yet it is these same officials who in theory direct and control the International Union, its officers and policies. To the extent that they operate independently of the International, it is because the Union's General President permits them to do so. The General President has constitutional powers that allow him whatever degree of power or control over Locals he chooses to wield. The officials who actually run the Union and represent the many Union political entities above the Local level are accountable only to the International Union bosses who in turn are not accountable to the rank and file.

At the base of the organizational pyramid are some 800 *Locals* scattered throughout the country. They vary in size from several hundred, to upwards of thirty thousand members. Some are trade locals, representing only members working in a single occupation or industry. Others are conglomerates where no trade faction has majority voting status.[1] Traditionally, the rank and file have focused their primary attention upon their Locals. After all it is the Local official who seems to determine whether, or to what degree to enforce their collective bargaining agreements. Their job security depends heavily upon their officials' willingness to go to bat for them, individually or collectively. They are not particularly aware how these officials fit into

[1]This membership characteristic often functions to keep Local officials in office who might otherwise be ousted by a certain craft or trade group which the Local is not faithfully representing. Thus, the power to determine the Local's jurisdiction can be a key to guaranteeing an official's longevity in office. This phenomenon has been repeatedly exposed in redistricting and voter rights suits in recent years. Art. VII, Sec. 3 of the IBT Constitution vests the right to approve Local Charter applications with the General Executive Board of the International Union "upon such terms and under such conditions as [it] shall consider appropriate." Art. IX, Sec. 11 confers absolute discretion upon the General Executive Board to "merge Local Unions and other subordinate bodies under such terms and conditions and subject to such qualifications as the General Executive Board may determine . . . ."

the larger, union picture. They only know that they appear to make and implement the basic decisions that affect their daily working lives. They look to them, much as the private looks to his sargent. These Local officials in turn generally look up to higher Union officials as lieutenants, captains, colonels, etc.

In addition, while the rank and file cannot vote for any other official in their entire Union, they can vote for, or against, their Local union officials in a popular referendum every three years.[2] At the very least, they get to elect the Executive Board of their Local which is composed of a President, Secretary-Treasurer, Vice-President, Recording Secretary, and three Trustees.[3]

Immediately above the Locals in the ascending hierarchy in the Union come the *Joint Councils.*[4] There are approximately 50 Joint Councils each of which is assigned a designated geographic territory by the General Executive Board of the International Union.[5] Every Local is required to affiliate with the Joint Council whose jurisdiction embraces it and is required to contribute whatever per capita monthly membership tax that may be set in the bylaws of the Joint Council.[6] Each Local is entitled to send all seven of the elected officials on its Executive Board as delegates to the Joint Council. These delegates then elect a similar 7-person Joint Council Executive Board from among their numbers to conduct its business.[7] The primary function of these Boards is to adjudicate election disputes, disciplinary proceedings against members and Local officials, and jurisdictional disputes involving the Locals within their jurisdiction — subject to appeal to the IBT Executive Board. The Joint Council must also be consulted by Locals every time the Local proposes to execute a locally

[2]29 U.S.C. 481(b) provides: "Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing." As we shall see later in this report, this democratic right is frequently more transparent than real in many Teamster Locals.

[3]Depending upon Local bylaws, business agents and stewards may also be elected.

[4]See generally Art. XV, IBT Constitution.

[5]The General Executive Board of the IBT is composed of the 15 Vice-Presidents, plus the General President and Secretary-Treasurer. Art. XXV, IBT Constitution. This Board has sweeping discretion to expand or contract the jurisdiction of Joint Councils for any reason whatsoever. Art. XV, Sec. 1, IBT Constitution.

[6]The General President of the IBT is vested with authority to approve or disapprove of the Joint Councils' bylaws subject to review only by the General Executive Board of the IBT. Art. XV, Sec. 5, IBT Constitution.

[7]Since each Local sends the exact same number of delegates regardless of the size of the Local, it would appear that this voting procedure is violative of the "one man/one vote" mandate of the Landrum-Griffin Act. 29 U.S.C. 411(a)(1) provides in relevant part: "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections . . . ." Nonetheless, each Local must contribute to the support of its joint council on a strict per capita basis producing a sort of "taxation without equal representation" situation.

negotiated contract or engage in strike activity — indeed, prior to becoming involved in any "lawsuit or serious difficulty" the Local must first consult the Joint Council.[8] The Joint Council then sends its recommendation to the IBT General President for final disposition.

The next formal organizational level in the Union's structure is the *Conference.*[9] While the Joint Councils technically are autonomous political bodies which derive their authority from, and theoretically report to, their member Locals, the Conferences are very clearly subordinate bodies within the International Union structure. The IBT Constitution provides explicitly that Conferences "shall be at all times subject to the unqualified supervision, direction and control of the General President and they shall function under the rules prescribed by the Bylaws approved by the General President." (Art. XVI, Sec. 1)

There currently are five Area Conferences whose jurisdiction embrace every state in the union as well as Canada.[10] There are also eight separate State Conferences which necessarily fall within the geographic territory of the Area Conferences.[11] And finally, there are either ten or eleven Trade Conferences (sometimes known also as Trade Divisions) which cut across geographic boundaries and cover specified trades.[12] The IBT Constitution does not specify what functions the Conferences shall have but rather leaves this matter up to the discretion of each Conference to spell out in its bylaws. Their bylaws must, however, be approved by the General President.

Every Local and Joint Council is required to affiliate with its respective State and Area Conference and to contribute directly to it whatever per capita assessment that may be prescribed.[13] The business of the Conferences is conducted by an elected[14] Policy Committee;

[8]Art. XII, Sec. 1(c), IBT Constitution.

[9]See generally, Art. XVI, IBT Constitution.

[10]The formation of the Canadian Conference was announced in October 1975.

[11]Georgia-Florida, Illinois, Indiana, Iowa, Kentucky-West Virginia, Missouri-Kansas, Ohio, and Texas.

[12]Airline; Automotive, Petroleum and Allied Trades; Bakery; Brewery and Soft Drinks; Building Materials and Construction; Communications; Freight (interstate trucking); Food Processing; Laundry; Warehouse; Household Goods, Moving and Storage.

[13]The International supplements these payments by contributing an additional per capita sum (10¢/month) to those Conferences which represent geographic areas. Art. X, Sec. 3(e), IBT Constitution. It is not known how the various Trade Conferences or Divisions either are run or financed, except by the International.

[14]"The IBT Constitution is silent on the subject of Conference conventions and delegate qualifications; one must consult instead the bylaws of each Conference. Most Conferences covering geographic territories hold periodic Conventions (e.g. Eastern Conference: 4 years) where each Local and Joint Council may send 2 delegates who must in turn be elected officials of their respective bodies. Policy Committees are selected in turn from among these delegates. These election procedures would appear to violate Title I of the Landrum-Griffin Act which essentially requires "one man/one vote". See 29 U.S.C. 411 (a)(1).

however, the General President may also appoint one of the International Vice-Presidents as "International Director" of each Conference "to assist him in supervising and directing the activities of the . . . Conferences."[15]

Finally, at the top of the Union's structural pyramid comes the IBT General President, the General Secretary-Treasurer, and the 15 Vice-Presidents — all of whom collectively comprise the *General Executive Board* — plus three trustees.[16] All of these positions are filled at the International Convention which takes place every fifth year.[17] Any member of the Union who has been in continuous good standing for a period of 2 years prior to the convention is technically eligible to hold one of these offices,[18] which are all filled by majority vote of the convention delegates. Although no two Vice-Presidents are supposed to come from the same state or Canadian province, the Vice-Presidents are all elected "at large" and they do not represent any particular geographic area or trade division.[19] As we have seen, however, they may subsequently be appointed by the General President to serve as the International Director of a Conference or Trade Division.

Every Local, Joint Council, State and Area Conference is entitled to send delegates to the *Convention.* In addition, every salaried International officer, organizer or auditor who is not otherwise appointed as a delegate by a subordinate body may also attend as a delegate.[20] The Joint Councils and Conferences are permitted one delegate apiece. The Locals are permitted to send a number of delegates depending upon the number of members they represent.[21] The Convention of assembled delegates is the "supreme governing body" of the Union. In addition to electing the IBT officials who will carry on the Union's business between conventions, the delegates are empowered to modify or amend the Constitution.

[15]Art. XVI, Sec. 3, IBT Constitution.

[16]See Arts. IV and XXV, IBT Constitution.

[17]29 U.S.C. 481(a) provides: "Every national or international labor organization . . . shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot." The IBT does not hold conventions more frequently.

[18]Art. II, Sec. 4, IBT Constitution.

[19]Art. IV, Secs. 1-2, IBT Constitution.

[20]These delegates may vote on all matters before the Convention except the election of officers. Art. III, Sec. 5(c), IBT Constitution.

[21]The Local delegate formula is as follows: 1 delegate for the first 1,000 members and one additional delegate for each additional 750 members or major fraction thereof. Art. III, Sec. 2, IBT Constitution.

The process by which delegates are "elected" to attend this Convention is worthy of note.[22] A number of Convention delegates become eligible solely by virtue of their position as salaried officials of the International Union. A number of these officials are appointed by the Union's General President or its Secretary-Treasurer. Those who represent the Joint Councils and Conferences are appointed by their respective governing bodies.[23] Delegates who represent the Locals are selected from among the previously elected members of the Local Executive Board, by the members of that Board, not by the rank and file.[24] To the extent that the membership of a Local may be eligible to send more than all 7 members of their Executive Board as delegates to the Convention, the Board designates which of the elected business agents, should there be any, they wish to have join them as delegates. Only in the event that there are an insufficient number of previously elected Local officers, must the Local hold a special election wherein the rank and file can designate the appropriate additional number of delegates they wish to represent them at the Convention.

Thus, while the rank and file do not elect their International, Conference or Joint Council officials, they do elect their Local officials and these individuals act as their delegates in electing the higher Union officials. It is this simple picture that the Union uses to convey the impression of a democracy both to its members and to the public. However, because of the sweeping powers of the General President to approve and control actions throughout the Union and to dole out financial and other favors, this picture is highly misleading.

In the next chapter of this report we will take a closer look at each of the Union's political building blocks, how their officers are selected, and what kind of authority they actually wield. This examination will begin by focusing upon the International Union and the General President.

[22]The Landrum-Griffin Act requires that where election of International officials is not by secret ballot in a popular referendum among the rank and file, it must be accomplished at a convention of delegates chosen by secret ballot. See footnote No. 17.**supra.** The law does not specify when, in relation to the convention, delegates should be elected or whether they should be elected solely, or even primarily, to serve as delegates.

[23]Art. III, 5(e), IBT Constitution. Since all delegates to, and officials of, the Joint Councils must also be duly elected Local Union officials, the individual designated as a delegate by the Joint Council would presumably be an "elected" official.

[24]Art. III, Sec. 5(a), IBT Constitution.

CHAPTER 2

The Awesome Powers of the General President

Most decision making in the day to day operation of the International Brotherhood of Teamsters is entrusted to the General President.[25] Many of his decisions are subject to approval by the Union's 17-member General Executive Board over which he presides. In addition, the General Executive Board has authority to make certain decisions on its own. Certain actions taken by the International Union, either by the General President or by the General Executive Board, can theoretically be appealed to the International Convention.

In reality, however, the IBT Constitution vests the Union's General President with such a bewildering array of powers as to permit him in fact to dominate and control the General Executive Board and the Convention. Thus, neither can effectively exercise its theoretical supervisory authorities. Both bodies can be manipulated or outrightly coerced by the General President and they accordingly rubber stamp his actions on a regular basis. By the same token, however, the General President may also exchange the "favor" by rubber-stamping certain actions his Vice-Presidents may have taken in their capacities as officials in Locals, Joint Councils or other union organizations where he is authorized to review and approve their actions. His doing so is more an act of comity than of political necessity. The picture only begins to come into focus when one reviews a shopping list of the powers conferred upon the General President by the IBT Constitution.[26]

First and probably foremost of the General President's tools is the power of appointment. He is empowered to fill vacancies as they occur among the various IBT elective positions.[27] He can appoint and remove at whim any person as an International Organizer, a position which carries with it a $30,000 salary plus considerable monetary allowances, and a virtually unlimited expense account.[28] There is no limit to the number of persons upon whom he can bestow this official status and its remunerative benefits. Since the Union has no prohibition against

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[25]The President receives a straight salary of $125,000 annually in addition to many other financial, and "in kind" benefits discussed in detail in Part II of this Report.

[26]The present Constitution is substantially a product of the 1961 IBT Convention presided over by James R. Hoffa. Mr. Hoffa, together with his expert legal counsel, "rewrote" the Constitution at that time to achieve his objectives in spite of the democratic restraints imposed by the newly enacted Landrum-Griffin Act.

[27]Art. IV, Sec. 4(a), IBT Constitution.

[28]Art. V, Sec. 1(d); Art. VI, Sec. 6, IBT Constitution.

holding multiple offices, the General President can dole out International Organizer jobs to anyone from a Vice-President on down to a Local official. The post can also be given to individuals who have never been elected by anyone and who would owe their entire loyalty to their boss; these people are, of course, also entitled to attend the International Convention as delegates and to vote on all matters (including constitutional amendments) except the election of officials.

The General President also names the International Directors to each of the Area Conferences; it is their job to effectuate the President's "unqualified supervision, direction and control" of the Conferences. These Directors can then in turn appoint Conference Organizers who are in effect also beholden to the General President. Obviously, the subject of Presidential appointments is one which cannot be exhausted in a brief outline and we will return to develop it more fully after completing our shopping list of Presidential powers.

Another powerful tool in the hands of the General President is authority to throw any subordinate union body into trusteeship or to revoke its charter.[29] He may impose trusteeship whenever he "receives information which leads him to believe" any one of a long string of vague criteria may have been met. Among these is his belief, however justified, that any of the officers of that subordinate body are "dishonest or incompetent," that it is not being run "for the benefit of its membership," or that it is being conducted in a manner so as to "jeopardize the interests of the International Union".[30] The General President is in turn entrusted with primary authority to interpret the Constitution[31] and to determine what are the interests of the International Union which might be jeopardized.

The General President also possesses a large number of devices he can use to manipulate who gets elected to those Union positions which are elective and to define what their powers shall be once they are elected. Any member attempting to run for office who is ruled to be ineligible by the incumbent officials in his Local must appeal directly to the General President for a ruling which is then subject to approval by the General Executive Board at its next regularly scheduled meeting. Such meetings may not occur until after the election. The same procedure applies to all other disputes concerning pre-election conduct.[32] The General President can also detail organizers to the

[29]Art. VI, Sec. 2(b), IBT Constitution.

[30]Art. VI, Sec. 5(a), IBT Constitution. In this connection the General President is also authorized, to cause any subordinate body to be audited at any time and by any person he should designate. Art. X, Sec. 10, IBT Constitution. The General Secretary-Treasurer may also order such audits by any of the International's official auditors. In either case, the audit may turn up grounds for trusteeship; it may also be used, however, merely to harass honest elected officials.

[31]Art. IV, Sec. 2(a), IBT Constitution.

[32]Art. XXII, Sec. 5(a), IBT Constitution.

scene of elections ostensibly to conduct Union business, much in the same fashion President Nixon utilized his Cabinet members so extensively during his 1972 campaign. Once the election has been conducted, complaints concerning its conduct must be filed within the exceedingly short period of 48 hours. Such protests are submitted first to the Joint Council; its decision is then appealed to the General Executive Board over which the General President presides.[33]

Once a Teamster official gets elected, the General President is in a position to apply enormous pressures upon him and his subordinate union body, as well as to confer substantial benefits. In the first place, the General Executive Board can, at the President's behest, order the merger of Locals and other subordinate bodies (principally Joint Councils) for whatever reasons and subject to whatever conditions it chooses. The obvious effect is to terminate the existence of one of the two merged bodies and eliminate the need for two sets of officials. The affected members may or may not be allowed to express their views in a referendum depending upon whether the Executive Board should in its discretion decide to permit one. In the event it should call for a referendum, the results are not binding.[34]

The Executive Board, under the President's guidance, may also expand or contract the territorial jurisdiction of any Joint Council.[35] In so doing, it can draw the lines so as to relocate a particular official dominating one Joint Council into the jurisdiction of another Joint Council that may be in the firm control of a favored leader. The Board can also authorize the issuance of new Local union charters to any group of members of an existing Local and even require the parent Local to pay all the costs of starting up the new Local.[36] Since each Local sends the same number of delegates to the Joint Council, this could dilute the influence of a particular Council official and permit his ouster. In addition, the Executive Board is empowered to resolve all jurisdictional disputes between Local unions, including disputes between newly chartered Locals and their parent Locals, and the Board can order members transferred from one Local to another.[37] This device can be used to reduce the membership base — and wealth — of a Local whose elected officials are in disfavor.

On the other hand, the General President has exclusive discretion to confer permission upon any particularly favored Local official to hold office in more than one Local. In addition to many of the obvious

[33]Art. XXII, Sec. 5(b), IBT Constitution.

[34]Art. IX, Sec. 11, IBT Constitution.

[35]Art. XV, Sec. 1, IBT Constitution.

[36]Art. XVII, IBT Constitution.

[37]Art. XII, Sec. 12, IBT Constitution.

political and economic benefits which may flow therefrom,[38] that official is permitted to cast multiple votes on behalf of each Local he represents at the Joint Council.[39]

The General President has sole authority to approve the bylaws of every subordinate body; in the event he should disapprove of a subordinate's bylaws, his decision is appealable to the General Executive Board.[40] He can step into any Local at any time and require a referendum vote on any subject,[41] including the submission of a particular contract under negotiation to the membership of that Local for ratification or strike vote.[42] Indeed, Teamster Locals are required to consult with, and obtain permission from, their Joint Council for virtually any significant action. The Joint Council must then notify the General President of the proposed action and he has the authority to

[38]For example, Fitzsimmons conferred permission to hold office in two New York Locals (813 and 1034) upon Bernard Adelstein and his two sons Martin and Alan which permitted them to net collectively in 1974 a total of $230,000. John Felice and his son, John Jr., together grossed $120,000 in 1974 by virtue of their positions in two Cleveland Locals (73 and 293). Mark Davidoff is an officer in both of New York City's air freight workers' Locals (295 at JFK International and 851 at Newark International).

[39]Art. XII, Sec. 3, IBT Constitution.

[40]Art. VI, Sec. 4(a); Art. XV, Sec. 5 (Joint Council bylaws); Art. XVI, Sec. 2, confers exclusive authority upon the General President to approve, disapprove and amend the bylaws of the Conferences at any time. There is no provision for an appeal by the rank and file of the President's approval of Local or Joint Council bylaws.

[41]Art. VI, Sec. 1(h), IBT Constitution.

[42]Art. XII, Sec. 1(b), IBT Constitution. In fact, the Union's Constitutional procedure for membership ratification of collective bargaining agreements negotiated on their behalf by Union officials is rather bizarre. (Major contracts are negotiated by officials personally designated by the General President.) Art. XVI, Sec. 4, provides that "Upon completion of negotiations . . . such contract shall be submitted to the membership covered by said contract proposal for their approval or rejection." It then proceeds to state that a majority vote is required for acceptance but that a 2/3rds vote is necessary for "rejection of the final offer and strike authorization . . ." The question is, who determines when the employer's offer is "final"? What should happen if 65% of the covered employees should vote against the contract? The Union's response has been to unilaterally announce when it has determined the offer to be final and then to execute contracts rejected by an overwhelming majority, albeit less than a two-thirds majority. The General President may, of course, be the one to precipitate this course of overriding rank and file sentiment.

The best example of the General President's use of this provision to deny the rank and file any real voice in the ratification of their collective bargaining agreement is the procedure utilized to secure ratification of the National Master Freight (Trucking) Agreement covering 450,000 members, the largest single labor contract in the free world. The Master contract is in fact only the first half of the full agreement and it actually covers only very general subjects. The meat of the agreement pertaining to wages, hours, and terms and conditions of employment is contained in the 32 totally different Supplements covering the many different employee job classifications for different geographic regions. Although each of the 450,000 employees is covered by only one Supplement, the Union sends every one of them a single ballot asking whether they approve of *the* Master Contract and *the* Supplements. The result is that city drivers in New England who may be pleased with their Supplement are voting in favor of the Supplement covering road drivers in Texas who may be most displeased with their Supplement. The effect is to deny huge sectors of the Union's rank and file their Constitutional right to vote for or against the contract actually covering them, and them alone.

modify it in any way he should see fit.[43] In addition, should any Local become involved in a strike, it is also the General President who has the primary authority to determine whether to allocate, or withhold, the strike benefits.[44]

As overall director of both the International and the area Conferences, the General President also has considerable authority over how much assistance (information, manpower or financial) the wealthy IBT and/or its Conferences may confer upon a Local or Joint Council, for whatever reasons.[45] Moreover, whenever any Local might seek to secure a loan directly from a sister Local instead, it is required to secure the approval of the General President.[46]

Another important tool of the General President is the authority to spend unlimited amounts from the Union's general treasury "in his sole discretion for lobbying and other political purposes."[47] The General President also supervises publication of the Union's official monthly journal, the *International Teamster*, which is sent to every member and to every other person or organization the General President might designate.[48]

While this list of Presidential powers is by no means complete, it is sufficient to begin to convey a more accurate impression concerning who is boss of the Teamsters Union —or at least who is capable of dominating the nation's largest, wealthiest and most powerful union if

[43]Art. XII, Sec. 1(c), IBT Constitution.

[44]Art. XII, Secs. 2-5, 7, IBT Constitution. The General President's authority is exclusive with regard to strikes involving 200 employees or less. It is the General Executive Board which has primary decision-making authority regarding strike benefits where more employees are involved.

[45]For Example, in 1974 the Central States Conference gave a $54,000 "organizing grant" to Kansas City Joint Council 56 which is controlled by IBT Vice-President Roy Williams. Interestingly, Roy Williams' salary from the Joint Council shot up to $43,725 that year over the $17,325 he had received the preceding year.

[46]Art. XIII, Sec. 2, IBT Constitution.

[47]Art. VI, Sec. 9, IBT Constitution. It was pursuant to this authority that Fitzsimmons gave Rabbi Korff a check for $25,000 to use in attempting to fight impeachment of then-President Nixon. PROD filed charges on behalf of several members against both Fitzsimmons and Miller with the General Executive Board which upheld their action. This decision may be appealed to the 1976 Convention. The reason charges were filed against both individuals stems from the fact that while the Secretary-Treasurer signs all IBT checks for ordinary, ministerial payments, the General President must co-sign checks for any other sort of payment. Art. VII, Sec. 2(b), IBT Constitution. Thus, the Secretary-Treasurer does not have unlimited access to the General Treasury. Should the Secretary-Treasurer decline, however, to co-sign a check for an extraordinary expenditure sought by the President, the dispute is submitted to the full Executive Board which, we shall see presently, is dominated by the President.

[48]Art. VI, Sec. 7, IBT Constitution. It is interesting to note that PROD sought to subscribe to the *International Teamster* and tendered a check for the annual subscription rate published in the masthead. By letter dated April 4, 1974, over the signature of Murray W. Miller, General Secretary-Treasurer, the check was returned with the explanation: "We cannot accept this subscription to the 'International Teamster' magazine."

he chooses. The General President is surely endowed with formidable influence to "run out of town" any official who does not whistle his tune and to reward handsomely those who do. It is important to remember that these are the very same officials who "elect" the General President at the IBT Convention every five years. It is this phenomenon which is known as "Teamster Democracy."

CHAPTER 3

Further Analysis of the General President's Appointive Powers: The Ability to Dominate the Executive Board

A simple statement of the General President's constitutional authorities is inadequate, however, to show his real power to manipulate the members of the General Executive Board, officials of subordinate Union organizations, Local officials and ultimately the rank and file. Let us proceed, therefore, to analyze how the General President could wield his powers, if he should choose, and examine how the current president, Frank E. Fitzsimmons, has in fact done so. We will certainly not attempt a complete review of President Fitzsimmons' presidency. To do so would be impossible. Our examination of President Fitzsimmons' performance is intended only to illustrate how his constitutional authority can and has been used in the recent past.

Many argue that the International Brotherhood of Teamsters is the most decentralized of our major unions. In some respects, the International leadership does allow considerable regional and Local autonomy as it must due to the fact the Union represents employees from so many different trades and industries. President Fitzsimmons only infrequently exercises his many powers thereby permitting many decisions made by lesser officials to become final. Whether this practice is the product of his specific intentions or the result of default, owing to personal inadequacies, is anyone's guess. In reality, it probably results from a combination of both. However, the essential point remains — General President Fitzsimmons does possess vast power with which he could call the vast Teamsters Union to attention, commanding its members and officials to march in step to his cadence. They know it, and they respect it, regardless of whether they respect the man.

Since a number of the General President's actions are subject to approval by the General Executive Board, we begin our more detailed analysis by focusing upon President Fitzsimmons' relationship with the Board. First, since the President is authorized to fill vacancies which occur on the Board between conventions due to death, resignation or retirement, the individuals selected by the President may properly be said to owe their positions to Fitzsimmons. Of the fifteen Vice-Presidents on the Board today, eleven were initially appointed by

Fitzsimmons.[49] Fitzsimmons also handpicked both of the two most recent Secretary-Treasurers who also sit on the Executive Board.[50] Thus, of the 16 Board members (not including Fitzsimmons), 12 owe their positions to Fitzsimmons.

It may undoubtedly be argued that since all Board members must eventually be elected at a Convention every fifth year, upon election their loyalties will shift from the man who appointed them to the delegates who elected them. This does not really happen for several reasons. In the first place, Vice-Presidents and the Secretary-Treasurer do not have broad power bases. Since they are all elected "at large" by the Convention, they do not have their own constituents whose specific interests they represent at the Executive Board level, whose support they must earn, but whose support they may also count upon. When they are elected, it is on the Fitzsimmons' slate at a Convention which, we shall see presently, Fitzsimmons has the authority to dominate. When they do "run" for office, they have the incumbents' advantage which in the Teamsters Union is particularly great. Since the Union is a large, sprawling conglomerate, the only way an official can gain visibility throughout the entire Union is to be appointed first to the office, have his name and photograph appear frequently and prominently in the Union's official publication mailed to every member monthly, and then go into the Convention as an incumbent-member of the Fitzsimmons' team. Incidentally, it should be noted that five members of the current Executive Board have in fact never even been elected to their current offices by a Convention. They will presumably run for their offices for the first time at the June 1976 Convention.[51]

In addition to their salaries from various subordinate Union entities, Vice-Presidents receive an automatic additional stipend of $18,000 annually plus various benefits, allowances and expenses; the Secretary-Treasurer receives a $100,000 salary. Fitzsimmons has the

[49]Fitzsimmons pushed through an amendment to the Constitution at the 1971 Convention which expanded the Executive Board from 12 to 15 Vice-Presidents. While the stated reason for the new positions was ostensibly to provide new crafts the Union was absorbing with representation, the real reason was to permit Fitzsimmons to consolidate his political strength by "packing" the Board with loyalists who could neutralize what lingering support Hoffa might have. Today, only the four most senior Vice-Presidents attained office during the Hoffa era. They are George E. Mock, Harold J. Gibbons, Joseph Trerotola and Robert Holmes. The following individuals were appointed by Fitzsimmons: William Presser, William J. McCarthy, Sam Provenzano, Edward Nangle, Roy Williams, Joseph W. Morgan, Edward Lawson, Weldon Mathis, Arnie Weinmeister, M.E. Anderson, and Louis F. Peick, the last four of whom have not yet been elected since they were appointed after the 1971 Convention.

[50]Murray W. Miller was appointed Secretary-Treasurer by Fitzsimmons in 1972 when Thomas E. Flynn died. Miller resigned in December of 1975 and Fitzsimmons named Ray Schoessling to fill the post.

[51]The Vice-Presidents are Weldon Mathis, Arnie Weinmeister, M.E. "Andy" Anderson and Louis F. Peick. While Ray Schoessling was an elected Vice-President, he now holds the office of General Secretary-Treasurer, the office recently abandoned by Murray W. "Dusty" Miller who similarly had been elevated by Fitzsimmons to that post from the office of Vice-President and who also had never been elected to the office of Secretary-Treasurer.

capacity to enrich each member of his Executive Board still more. As we have seen, Fitzsimmons can appoint any number of International "Organizers", a position without any specifically defined responsibilities. As we shall see in more graphic detail in Part II of this Report, it is the hallmark of the Teamsters Union that officials may simultaneously hold any number of positions, collecting full salaries for each, in spite of the fact they may not be able to devote their attention to more than one job. Vice-Presidents are no exception. Looking at the roster of Vice-Presidents just prior to the recent change necessitated by Dusty Miller's resignation, we see that 12 of the 15 men have been named Organizers by Fitzsimmons.[52] Remember, Fitzsimmons has an unqualified right to fire, as well as hire, his Organizers. In addition, Fitzsimmons has selected five of his Vice-Presidents as his Directors of the Area Conferences.[53]

Now, what do these titles represent to their holders? Money, status, and in some instances power. Conference Directors are paid $25,000 annually[54] in addition to the $18,000 they receive as Vice-Presidents, plus whatever they receive as elected officials of Locals, Joint Councils,

[52]The V-Ps Fitzsimmons had, as of 1974, placed on his "organizing" payroll were: George Mock, Joe Trerotola, Robert Holmes, Ray Schoessling, William Presser, William McCarthy, Salvatore Provenzano, Ed Nangle, Roy Williams, Joe Morgan, Weldon Mathis, and Andy Anderson. The three V-Ps who Fitzsimmons had not favored with Organizer status were: Harold Gibbons, Ed Lawson and Arnie Weinmeister. Fitzsimmons treatment of Gibbons will be discussed shortly. Lawson was once an Organizer but Fitzsimmons reportedly "fired" him from the post when he refused to approve Fitzsimmons' decision to remove Gibbons as Central Conference Director. Weinmeister was just appointed by Fitzsimmons as a VP in 1974.

[53]The Eastern Conference Director is Joe Trerotola; the Southern Conference Director is Joe Morgan; the Central States Conference Director is Roy Williams; and the Western Conference Director is Andy Anderson. As the only Vice-President from Canada, Lawson was recently appointed Director of the Canadian Conference.

There are some further circumstances which warrant our attention. In addition to serving as the Director of the Southern Conference, Morgan also serves as the elected Chairman of the Conference Policy Committee, a position which entails no additional responsibilities to those he already shoulders as the Director. Nonetheless, Morgan draws a substantial additional salary directly from the Conference. Ray Schoessling was until just recently the Director of the Central States Conference and he, too, held down the overlapping job of Policy Committee Secretary-Treasurer. Since the Conferences are subject to the President's "unqualified supervision, direction and control", Fitzsimmons could easily put an immediate stop to this practice of drawing two salaries from different union entities for doing what is essentially a single job.

Andy Anderson is the only Conference Director who has never been elected to the office of Vice-President. In fact, Fitzsimmons appointed him Conference Director six months before a vacancy occurred on the Executive Board which Fitzsimmons appointed Anderson to fill, thus qualifying him belatedly for his Conference job. For whatever reasons, Fitzsimmons obviously holds Anderson in high esteem. Not surprisingly perhaps, the Western Conference declared its support for Fitzsimmons' reelection as General President, nearly a full year prior to the June 1976 Convention.

[54]It is not clear who has the final say in setting the salaries of Conference Directors. Article V, Section 1(f) confers this authority upon the President alone; Article XVI, Section 3 states just as unequivocably the General Executive Board shall fix the salaries of Conference Directors. The inconsistency is of little import, however, since the Board acts largely as a rubber stamp for the President and since five of its members are voting for their own salaries and their colleagues are unlikely to withhold their approval.

or even their own Conference.[55] Organizers, on the other hand, are eligible to receive whatever Fitzsimmons agrees to pay them, up to a $30,000 annual salary limit which most Organizers actually receive.[56] In addition, Organizers also receive a $7.50 per diem and a $200 monthly automobile allowance automatically plus whatever additional allowances and expenses Fitzsimmons chooses to allow. The Constitution does provide, however, that those Vice-Presidents who also hold the rank of Organizer shall receive only the full Organizer salary and benefits, rather than both that sum and the smaller Vice-President salary as well.[57] Thus, the status of Organizer represents an estimated $15,000 extra to a Vice-President. Of all the Vice-Presidents, however, only the most senior, George Mock, did not hold any other elective position in the Union during 1974 that we could find; accordingly, he was the only Vice-President who could actually have devoted himself to organizing during that portion of his time which was not occupied by Executive Board matters. Fitzsimmons' appointment of so many of his Vice-Presidents as International Organizers belies his belief that one does not bite the hand that feeds him.

Finally, in addition to all the other posts which Fitzsimmons can selectively distribute among his Vice-Presidents, there is the office of Executive Assistant to the General President which he has filled with Weldon Mathis. Mathis receives an additional $20,000 annually plus the use of a $12,500 Lincoln for his services as Fitzsimmons' assistant — this in addition to his salary, allowances and expenses as an International Organizer and his salary as President of Local 728 in Atlanta, a job he rarely has time to devote any attention to although he has seen to it that his brother and son are both on the Local payroll and able to run the union in his absence.

In addition to the carrot, Fitzsimmons also wields a stick to assure unanimous support for his decisions among the members of the Executive Board who supposedly "supervise" his conduct at the helm of the Union. Let's take a brief look at what happens when a Vice-President crosses Fitzsimmons. The case in point is the demise of Harold Gibbons as an important International Union official. Gibbons

[55]E.g., prior to his fall from favor, Harold Gibbons served both as Fitzsimmons' Director of the Central States Conference and as Secretary-Treasurer of the elected Policy Committee of that Conference. See also footnote No. 53.

[56]While the financial data in this Report is based upon Union disclosures for calendar year 1974, PROD did learn, just as the Report was going to press, that during calendar year 1975, Fitzsimmons paid 10 of his Organizers, including his son, Richard, salaries in excess of $30,000 despite the fact the Union Constitution clearly provides that their salaries "shall . . . not exceed thirty thousand dollars." Art. V, Sec. 1(d). The other Organizers Fitzsimmons singled out for "bonuses" in excess of the strict constitutional limitation were: Clyde Crosby, Albert Evans, C. Howard Jones, Verne Milton, Thomas Owens, George Rohrer, William Smith, W.W. Teague, and Joe Whiteford. In addition, while the same salary limitation applies to International Auditors (see footnote No. 59 below), they were all paid $31,250 during 1975. All together, the excess payments made by the IBT to these officials during 1975 totalled $35,000.

[57]Art. V, Sec. 1(b), IBT Constitution.

was a member of the old guard who was one of Hoffa's most trusted lieutenants. Gibbons left no doubt that his loyalties would run to Jimmy Hoffa in the event the former President should seek to reclaim the office from his caretaker, Frank Fitzsimmons. In addition, Gibbons was the one member of the Executive Board who broke ranks with Fitzsimmons in his blind support for Richard Nixon. In 1972, Gibbons received a total disbursement from the International alone of $72,000; the next year, after refusing to support Nixon's reelection bid and to recant his allegiance to Hoffa, Gibbons received only $22,700. Fitzsimmons simply stripped him of his position as Director of the Central States Conference, giving that post instead to Ray Schoessling. Since the Vice-Presidency is an elective position there was nothing further Fitzsimmons could do to Gibbons until the 1976 Convention when he could put another official on his ticket in Gibbons' place. Fitzsimmons did, however, manage to engineer Gibbons' removal from his elected position as Secretary-Treasurer of the Central States Policy Committee which cost Gibbons an additional $30,000, the salary which went with that post.

What Fitzsimmons was able to do to Harold Gibbons, he could do to any member of the Executive Board. Quite plainly, he can easily dominate this governing body which on paper is designed to look like it supervises and guides him instead. In fact, the International Brotherhood of Teamsters is in the firm grip of a single, solitary individual — Frank E. Fitzsimmons.[58]

Fitzsimmons' political clout reaches far beyond the Executive Board as well. The status of Organizer is not limited to Vice-Presidents. Indeed, there is no limit to the number of organizers Fitzsimmons could appoint and he has in fact conferred this status (and the rewards that go with it) upon roughly 60 individuals at all levels of the Union. The remainder of his appointments have been doled out with equal attention to their political impact.[59] Although there are nearly 50 Joint

[58]Some will naturally contend that this statement is an over-simplification. Needless to say, there is also the chemistry of personalities working together among all of the members of the Executive Board and we do not pretend to know exactly what this particular formula may be. Again, Fitzsimmons may give certain individuals considerable rein, but the fact of the matter from a political, structural, or legal point of view is that Fitzsimmons does definitely have the authority to tighten the reins over his Executive Board.

[59]In a similar vein, the General Secretary-Treasurer is also empowered to appoint International (or General) Auditors, but the number of Auditors he may appoint is set by the General Executive Board which, of course, is dominated by Fitzsimmons. Moreover, the President is empowered to set the Auditor's salaries, subject to the same $30,000 ceiling applicable to Organizers. Art. VII, Sec. 7, IBT Constitution. In 1974 the number of Auditors was set at 10 and the average take-home pay for the Auditors was $41,000, including allowances and other benefits.

The Auditors who have been appointed by Dusty Miller, the outgoing Secretary-Treasurer, give one the impression that the position, like Organizer, is awarded on a patronage basis since none are knowledgeable accountants, nor do any of them possess professional skills in auditing. Indeed, it would appear that the Union recognizes this problem since there were 9

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Councils, roughly three quarters of the Union's membership fall within the jurisdiction of just 17 of these Joint Councils. Fitzsimmons has named at least one of the most influential officers of these Joint Councils as an International.[60] He was also careful to put Don Peters on his organizing payroll since Peters is the head of the largest Local in the country (#743 in Chicago) sending the largest block of delegates to the Convention. In addition, Fitzsimmons has arranged for countless additional influential officials to be made Conference Organizers in his capacity to direct and control the Conferences.[61]

Fitzsimmons' attention to the political effects of his Organizer appointments has induced him to pass out jobs (and salaries) to the sons of Vice-Presidents Presser, Tretorola and Mathis, in addition to his own son, and to appoint C. Howard Jones, Dusty Miller's son-in-law, as an International Organizer as well. Fitzsimmons also arranged for Vice-President Roy Williams' close associate, Sam Ancona, to be named an International Organizer.[62] Fitzsimmons has been equally judicious in utilizing his appointive powers to penalize, as well as benefit, lower Union officials. Thus, for example, he pointedly withheld an Organizer job from Thomas Fagen, President of Local 249 (a large Local in Pittsburgh) and of Joint Council 40 as well, while awarding an Organizer job to T.R. Cozza, Fagen's arch rival on the Joint Council. Fagen was the only other prominent Teamster official who rejected Fitzsimmons' "advice" that everyone support Nixon for President in 1972.[63]

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professional accountants on the IBT payroll in 1974 averaging only $16,500 in salary, as compared to the $41,000 paid to the political Auditors.

The patronage character of the post is illustrated by the following appointments. Bruce Mohn, the son of former Vice-President and Western Conference Director Einar Mohn is assigned to audit the Western Conference. Auditor Richard C. Bell is the son of long-term Eastern Conference official Richard Bell, Sr. R.L. Rampy, former president of Local 53 and Joint Council 23 in Montana, was rewarded with the post. As appointed International Officials, it is important to remember that every Auditor is qualified to attend the Convention as a delegate and vote on all constitutional amendments, resolutions, etc., save the election of officials.

[60]Fitzsimmons can also arrange for these same individuals to receive special "organizing grants" either from the International or from an Area Conference. For example, in 1974 the Central States Conference gave a $54,000 grant to Roy Williams' Joint Council 56 in Kansas City, $50,000 to Organizer Jack Jorgensen's Joint Council 32 in Minneapolis, and $30,000 to William Presser's Joint Council 41 in Cleveland.

[61]For example, William Joyce (Local 710) and Joseph Bernstein (Local 781) received $22,000 and $10,417 respectively in 1974 as Central Conference Organizers in spite of the fact each received in excess of $100,000 from the Local he headed.

[62]During 1974, Ancona received $39,677 in salary, allowances and expenses from the International. In addition, he received $35,195 from the Kansas City Joint Council which is headed by Roy Williams. In fact, Ancona grossed more in 1974 as a Teamster organizer than I.W. Abel was paid by the nation's second largest labor union, the Steelworkers, to serve as its president.

[63]Cozza is the president of Local 211, an insignificant Local in Pittsburgh which represents newspaper deliverymen. With Fitzsimmons' influence and support, Cozza hopes to unseat Fagan as head of Joint Council 40.

All tolled, Fitzsimmons has quite an army of loyal troups in the ranks of his appointed Organizers. How much organizing these "organizers" do is questionable. Of the 60 International Organizers on the 1974 payroll, only a dozen or so did not hold any other Union job which placed heavy demands upon their time.[64] Again, one must bear in mind that those International Organizers who do not hold other elective Union positions may nonetheless attend IBT Conventions as delegates because of their status as officials of the International Union. Those Organizers, serving at Fitzsimmons' pleasure, owe their absolutely undivided loyalty to him. Thus, they tend to engage in unlimited travel and political armtwisting on his behalf rather than any real organizing at the rank and file level.

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[64]The subject of multiple office holding, particularly among the ranks of the International Organizers, will be discussed in some depth in Part II of this Report.

CHAPTER 4

Further Examples of Presidential Powers: Crushing Political Activists and Rewarding Criminals

One of the General President's most potent weapons is the power to impose trusteeship upon any Local or other subordinate body (e.g., Joint Council). This device may be used either to exact compliance with various laws or high principles of aggressive trade unionism, or to induce the loyalty of an independent, and recalcitrant entity.[65] The only restraint upon the President is that he must schedule a hearing before a panel that he may handpick. The panel must then submit its "recommendations" to him, either orally or in writing, and he may then do as he pleases since he is not bound by the panel's recommendation. The President can send in his personal representative to take over the union's "moneys, books and properties" before these hearings take place and before the trustee has terminated the elected officials of the Local.[66] When the President, for whatever reason, deems an "emergency situation" to exist, he may send in his trustee to take over the union on a moment's notice. He is then supposed to hold a hearing within thirty days and make a final determination within sixty days but these time limits, designed theoretically to assure affected members with some elementary due process, are in fact merely advisory. While in all likelihood a futile gesture, the Constitution does provide for appeals from the President's decision to be taken up with the Executive Board.

Once imposed, trusteeships are presumed in the eyes of the law to be valid for a period of 18 months and the burden of proving that they were not imposed for lawful and valid purposes rests on anyone challenging the President's action; thereafter the presumption and burden reverse.[67] According to the Union's Constitution on the other hand, while either the President or Executive Board may determine at any time that self-government should be restored and direct the trustee to conduct an election, the officers elected may not actually be installed until the President shall direct his trustee to do so. The members of the Local may not petition the President for restoration of self-government, following a majority vote at a membership meeting, more frequently than every six months.

The fact is that Fitzsimmons' power to impose trusteeships need not be exercised very often to insure his tight control of, and close loyalty among the Teamster rank and file and particularly their Local elected

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[65]See generally Art. VI, Sec. 5, IBT Constitution.

[66]After Local officials are terminated, they cannot hold office in any Joint Council or Conference and may not attend any Union Convention as a Delegate.

[67]29 U.S.C. §464(c).

officials. His total authority to devastate self-government at the Local level has in practice been used more as a tool for stifling aggressive, independent leadership in the Union than to exact compliance by Local officials with the law or to assure faithful enforcement of collective bargaining agreements.[68]

While Locals have been thrown into trusteeship from time to time, it is rarely for mismanagement of funds, criminal conduct or breach of fiduciary duty. Indeed, Fitzsimmons actually seems to have a policy of consciously ignoring the many Locals and Joint Councils whose officials are widely reported to have close ties with the Mafia, to have been convicted of assorted crimes stemming from their union-related activities, or to have been involved in blatant "sweetheart" arrangements with employers which bind their members to substandard working conditions and wages. While Fitzsimmons could and should use his trusteeship powers to control corruption, he generally does not. Indeed, if a pattern exists, it seems that Fitzsimmons actually tends to single out corrupt individuals and lend them his active support.[69]

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[68]For example, Fitzsimmons threw Local 695 (Madison, Wisc.) into trusteeship shortly after its politically "leftist" officials began advocating U.S. withdrawal from Vietnam and making other embarrassing statements while Fitzsimmons was lending his complete support to President Nixon's Vietnam policies.

[69]In a *Wall Street Journal* article (12-19-75), staff reporter John Kwitney documented a number of "sweetheart" deals between New York/New Jersey Teamster officials and area trucking outfits. Sweetheart contracts which bind certain Teamster members to working under substandard conditions and for smaller wages than many of their own union brothers are one of the Union's hallmarks. Fitzsimmons has taken no action to discipline the officials who enter into such "arrangements" despite the fact they are widely known and must first be approved by his staff on the Area Conferences. Similarly, Fitzsimmons has taken no action to unseat various officials who have distinguished themselves only with criminal records and a list of accomplishments which benefit themselves at the expense of their membership; instead he has conferred substantial privileges and benefits upon such individuals. A few illustrations follow. First, two of Fitzsimmons' Vice-Presidents, William Presser and Sam Provenzano, are widely reputed to have close contacts with organized crime. Provenzano's only credential seems to have been his fraternal relation to former Vice-President Anthony Provenzano who had to step down when he was convicted for extortion. Many believe that this appointment was designed to permit "Tony Pro" to continue to participate in Union activities through his brother in spite of the statutory prohibition against such participation. Fitzsimmons' close friendship with ex-con Tony Pro, the prime suspect in the Hoffa disappearance, is no secret; Fitzsimmons was the guest speaker at Tony's "coming-out" dinner banquet in New York City marking the expiration of the statutory prohibition on his holding Union office. Presser has been convicted of various offenses including receiving illegal payments from employers. In fact, he pleaded guilty to one indictment shortly before being elected at the 1971 Convention. Not only did Fitzsimmons not bump him from his ticket, he approved a set of Joint Council bylaws permitting the Ohio Teamster official to unlimited travel and recreation at his members' expense. Fitzsimmons has also conferred substantial benefits upon Presser's son Jackie and other cohorts Presser has put on the gravy train. (See Chapter 7 for an in-depth discussion of the Pressers and their dealings in Ohio.)

Of the three IBT Trustees whose job entails the highest fiduciary responsibility of any official in the entire Union, auditing the International's books, one of them, Frank Matula, was convicted in 1959 of perjury.

T.R. Cozza, the individual Fitzsimmons is assisting to oust Tom Fagen as president of Pittsburgh Joint Council 40, was indicted in 1959 for taking illegal payments from the Pittsburgh Sun-Telegraph after the McClellan Committee hearings revealed that he had been on

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Fitzsimmons has two other devices that permit him to put certain subordinate union officials out of business altogether. The first is to have the Executive Board revoke the Local's Charter.[70] While the Landrum-Griffin Act addresses the subject of misuse of trusteeship powers, it is silent on the subject of putting a Local, itself, out of business permanently. Similarly, Fitzsimmons can merge Locals or Joint Councils with larger bodies in the firm grip of a trusted lieutenant and simply put a politically independent slate of officers out of business that way instead. Should the officers and members of a Local learn of Fitzsimmons' plans to squash their political militancy, and should they seek to beat him to the punch and pull out of the Union, they would find that they cannot; they are trapped and they will inevitably be muzzled and punished.[71]

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the newspaper's payroll throughout the 1950s. Cozza's Local union members, the men he supposedly represents, work for the Sun-Telegraph.

Rolland McMaster, former secretary-treasurer of Fitzsimmons' own Local 299 (Detroit), accepted payments from the president of Youngstown Cartage Company yet Fitzsimmons set him up in 1971 as the head of a special task force of Organizers to recruit independent, owner-operators who haul steel. Over a two year period, this task force spent in excess of 4 million dollars and accounted only for several hundred new members according to investigative reporter Dan Moldea. The unit was, at the same time, successful in "disciplining" those steel haulers the Union already represented who had insulted the Union by turning down alleged sweetheart agreements it had negotiated on their behalf in 1970. Fitzsimmons then appointed McMasters to the negotiation committee to apply his newly developed knowledge of the steel hauling industry during the 1973 contract talks.

In 1970 Donald Gillette was convicted of taking a $12,000 payoff from the Fellows Development Company along with Joseph John Fischetti, a cousin of Al Capone. After serving six months in jail for the offense, he was elected President of Local 769, the home local of Teamster Vice-President Joseph Morgan. By 1974 Gillette left his Local and became both a Southern Conference Organizer under Morgan and an International General Organizer.

Harry Davidoff, an official in Hoffa's famous "paper locals" in New York City back in the 1950s and a convicted extortionist, was granted a new charter by Fitzsimmons to represent air freight employees at Newark Airport. His son, Mark, heads the Local representing the same employees at JFK International Airport where air freight often never reaches its consignees and finds its way instead into the hands of New York Mafia figures. Fitzsimmons has given Mark authorization to hold office in his father's Local in addition to his own.

Bernard Adelstein is another official Fitzsimmons has given his permission to run more than one Local. He figured prominently in the McClellan Committee investigations for his role in the New York City garbage scandals of the 1950s and he too has been convicted of extortion although his conviction was later overturned. With Fitzsimmons' required consent, he today makes $140,000 a year heading two Locals and managing three Teamster trust funds.

Joey Glimco, the man Hoffa refused to oust from the Union in the early 1960s in the face of enormous pressure from the Union's judicially appointed Board of Monitors, was the beneficiary of an organizing grant of $18,000 from the Central Conference in 1974, 1973, 1972 and 1971.

[70]After revoking a Local Charter, the Executive Board can mete out devastating discipline by transferring only those members to another Local who were not "responsible for the revocation or forfeiture of the charter." The Board may exclude from membership in the new Local or the Local absorbing the members from the dissolved body those individuals the Board "has reason to believe are disloyal to the International Union or who may cause disruption in the newly organized Local Union." Art. IX, Sec. 3(a), IBT Constitution.

[71]Article XX, IBT Constitution, provides in part that "No Local Union can dissolve, secede or disaffiliate without the approval of the General Executive Board while there are seven (7) dissenting members." Every member is presumed for these purposes to oppose dissolution or secession unless he has actually submitted a notarized affidavit to the IBT Secretary-Treasurer within the calendar month in which the request for secession is made. Moreover, "fostering

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Of course, there is no need for Fitzsimmons to totally obliterate a Local Union or arrange to have its elected officials dismissed. There are a number of more subtle ways he can undermine officials without appearing to have denied the Union's rank and file their democratic rights. A simple device is to grant a new Local Charter to a clique of loyalists within the rebel Local and then transfer the membership out from under the rebel leaders into the new Local. If the targetted officials have gained control of a Joint Council, Fitzsimmons can easily undermine their base of support by redefining the boundaries of the Joint Council to include more loyal Locals or to exclude those Locals who comprise the officials base of support. The same goal can also be reached simply by chartering some "paper" Locals and putting puppets in the officers' seats. Remember, there is no "one man/one vote" at the Joint Council or Conference Policy Committee levels of the Teamsters Union; each Local, regardless of the number of members in that Local, is entitled to the same number of votes when electing the officials of those important Union entities.

Fitzsimmons' authority to approve the bylaws of every subordinate union entity has been used to obstruct reform efforts and to aid his loyal supporters. Two cases provide ample illustration of this point.

First, in 1972 the members of Warehouseman's Local 853 in the San Francisco bay area overhauled their bylaws despite the opposition of their elected officials. The new bylaws required the Local officials to provide the membership with quarterly financial statements and permitted the rank and file to elect contract negotiating committees rather than entrust the negotiation of contracts always to their officials. The bylaws also provided for the transfer of substantial control over the processing of contract grievances from the officials to an elected stewards' council. The members mustered the necessary 2/3rds vote to adopt the new bylaws and forwarded them to Fitzsimmons for his approval. However, Fitzsimmons simply would neither approve or disapprove their bylaws in spite of the petitions they sent imploring him to do so. It was not until after several hundred members filed suit against Fitzsimmons two years later that he finally granted his approval.

On the other hand, Fitzsimmons required less than a month to review and approve a 1971 revision of Joint Council 41's bylaws that gave

secession" is grounds for disciplining members and officials under Article XIX, Section 6. In the event the members should actually be able to get past these practically insurmountable obstacles, they would forfeit "all properties, funds and assets, both real and personal" owned by their Local to the IBT. Under these conditions, it is virtually impossible to imagine any circumstances in which a Local could disaffiliate from the IBT.

The only other means by which members can disaffiliate from the IBT is to do so individually, rather than as a collective Local entity. This can be accomplished only by decertifying the Local as their bargaining representative in a NLRB proceeding. Such proceedings are permitted by law, however, only during a 30-day period preceding the expiration of their collective bargaining agreement (between the 90th and 60th day preceding the expiration date) or after the contract has expired in the event a new contract has not yet been ratified. Otherwise, as long as there is a contract in force, the members cannot disaffiliate via the NLRB decertification route.

William Presser virtually dictatorial control over the 100,000 member Cleveland Joint Council. The revisions also granted Presser an unlimited travel account and permission to bring along anyone he pleases whenever he finds it necessary to "refresh his health and general well being." Three months later, Fitzsimmons received Presser's endorsement and support at the IBT Convention when he was elected the Union's General President in his own right for the first time.

The many judicial powers conferred upon the General President by the Constitution also give Fitzsimmons the opportunity to pay off his supporters and deprive other individuals of their rights and privileges. All complaints concerning pre-election conduct (usually against incumbents) and eligibility to hold office (usually brought by challengers) are referred to Fitzsimmons for resolution. Disputes arising over the conduct of the election are appealed to the full Executive Board.[72] The General Executive Board is also the appellate body which hears all cases involving the disposition of charges against members or officials[73] alleging any of the following offenses: breach of the Union's Constitution as construed by the President, violation of the oath of loyalty, embezzlement, fostering secession, written or oral abuse of officers, filing charges in bad faith, any action which interferes with the performance of contractual duties, or crossing authorized picket lines.[74] In the event Fitzsimmons is predisposed to rule against a particular individual in the event charges should be preferred, there is never a problem finding someone to initiate a proceeding which will then vest the General Executive Board with jurisdiction to discipline the individual or group.[75]

[72]The General President, however, is authorized to hear and decide all protests or charges concerning the conduct of Joint Council elections. Art. XV, Sec. 2(d), IBT Constitution.

[73]See generally Art. XIX, IBT Constitution. Charges filed against members are tried by their Local Union Executive Board. Charges filed by members against any member of their Executive Board are tried by the other members of that Board. Charges filed against an entire Local are tried by the Executive Board of the Joint Council with which the Local is affiliated. Charges filed against a Joint Council are tried in the first instance by the General Executive Board of the International.

[74]The specific offenses for which members may be disciplined are set out in Art. XIX, Section 6, IBT Constitution. Item #5 reads: "Abuse of fellow members and officers by written or oral communication." The very presence of this prohibition in the Constitution could very possibly have a chilling effect upon the members' statutory free speech rights conferred by Title I of the Landrum-Griffin Act. 29 U.S.C. 411(a)(2). Should this "ground" for discipline ever be invoked by a union tribunal, its action would undoubtedly be subject to being reversed by a federal court which would probably also assess punitive damages against the members of the tribunal for surpressing members' democratic rights.

[75]For example, when a slate composed of a number of PROD reformers stressing the need for more aggressive representation particularly in the area of workers' safety and health unseated in December, 1974 the entire slate of incumbents in Local 667, Memphis Tennessee. A protest citing pressure by the U.S. Department of Labor was quicky filed by an individual who confided to several sources that he had been requested to do so by "an individual at the top of the Union in Washington, D.C." Joint Council 87 promptly held that the election should be overruled due to U.S. Government interference in saying that it would investigate charges that the incumbents, and Fitzsimmons, had improperly ruled that the leader of the reform faction was ineligible to run for office. The General Executive Board then rubber stamped the Joint Council's decision.

By the same token, Fitzsimmons is vested with discretion to assume jurisdiction and try cases himself, upon a mere 48 hours notice to the individuals involved, whenever he should believe that an imminently dangerous situation exists which threatens the welfare of any organizational entity in the Union.[76] The penalties he can mete out range from reprimands or fines to suspension or expulsion, charter revocations, and temporary or permanent denial of the right to hold office. The General Executive Board does still function, however, as the final appellate tribunal for those individuals who are aggrieved by adjudicatory decisions.

On the other hand, should charges be filed by a member against Fitzsimmons, his case will be heard in the first instance by his colleagues on the Executive Board who can be expected to dismiss the charges unless they should unanimously decide to mutiny. Executive Board decisions involving charges against any member of the Board are appealable to the entire Convention when it is next convened.[77] This procedure is largely meaningless for, as we shall see presently, the General President can manipulate convention business and most of the delegates are in one way or another beholden to him. Clearly, the Constitutional procedures for conducting trials and disciplining either members or Union officials is a single edge sword which can be used effectively only by officials against the rank and file, or by higher officials against lower officials. The Union's General President, Mr. Fitzsimmons is virtually immune from this system. Accordingly, this lopsided disciplinary procedure affords Fitzsimmons and other Union officials with yet another device for pressuring dissidents who might be inclined to exercise some independence in accordance with democratic principles.

There is yet another procedure Fitzsimmons and his lieutenants have available to them for eliminating dissent within the Union's ranks — the grievance machinery. While a member's rights within his union may be highly significant, ultimately the most important concern of any working man or woman is his job. When a worker is unfairly harassed, suspended or discharged by his employer, he is virtually at the mercy of his Union which has sole discretion with regard to the processing of grievances.[78] This is true, of course, for most every employee covered

[76]See Art. XIX, Sec. 10, IBT Constitution.

[77]The United Auto Workers provide a unique procedure for the appeal of similar decisions to a totally impartial Public Review Board. The members are all highly respected leaders of our public institutions with no connection to the UAW or its officials. While funded by the union, its funds are guaranteed and the union cannot terminate any member or in any other manner affect the decision-making process. Knowing that objective, impartial "outsiders" are looking over their shoulders may operate both to keep the UAW leadership in strict compliance with the Union's constitution and to inspire more confidence among the rank and file in their leaders.

[78]An employer's discretion to treat his employees arbitrarily is curtailed only by a few statutes forbidding certain specified forms of discrimination (e.g., race, sex, age, union activities) and by

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by a collective bargaining agreement. However, unlike other unions which provide their members with impartial arbitrators, the Teamsters Union frequently utilizes bipartite, union-management committees comprised of an equal number of union and management representatives with no outside, or neutral tie-breaker to resolve impasses. This feature is tremendously important since the Union officials who sit on the grievance committees can "dump" a perfectly meritorious grievance filed by a dissident while nonetheless meeting the legal requirements required to immunize the Union from all liability.[79]

Since Fitzsimmons and his lieutenants have the ability to determine who shall represent the Union on these joint committees, they are in a comfortable position to impose upon any dissident the most devastating form of discipline of all — loss of employment.[80] That opportunity may

a collective bargaining agreement which may have been negotiated by his employees' certified union. Contracts generally prohibit "unjust" discipline by employers leaving the specifics to be resolved on a case by case basis via the grievance machinery. While most legal contracts are interpreted and enforced by the courts, union contracts are an exception. In a series of decisions referred to as the *Steelworkers Trilogy*, the U.S. Supreme Court has uniformly held that disputes arising under labor contracts must be resolved by the grievance procedures contained in those contracts and that the courts must respect and defer to grievance decisions, be they right or wrong.

[79]A union's liability is spelled out in Supreme Court's decision in *Vaca v. Sipes*, 366 U.S. 171 (1967). Generally it is under an obligation only to act in good faith when processing grievances. However, to prove that a union has breached its duty of fair representation, a member must actually be able to prove with probative evidence that it acted arbitrarily or in bad faith. Generally, the courts look only to whether a union has "processed" the member's grievance through the grievance machinery. Teamster grievances must automatically be "processed" before joint committees and are invariably resolved by majority vote of some committee. Thus, the courts are satisfied in light of the fact they customarily focus exclusively upon unions' prosecutorial roles. They simply overlook the critical fact that the Teamsters have wrapped themselves in the robes of both prosecutor and judge of their members' grievances. Moreover, since joint committees rarely issue written opinions and since their deliberations are secret, there is absolutely no way a member can prove that the Union committee representatives "dumped" his grievance arbitrarily or in bad faith.

[80]The grievant's own Local officials only act as advocates before joint committees. Other Union officials sit on the committees. Many of these Union committee members are closely tied into the Union's power structure and are the beneficiaries of many privileges and subject to pressures which filter down from Fitzsimmons. Thus, on the one hand, if the grievant's own Local official passes the word to his colleagues who will be sitting in judgment of his grievant that he is not in fact anxious to win the grievance, they are likely to respect his "advice" in the hopes that when they exchange places on another day for another grievance he will respect their advice in turn.

On the other hand, the Local official may earnestly advocate a grievant's case only to find that it is doomed since either the grievant or the official, himself, is out of favor in the Union's power structure. Thus, in spite of the fact grievances presented to joint committees are 100% meritorious, stemming from outrageously unfair or totally arbitrary employer conduct, the joint committee can do with them as it pleases. Since its decisions are rarely reasoned, written opinions, it is not bound by its own precedents. It can easily dump or "horse trade" strong cases in order to win weak cases brought by "party loyalists". By the same token, if a group of dissidents should be elected at the Local level, their base of political support would rapidly evaporate if they were unable to win any of their members' grievances before joint committees dominated by other officials whose loyalty has either been bought or coerced by Fitzsimmons. In fact, it is Fitzsimmons practice to have one of his Organizers pay a visit to such exuberant,

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arise when an employer independently fires an activist employee who is rocking the boat or it may be arranged by a Union request to the employer. In either case, the Union can seal its member's misfortune by voting to deny his grievance. On the other hand if the Local leadership are activist reformers, the Fitzsimmons' loyalists who control the joint committees can undermine the Local leaders by denying most of the grievances they prosecute on behalf of their members.[81] In any case, the joint committee grievance machinery leaves the rank and file, as well as their more aggressive, reform oriented leaders, at the mercy of the Union's incumbent power structure dominated, of course, by Fitzsimmons. This is one important reason why such a large percent of the Teamster rank and file is so docile and easily manipulated by their "elected" leaders.

In light of the foregoing discussion, it should be clear that General President Fitzsimmons has a bewildering array of powers which enable him to harness the goliath Teamsters Union and run it as he pleases. Fitzsimmons can both buy support and quell dissent — almost before it ever materializes. For whatever reasons, a substantial number of the beneficiaries of his largesse have been individuals distinguished more by their criminal records and their long histories of selling out their members' interests with "sweetheart" contracts than by their reputations as aggressive, law abiding trade unionists. These same individuals, and others, have also benefitted by Fitzsimmons' general laissez-faire attitude which has permitted them to go about their business without interference provided they do not cross him at any important political juncture.

Fitzsimmons also has the power, and he has not hesitated to use it when necessary, to put dissidents out of business before they ever really get into it — literally to nip dissent or any reform movement at the bud. This top-weighted power structure is more characteristic of a military machine than of a democratic union. Of course it may be argued that to be effective unions must be well-heeled organizations which can present a strong, united front. However, implicit in the democratic philosophy is the notion that the majority may dictate policy to the minority so long as it is in power. Thus, theoretically if Fitzsimmons, or any other Teamster General President, really did represent the majority of the Union's rank and file, it might be argued that we should overlook the fact he can unify the Union behind him, albeit at the expense of

newly elected reformers and "remind" them of precisely this fact, asking of course for their cooperation and support — an offer they can hardly refuse.

Finally, of course, should the Union joint committee representatives at various regional levels stick behind a grievant with whom Fitzsimmons is out of sympathy, the case will repeatedly deadlock and ultimately get referred to the National Joint Committee on which he sits with his trusted Vice-Presidents. Nothing further need be said. Thus, the grievance machinery also lends itself to Fitzsimmons as a most potent, political tool.

[81]See preceding footnote No. 80.

quelling dissent.[82] Therefore, we must now turn our attention to the Teamster Convention, the process by which Fitzsimmons gets "elected" to his enormously powerful position, to determine whether it may fairly be said that he does represent a majority of the Union's members.

[82]This argument overlooks, of course, the vitally important ingredient in any democratic institution that the minority shall always have the opportunity to win converts and to become the majority. By squashing dissidents and quelling dissent, the Temaster leadership hardly afford the minority this opportunity.

CHAPTER 5

The Teamster Convention: A Hollow Democratic Body

Teamster General President Fitzsimmons and the rest of the International Union officials (General Secretary-Treasurer, 3 Trustees and 15 Vice-Presidents) are NOT elected by the Union's rank and file. Rather, they are elected by delegates who theoretically represent the members at the International Conventions held once every five years, the minimum frequency permitted by law. Who are these delegates and do they in fact reflect the will of the Union's 2.3 million members?

As we have seen, each Local in good standing[83] is entitled to send a number of delegates which roughly reflect the size of its membership.[84] In addition, each Joint Council and Area Conference is entitled to send a single delegate regardless of the number of members its jurisdiction embraces.[85] And finally, all appointed International auditors, organizers and other officials are entitled to attend.[86] Every delegate, with the exception of the various International officials, must have been elected to some office in a Local by the Teamster rank and file within the previous three years.[87] However, they were not elected specifically for the purpose of attending the Convention and casting votes reflecting their members' mandate with respect to specific candidates, constitutional amendments or other issues. Instead, they were elected by the Local rank and file to negotiate and enforce contracts affecting them, to audit the Local's books periodically (trustees) or even just to attend meetings and take notes (recording secretary).[88]

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[83]A Local in trusteeship may not send any delegates.

[84]The Local may send one delegate for the first 1,000 members or less, and one additional delegate for each 750 members or major fraction thereafter. Thus, at the 1971 Convention, Local 47 with 1320 members sent one delegate as did Local 94 with 80 members.

[85]At the 1971 Convention, 49 Joint Councils sent delegates as did 13 Conferences. These 62 additional delegates were permitted to vote for International officers. They did not either directly or theoretically represent any members, nor did their numbers correspond in any way to the numbers of members within their jurisdiction. The size of Joint Councils range from only a couple thousand to several hundred thousand members. The number of members embraced by the Conferences ranged in 1971 from 110,000 in the Southern Conference to 670,000 in the Central States Conference. The participation by these delegates in the elective process would appear to be violative of the Landrum-Griffin Act's "one man/one vote" requirement. See 29 U.S.C. 411(a)(1).

[86]At the 1971 Convention, 31 delegates representing the International Union attended and voted on all matters before the Convention save the election of International officers.

[87]This is true since Local union elections must, by law, be held no less frequently than every three years. 29 U.S.C. 481(b).

[88]The Landrum-Griffin Act requires international union officials to be elected not less often than once every five years "either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot." 29 U.S.C. 481(a). It is unlikely the Congress contemplated that the delegates might have been selected years before for an entirely different purpose, albeit in an election by secret ballot.

Even if the Teamster rank and file did have the opportunity to elect individuals solely for the purpose of attending IBT Conventions, the exercise would be largely futile. The identity of the candidates for office, the business which will be considered, the amendments and resolutions which will be presented for adoption, are not announced prior to the actual convocation.[89] This policy[90] precludes the rank and file or their Local leaders from evaluating the candidates and issues and from formulating any sort of a consensus before the Convention. Instead, the delegates are presented with a programmed Convention where they rubber-stamp decisions that have already been made by the Union's incumbent administration.

The delegates to the Convention are almost exclusively Local elected officials.[91] We must ask, how independent of the incumbent administration of the International are these delegates? Remember, Fitzsimmons and his handpicked lieutenants have been wielding their far-reaching powers to confer privileges and benefits on these officials over the previous years and have also been working to eliminate any opposition among the ranks of the Local officials. In addition, Fitzsimmons doles out hundreds of thousands of dollars in additional favors to various delegates attending the Convention. Fitzsimmons has this ability by virtue of his authority to create any number of Convention Committees comprised of any number of delegate-members he may wish to appoint. These individuals are then compensated whatever amount the incumbent General Executive Board may set for their services.[92] In addition to himself, Fitzsimmons selected 187 other delegates to the 1971 Convention to reward with special remunerative assignments.[93] How impartial these many beneficiaries of President Fitzsimmons' largesse may be is the subject of legitimate skepticism.

[89]In a very few instances, the rank and file do have the opportunity to elect individuals solely to serve as delegates. When a Local is entitled to send more than seven delegates (see formula in footnote No. 84, above) the 7-member executive board which will be attending the Convention selects the additional number from the ranks of the business agents in the event they were elected, rather than appointed (this varies from Local to Local). If there are not enough business agents or if they were not elected, then and only then is a special election called.

At the 1971 Convention where some 800 Locals sent delegates, only 36 Locals sent more than 7 delegates. Of these, it is not known how many actually had to hold special elections for delegates. We do know that the bulk of them were elegible to send only a few additional delegates. Only 9 Locals were eligible to send 12 or more delegates.

[90]Sole discretion with regard to determining and scheduling the order or business is vested in the incumbent General President. Art. III, Sec. 9, IBT Constitution.

[91]The final say with regard to who shall be eligible to attend is vested for all intents and purposes with the Credentials Committee. The incumbent General President and Secretary-Treasurer are automatically members of the committee which must be composed of at least 7 delegates-elect; the President, however, appoints the remaining members. Art. III, Sec. 7, IBT Constitution.

[92]Art. III, Sec. 8, IBT Constitution.

[93]For example, 49 delegates received a minimum of $1,300 each for serving as "sargents at arms." The most highly paid Committee members were the delegates who served on the all-important Constitutional Amendments Committee. They each received between $2,700 and

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Under these circumstances, if an amendment or resolution were offered which the incumbents did not favor, few of the delegates are likely to forget how nicely they were treated by the incumbents over the years. Even the few bearing grudges who may have succeeded in holding on to their Local elective positions will consider very carefully their future in the Union (or even in a Union represented industry) when pondering whether to cast a vote which might antagonize the Teamster leadership unless they felt virtually assured that they could oust that leadership during the elections on the last day of the Convention.

In fact, however, the possibility of pulling off a successful coup is extremely remote. It would require extensive organization and advance work that would probably be discouraged by Union officials. Fitzsimmons clearly has the means to quash such activities. Moreover in order to execute a successful coup, the delegates might have to elect an entire slate of new Vice-Presidents who would back their new President.[94] Even if the delegates could succeed in accomplishing this feat, however, they would still have to face the fact that the incumbents they had ousted would continue to hold various other "elected" union positions on Joint Councils and Conferences which would enable them to "vent their frustrations" with whatever powers they still retained. Thus, even if the delegates were sufficiently organized and could hurdle the many obstacles, they would still face the very real prospect of having to weather a storm of severe reprisals.[95]

The delegates might not fear such reprisals, of course, if their votes during the Convention were secret. Needless to say, voting at the Teamster International Convention is not secret and this is not because the Convention architects were hoping to make the delegates accountable to their constituents in the Union's rank and file. At this point, let us take a closer look at how Teamster Conventions are run and what the voting procedures are in fact.

As we have seen, the General President is authorized to appoint various Convention committees, the most important of which is the

$4,000 over and above all other salaries and allowances. The total sum expended for such delegate services at the 1971 Convention was roughly $300,000.

[94]Even if a number of the Vice-Presidents were hostile to a new, popularly elected President, he could probably still gain firm control of the International, given time, by exerting his many forms of influence over them. However, should the Constitution be overhauled to make the Vice-Presidents accountable to specific constituencies, they would become largely immune to such Presidential influence.

[95]Only a well known personality like Jimmy Hoffa who already had a well organized network within the Union could possibly succeed in pulling off such a coup. Hoffa, for example, continued to have the respect of a large percent of the Union's Local officials who would have been confident that he would do everything within his power to consolidate his power quickly and to protect them. Moreover, because of his special reputation, many of Fitzsimmons' "loyalists" could probably have been counted upon to abandon ship if they had felt there was any real possibility Hoffa might have won. They undoubtedly would have made every effort to be a part of his bandwagon.

Constitutional Amendments Committee. This Committee is charged with responsibility for preparing all "proposed amendments to the International Constitution for submission to the Convention."[96] Of the 30 members Fitzsimmons appointed to this Committee for the 1971 Convention (in addition to himself), an overwhelming majority (19) were on his immediate payroll and the remainder were all carefully selected individuals upon whom he had conferred many privileges and benefits and whose support was virtually assured.

Any attempt to reform the Union's structure to make it more democratic would necessarily pose a threat to the General President. Such reforms would necessarily diminish his sweeping powers and cut into his practically unlimited discretion to steer the giant Union and its rank and file. Any such effort would, of course, require numerous amendments to the Constitution which is the vehicle by which he derives his authority. These amendments would, of course, also have to survive his stacked Constitutional Amendments Committee. On the other hand, should the President wish to expand his authorities, or "tighten the noose", there is little doubt that his Committee would offer the appropriate amendments to the delegates for their approval.

Not only does the President have considerable control over the substance of the Convention's business, he has total control over the order of business and may alter it at any time without notice. In this connection, it is noteworthy that amendments and all other actions by the Convention "shall be adopted by a majority vote of the delegates present, seated and voting at the time of submission of the amendment or other proposed action to the Convention."[97] There is no other requirement for a quorum and the President may accordingly manipulate the results of a Convention by offering various matters for consideration and adoption whenever he believes the delegates' mood is favorable to acceptance, or when few delegates, except his supporters, are present and seated. Remember also that there may be any number of International officials (organizers, auditors, etc., whose only allegiance is to their boss) who, as delegates to the Convention, will be voting on all resolutions and amendments. In any case, the President can spring matters of business upon the delegates at any time and can thereby effectively prevent those delegates who might wish to oppose an amendment or other item of business from organizing their opposition.[98] Finally, as

[96]Art. III, Sec. 8, IBT Constitution.

[97]Art. III, Sec. 9(b), IBT Constitution.

[98]The rules of the 1971 Convention did provide for reconsideration of adopted amendments. Theoretically, if an amendment had been pushed through while most of the delegates were elsewhere, or before they fully appreciated its significance, they could repeal it. However, the rules required that such action had to occur during the same day in which the amendment was adopted and two thirds of the delegates were required to vote in favor of reconsidering the amendment.

chairman of the Convention, the General President can also cut off debate, should it begin and President Fitzsimmons has been known to resort to this parliamentary maneuver.[99]

Now, how is the voting actually accomplished? By recorded vote? No. Virtually all matters at the Convention are determined by voice vote or, where there is doubt, by a "division of the house" whereby delegates either raise their hands or stand to be counted. This voting technique is used also when electing each of the 15 Vice-Presidents.[100] The technique does not, however, permit the Union's rank and file to determine how the delegates supposedly representing them in fact voted.[101] The Constitution does call for a roll call vote only in three instances: when there is opposition to candidates for the offices of 1) President, 2) Secretary-Treasurer or 3) Trustee.[102]

The election of officers is a somewhat curious process. Each Vice-President is elected separately, starting with the 1st Vice-President and running through the 15th. Their numbered designation refers only to their seniority on the General Executive Board since they are elected "at large", rather than from any sort of numbered constituencies, geographic conferences or trade divisions. Every delegate votes for every Vice-President. Oddly, however, the Constitution prohibits any individual from running for more than one International office and each

[99]For example, at the 1971 Convention an effort was made to permit discussion and debate on the recommendation of the Appeals and Grievance Committee that the appeal of members of Local 208 (Los Angeles) protesting trusteeship be denied. The Committee report was read. It contained no factual discussion whatsoever and merely assured that the members (handpicked by Fitzsimmons) had read the Executive Board's decision and reviewed the exhibits and had concluded that it was proper. When one delegate asked, on a point of order, whether the appellants would be allowed to appear personally and argue their case, Fitzsimmons ruled him out of order on the grounds that a motion was on the floor to approve the Committee's recommendation. The ensuing "aye" vote of course mooted the debate question. Catch 22!! "Proceedings of the 20th Convention", 1971, pp. 263-266.

The subject of a dues increase did produce debate which then-chairman Einar Mohn permitted. When he turned the chair back to Fitzsimmons, the President made a lengthy speech in favor of the dues increase and then sought to cut off debate. On a point of order which permitted the delegates to decide whether to cut off debate, Fitzsimmons lost a vote and was forced to permit continued debate. *Id.* at pages 304-342.

[100]At the 1971 Convention, there was no serious dissent on any issue and the "division of the house" technique was never used. The only opposition to confront any vice-president was fleeting; John Greeley was nominated to oppose Ed Nangle but he immediately and graciously declined to accept the nomination.

[101]This after-the-fact knowledge would not, of course, permit the rank and file to participate in a meaningful way in Convention activities anyway. At best it would permit them to oust an official from office at the next Local election owing to the way he voted several years before. This is unlikely because most members will consider the action to be "water over the dam" and their memories will fade; if the official is doing a reasonably good job with regard to contract enforcement and other more visible, "at home" matters, as an incumbent he stands little chance of being thrown from office in spite of his Convention voting record.

[102]Art. IV, Sec. 2, IBT Constitution. Since there are 3 Trustees, the roll call would be used only if there were a fourth candidate in which case each delegate would cast only three votes and the individuals receiving the most votes would be elected. There were no roll call votes at the 1971 Convention since none of these officers were opposed.

numbered Vice-Presidency may be considered a separate office.[103] Each incumbent Vice-President is secure in his particular numbered slot and none will oppose any other; the General Executive Board "club" is designed to self-perpetuate intact with no internal controversy or upheaval. The situation is totally uncertain and most confused, however, if you are a hopeful challenger. If Vice-Presidents have no constituencies, why aren't they elected, like the trustees, on the basis of cumulative voting and why can't you just run for the office of Vice-President without having to pick a particular slot or individual to oppose?[104] Any opposition to Fitzsimmons' hand picked team is obviously intended to be frustrated.

Were a candidate to emerge and oppose a particular individual for his Vice-Presidential slot on the Executive Board, his chances of success would be small indeed. While incumbency is generally an advantage in any political campaign, the structure and rules of the Teamsters Union make incumbency an overwhelming advantage to International Teamster officials.[105] The Union's vast size and diversity allow no individual who has not already served on the Executive Board to become sufficiently visible throughout the entire Union to have become a "known commodity" behind whom the delegates from every corner of the sprawling Union could throw their support. Moreover, since the incumbent Vice-Presidents have not had to represent or

[103]Art. IV, Sec. 2, IBT Constitution.

[104]The only restriction upon Vice-Presidents is supposedly that no two are supposed to come from the same state. Therefore, if there already is a Vice-President from your state, you might have no choice but to run against him. This restriction might make sense if Vice-Presidents were elected only by a limited group of "constituents" from a particular "territory", be it geographic or craft, or some of both. In fact, it operates as a severe restraint upon those who might seek office.

Indeed, Fitzsimmons has, himself, already violated this Constitutional prohibition by appointing Andy Anderson as Vice-President while George Mock was still on the Executive Board, since both are from the state of California. The relevant provision in the Constitution does contain a "grandfather clause" which reads, ". . . provided that this provision shall not disqualify any member of the General Executive Board as of the 1961 Convention from continuing in such position and from eligibility for re-election at the 1961 and subsequent Conventions." Art. IV, Sec. 1(c). This language, like all grandfather clauses, was intended only to protect those already on the Executive Board from having to relinquish their posts in deference to a colleague on the Board who is also from their home state. Thus, since Joseph Diviny, Einar Mohn and George Mock were all three of them already Vice-Presidents prior to the 1961 Convention, all were permitted to continue to serve on the Executive Board in spite of the fact they all hailed from California. The overall prohibition would have prohibited, however, the appointment or election of yet another Vice-President from the State of California since the grandfather clause does not embrace new officials who would not have to face the prospect of a "demotion" but rather would merely have to wait their turn until there were no other Vice-Presidents from their state of California, or any other state, on the Executive Board or who could eliminate the one remaining official from their state by defeating him. Nonetheless, Fitzsimmons did recently appoint Andy Anderson as a Vice-President while George Mock was also still on the Board.

[105]Remember, of course, how each Vice-President, Trustee and Secretary-Treasurer originally obtained his incumbent status — by Presidential appointment. The Teamsters' so-called "elective process" is therefore hardly a democratic model since it serves in reality as no more than a rubber stamp to impose the appearance of a democratic seal upon the General President's selection of personnel.

report to any constituency in the past, the vast majority of the Convention delegates have no way of judging their performance on the Executive Board or determining that they should be ousted. Remember also that since there are no issues, no debates, no platforms, and no campaigning in the traditional sense prior to Teamster Conventions, there is no way for a challenger to distinguish himself and become known among the many Convention delegates.

On the other hand, the incumbents' names have been printed prominently on the masthead of the Union's monthly publication sent regularly to every member in every geographic and trade division. The members' and delegates' familiarity with these officers is enhanced by regular publication of their photographs in the *International Teamster*, photographs which often reflect various "work sessions" which the magazine applauds as having produced important new benefits for the rank and file.[106] The incumbents have also been able to travel widely at Union expense and meet frequently with a large percent of the Convention delegates for whom they may have helped to arrange, and then have voted to ratify, various loans, privileges, and other benefits conferred by the General President. In short, unless an International Teamster incumbent grievously stubs his political toe and obtains wide notoriety in the national press, he is a virtual shoo-in at the Teamster Convention.

Now, if the incumbent Vice-Presidents, Trustees and Secretary-Treasurer are secure in their positions,[107] the General President is virtually immune to ouster at a Teamster Convention. He, too, has all of the advantages of any other incumbent International official in addition to his vast powers that reach down through the Union's hierarchy to the Convention delegates. While all of this most certainly benefits his candidacy, the Constitutional prohibition against running for more than one International office virtually assures that he will not be opposed by any member of his Executive Board team, i.e., anyone of sufficient reputation and stature throughout the Union to pose any

[106]It may be said that every similar publication does inevitably tend to project the incumbents even though it may be reporting objectively only legitimate news items of interest to its readers. The *International Teamster*, however, makes little effort to faithfully communicate all news of interest to Teamsters and it does actively promote those incumbents on the General Executive Board who remain loyal to the man who supervises its publication, Frank E. Fitzsimmons. Thus, for example, neither Vice-President Harold Gibbons' name, nor his photograph have appeared in the body of the Magazine since Fitzsimmons "exiled" him. The Magazine gave no coverage to the "resignation" of Dusty Miller for months; indeed, Fitzsimmons did not even send a telegram or letter to Local Union officials informing them of the resignation and his appointments. The rank and file and their Local elective leaders only learned of the event through word-of-mouth and through the national press. In fact, any seasoned reader of the *International Teamster* will readily attest to the fact that the publication serves much the same interests within the Union as does the official Communist publication, *Pravda*, within the Soviet Union.

[107]This assumes of course that the General President will support their candidacies.

threat whatsoever.[108] A dark horse simply would never stand a chance of winning election to the office of International Teamster General President and no one but a dark horse would ever try.[109]

In conclusion, unless the Teamster Constitution is substantially modified, if not completely overhauled, it is practically inconceivable that an incumbent International Teamster President will ever be voted out of office. Once an individual has attained that position of enormous power, he has essentially been vested with tenure. This situation is, of course, completely inconsistent with any and all notions of union democracy — at least above the Local level. As the Union is presently structured, the International Teamster President is simply not accountable to the 2.3 members of his giant Union. Power, in the Teamsters Union, does not flow uphill to the President from the rank and file; rather, the President derives his sweeping powers to dictate policy and dominate both officials and the rank and file directly from the Union's Constitution. In the Teamsters Union there will be no Jock Yablonskis or Eddie Sadlowskis, there will be no one.

The Teamster Constitution is the key to the General President's power; whether the Union's rank and file have the key to their Constitution is, however, uncertain. Having once permitted their autonomy to slip so entirely out of their hands, largely upon the bidding of Jimmy Hoffa, it is probable that the Union's rank and file may not be able ever again to regain the upper hand and assert democratic control

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[108]Jimmy Hoffa, on the other hand, was the one "outsider" with sufficient reputation and stature to pose a threat. See footnote No. 95 above.

[109]Again, should an incumbent member of the Executive Board run for President and fail, he would automatically lose his position on the International Executive Board since he would be disqualified from running for his own seat. Moreover, after having distinguished himself as a Presidential challenger who might very possibly try again in five years, there is every likelihood that he would face an extremely rocky future while trying to hang on to whatever other offices he may hold within the Union's heirarchy in the face of the President's efforts to freeze him out. In any event, the individual would drop out of sight for all intents and purposes and would at best arrive at the next Convention as a relatively unknown commodity to many of its delegates.

Only if a member of the Executive Board had nothing to lose would he be willing to challenge Fitzsimmons. Thus, Harold Gibbons has successfully been frozen out of every Union office he once held and he will most probably not be a part of the Fitzsimmons' team nominated at the 1976 Convention. He would have nothing to lose by opposing Fitzsimmons. Similarly, any Vice-President who should ever be on the verge of retiring and whose Union pension should be absolutely secure yet who has a burning ambition to oust Fitzsimmons and/or become General President might conceivably run.

Normally, however, the Vice-Presidents are content to serve in the shadow of the General President, to make himself as agreeable as possible to the President and his colleagues on the Executive Board, and to bide his time, in the hopes that he might some day be able to move into fill a vacancy in the office of President created by death, resignation or removal of the former officer-holder. Under Article VI, Section 8, whenever the office should become vacant, the First Vice-President (most senior) would automatically fill the post for 10 days during which time the full Executive Board would have to convene and select one of their members to take over the reins (becoming the incumbent) and schedule a special convention at the end of six months to "elect" someone to fill out the remainder of the former President's term. Should the former President still be alive and provided he has not totally fallen from grace, he would most probably play an active role, as did Hoffa for example, in the selection of his successor.

over the men who currently are their masters — not at least without a carefully planned, "dissident" organization capable of orchestrating and coordinating the many necessary reforms and electing talented, diligent and honest leaders. The dissidents would also require every assistance from outsiders capable of aiding them. This assistance needs to come from the labor movement generally, law enforcement officials at all levels of government and from the U.S. Congress.

Due to the composition of the Teamster Convention and its domination by the General President and his incumbent administration, it is doubtful that the Teamster Constitution can be successfully modified in any significant respect by the Union's rank and file to recover democratic authority over their leadership. For the moment at least, the document from which President Fitzsimmons derives his vast power would appear to have become his exclusive property.[110]

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[110]There is always the remote possibility that a Teamster General President might, himself, take the initiative to overhaul and reform the Constitution, diminish his own absolutist powers and restore democracy to the rank and file. Since the President's sweeping powers enable him to perpetuate himself in office in spite of the members' sentiments, it is most unlikely that an unpopular President would take such initiatives unless he were retiring. Since Frank Fitzsimmons does not enjoy widespread popularity among the Teamster rank and file, it is most unlikely that he would take it upon himself to initiate democratic reforms at the June 1976 Convention unless he should decide not to run for reelection. Even then, since Mr. Fitzsimmons is not a dynamic leader, nor a man of much vision, he would make a most unlikely champion of reform.

CHAPTER 6

The Dynamics of Teamster Locals: Microcosms of the International

A. The Elective Process

The structural and political dynamics of the 800 Teamster Locals[111] closely parallel those of the International. Although Local elections are held every third year,[112] they frequently do not provide a realistic opportunity for challengers to unseat the incumbents. An incumbent Local president, like the International General President, has no problem maintaining a high degree of visibility in Union papers and occasionally in the local news media, at Local meetings, and from time to time at his members' place of employment. He generally uses these mediums both to promote his political image in the community and among his members and to belittle, distort or denounce his potential rivals.

A challenger may have great difficulty promoting his candidacy among the Local membership. In larger Locals, the incumbent officials generally hold separate monthly meetings for the members employed in different crafts or industries. At most, the challenger may be known only to those members who are employed by the same company, or in the same industry, *and* who have attended the Local membership meetings. This assumes that he has been allowed by the incumbents to speak out regularly on issues discussed at those meetings. Teamster officials running these meetings often refuse to recognize their critics or rule them out of order.

It is important to remember that rival candidates are employees who are being paid during the course of the campaign to drive a truck or perform some other job, not to engage in public relations — a principal activity of the incumbent union officials. The rival candidates may have

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[111] It is undoubtedly difficult to generalize about 800 different Locals and we caution that our general observations about Teamster Locals in this Chapter cannot be applied universally to all individual Locals. Our focus is admittedly upon some of the more undemocratic features and the abuses of power noted in certain Locals. This is not to say that all Locals are run in an undemocratic manner by leaders who are more intent upon promoting their own interests than those of their members. To the contrary, it is very likely that most Teamster Locals are run by earnest, hard working individuals who attempt to do the best job they can, often in spite of the lack of creative support and assistance from the International. The critical observations here and elsewhere in this Report are offered in a constructive vein so that the serious leaks in what might otherwise be described as a basically sound ship may be repaired before they cause the entire vessel to sink.

[112] The Landrum-Griffin Act requires elections for local union officials to be held "not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. 481(b)

considerable difficulty getting time off the job in which to run their campaigns. Moreover, their platforms typically call for more aggressive pursuit of the members' interests vis a vis their employers, a position which hardly endears them to their own employers. Short of discharging an employee running for Union office on such a platform, an employer will often collaborate with the incumbents, either openly or tacitly, by denying the challenger his accrued vacation or by assigning him overtime to prevent him from campaigning.

Union reform is a luxury to a workingman. The first necessity in his life is a good job and reliable source of income. Although some Teamster reformers may fear personal violence, all are concerned about the possibility they might lose their jobs. The irony is that those officials which the rank and file most want to throw out of office for their sweetheart dealings with their employers are precisely the ones who are the most difficult to oust since they are in the best position to arrange discharges. Opposition candidates and their supporters are simply afraid to jeopardize their jobs. And, Teamster employers characteristically do play a tremendously important role, albeit indirect, in the Union's internal politics, particularly at the Local level.

While the incumbent officials are technically under a legal obligation to provide their political opponents with representation in grievance proceedings they may initiate to recover their jobs or otherwise resist employer discrimination or reprisals, the officials may just go through the motions while conspiring to subvert their opponents' grievances. Unless the challenger can actually prove dishonesty, bad faith or actual malice on the part of the incumbent official, there is no way he can appeal the adverse grievance through the courts. Indeed, as we have seen in Chapter 4, the grievance machinery preferred by most Teamster officials and widely used by the Union is a joint labor-management committee system which particularly lends itself to the incumbent officials who control it as a device for ratifying management reprisals against their political opponents. This is true because the officials have simultaneously cloaked themselves in the robes of both prosecutor and judge of their members' grievances.

There are additional obstacles the incumbents can raise. In the first place, the incumbent Executive Board is entitled to judge the challenger's credentials to determine whether he is eligible to run for office. Their decisions are subject to review by General President Fitzsimmons who may be biased in favor of his incumbent Local union allies. Establishing one's eligibility may prove to be difficult. Most incumbent Local officials push through rules, permitted by the IBT Constitution (Art. II, Sec. 4), which require candidates to have been members of their particular Local for a minimum of 24 consecutive months and to have attended at least 50% of the monthly membership meetings during that period. Due to the highly transient nature of many Teamster crafts, members are frequently transferring in and out of

different Locals and they have little opportunity to plant roots and develop much knowledge of Local union politics. Moreover, since the Local membership meetings are frequently inconsequential or poorly run, most Teamsters make little effort to attend the meetings on a regular basis. As a result, only a very small fraction of the membership in most Locals are even eligible to run for office.[113]

Local Teamster officials frequently have politically useful, appointive powers not unlike those of the General President. The President or Secretary-Treasurer[114] often have discretion to hire (and fire) all their business agents and to appoint shop stewards who, although regularly employed by industry, may receive special privileges and benefits from the Union. Many officials make an effort to hire the most knowledgeable, experienced and competent people to fill these positions; others gravitate toward "outside muscle", ex-cons with reputations for getting "tough" with troublemakers. Or, the official, himself, may have reported connections with figures in organized crime and this reputation, alone, may be sufficient to dampen enthusiasm among potential challengers and reformers. Fear of physical reprisals still runs very high among a large percent of the Teamster rank and file. The recent Hoffa disappearance has served to heighten these fears.

While on the subject of Local officials' appointive powers, it should be noted that these powers may occasionally be used to circumvent the elective process entirely. Where vacancies arise on the Local Executive Board[115] for whatever reason, the remaining members are empowered to fill them for the duration of the term of office without the need for calling a special election.[116] For example, in New Jersey Local 560, former president Salvatore Provenzano (who is also an International Vice-President) recently appointed brother Anthony (Tony Pro) to fill the post of Secretary-Treasurer vacated by yet another brother Nunzio.

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[113]It is not unusual that fewer than 5% of a Local's members will be present on the average at monthly meetings. As a result, an even smaller percent of the membership is generally eligible to hold office under the 2-year, 50%-attendance rule. The burden of proving attendance at meetings is usually placed on the member-candidate. While the Local may have an attendance book available for members to sign when they arrive at meetings, it may not be placed in a convenient spot where those arriving would see it and sign. Moreover, most members are not aware of the 50% attendance rule or of the importance of signing the book. While still others may be aware of the rule, they may not anticipate running for union office a full 24 months before the election and may not bother to start signing the book until much later when they first decide to seek office.

[114]Depending upon the bylaws of the particular Local, one or the other of these two officials is always the principal Local officer. In some very small Locals, he may be the only full-time, salaried official.

[115]Local Executive Boards are comprised of 7 individuals: president, secretary-treasurer, vice-president, recording secretary, and 3 trustees. These officials must all be elected by the rank and file every third year.

[116]See Art. XXII, Sec. 9, IBT Constitution. This provision operates equally with regard to Joint Councils where the principal "elected" official can generally manage to appoint his cronies to his own executive board.

Salvatore then reportedly resigned as president and Tony supposedly appointed Nunzio to fill this post. Tony Pro then reportedly asked Salvatore to fill a vice-presidential slot which had mysteriously opened. This game of "musical chairs" may not be played often, but it does illustrate how Local leaders are able to please themselves in spite of whatever wishes the membership may have expressed during the Local election.

B. Manipulation and Self-Dealing by Local Officials

Local Teamster officials have been known to deal themselves various financial rewards, often without apparently violating the Local bylaws. Bylaws are to the Locals what the IBT Constitution is to the International. They are the source of legal authority and political power for Local officials. The Teamster rank and file are not, however, generally aware how tremendously significant their Local bylaws can be and even when they may wish to reform their bylaws, they are at a distinct disadvantage when the incumbent officials are opposed to reform.

To begin with, all bylaws permit the Local officials to retain legal counsel at union expense. Most lawyers consider it their duty to represent the best interests of their clients, the officials, not the Local rank and file. If the officials ask for counsel in preparing amended bylaws which would permit them greater flexibility in spending the members' dues-monies and making other decisions, the lawyer will prepare the desired language and counsel the officials on strategy in securing its adoption by the rank and file.

Many Local Teamster officials actively discourage efforts by their members to scrutinize proposed amendments to the bylaws which would benefit the officials. For example, in one New Jersey Local, the officers refused to provide the members with a written copy of the bylaws, insisting that it was sufficient to read the 50-page document during a membership meeting. Needless to say, even the most brilliant lawyer with a photographic memory would be unable to analyze such a crucial legal instrument under these circumstances. Indeed, the membership really need to have their own experienced and independent lawyer examine their bylaws, and proposed amendments, to explain to them what their effect is likely to be.[117]

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[117]The Union should, itself, pick up the legal fees for such advice. Since it is highly unlikely that most Union officials would approve such an expenditure, the rank and file must first amend their bylaws to institutionalize the procedure.

This idea of outside, independent counsel is not new. It is being espoused by many shareholders critical of corporate management's decisions not so much with regard to earning profits, the principal objective of the company, but with regard to the manner in which profits are obtained at the expense of the environment, public safety or health. However, corporate shareholders need this type of representation and counsel far less than union members. After all the Securities Exchange Commission already regulates in large part the representations

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Another tactic frequently used by Local officials who recognize that the amendments they hope to get approved are likely to be controversial is to orchestrate the meeting at which the vote is to be held. In the first place, the whole subject is played down and any requisite notice of the vote is buried in other printed material. Word is then sent out to all appointed business agents, stewards and others who are indebted to the officials one way or another to be sure to attend the meeting and to shout down and bully anyone seeking to speak out in opposition. In light of the very small turnout at most meetings, adoption of the bylaws can frequently be assured by such tactics.

Assuming Local officials are intent upon self-dealing and are successful in shaping the bylaws to suit their purposes, what can they accomplish? In the first place, they may win the right to set their own salaries and to bestow various other Union benefits and gifts upon themselves and members of their families. Or they may have to be content with the salary approved by the membership knowing that they have discretion to award themselves whatever "allowances" they might wish for clothing, entertainment, transportation, whatever. Luxurious automobiles they have selected and purchased with Union funds are generally available for personal, as well as official Union business.

One of the most serious forms of abuse frequently centers around Local insurance, health, and pension funds, both created and managed by the Union officials. Officials have on occasion created special retirement or severance funds earmarked for their own exclusive benefit. Or they may create funds for the benefit of their members, funded by employers, which they manage, sometimes for a rather steep fee in addition to their union salary.

This subject of misuse of Union funds, lavish salaries and allowances, and unlimited expense accounts we shall now proceed to develop more fully in Part II of this Report where we will focus upon specific individuals known to have engaged in some of the abuses outlined above.

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made by management to shareholders with respect to the corporations principal objective — making money.

A union's principal activity is representing its members in their dealings with their employers. Many unions, particularly including the Teamsters, also create and manage various funds for the benefit of the members and sometimes for the sole benefit of the officials. Many, if not most of these activities are not known to the membership and when known, they are rarely understood. Indeed, Art XXII, Sec. 2 of the IBT Constitution specifically provides that executive board meetings at all levels of the Union shall be closed to everyone, including the membership, except those specifically permitted by the officials to attend. While it may be argued that secrecy must be assured to permit the Union to be effective in its dealings with management, no argument can be made to the effect that the members should not be permitted to understand the scope of their bylaws, which understanding they can only obtain with the aid of legal counsel.

PART II

THE TEAMSTER DOLLAR:
WHERE IT GOES AND TO WHOM

CHAPTER 7

The Cleveland Connection

The principals in this chapter are IBT Vice-President William Presser who grossed more than $125,000 in 1974, his son Jackie who pulled in nearly $177,000 and Presser in-law Harold Friedman who did still better by grossing $181,000. The chief subordinates include several other Friedmans, the late Babe Triscaro and various other associates who insure the Pressers' continuing domination over Ohio Teamsters, assuming the International General President should not interfere. In fact, we will see that Frank Fitzsimmons has actually given his blessings to the Pressers under circumstances which should have provoked disciplinary proceedings. The various episodes of financial self-dealing traced in this Chapter are illustrative of a pattern of financial abuses which we will see repeated by other "industrious" Teamster officials in subsequent chapters.

William Presser spent six months in jail in the early 1960s for obstructing justice. He also spent another fifty days in prison for contempt of Congress for refusing to answer questions before the U.S. Senate Rackets Committee. In 1971 he pleaded guilty to accepting money from employers who were allegedly coerced into buying advertisements in a Teamster publication, but escaped a prison term because of ill health. In spite of this record Presser has retained control over the Ohio Conference of Teamsters with Fitzsimmons' tacit approval.[118]

Of the 15 International Vice-Presidents, William Presser ranks fifth in seniority. In addition he is one of Fitzsimmons' General Organizers of long-standing. He also presides over the following Teamster organizations: the Ohio Conference of Teamsters, which paid him $8,900 in salaries and allowances in 1974, the 100,000 member Cleveland Joint Council 41 which paid him $40,296, and Cleveland Taxicab Drivers Local 555, which supplied him with another $10,600. Until March of 1975, Presser also served as a Union trustee of the Central States Pension Fund, a position that netted him $26,800 in allowances and another $2,000 in expenses in 1974. Due to his conviction for accepting money from employers, he was banned by the new Pension Reform Act (ERISA) from holding the trustee job for a five-year period following his conviction — this prohibition ends in 1976. In an obvious act of nepotism and a subtle slap at the law, Presser

[118]For a more detailed account of Presser's difficulties with the law over the years, refer to his "profile" in Part IV of this Report.

arranged for his son, Jackie, to take his place as a Trustee for the duration of the probationary period.

In fact, the $126,000 that William Presser reported receiving in 1974 represents only part of the total Union benefits he receives. For example, Presser will never have to worry about his retirement. Consider the following. Local 555 has set up a special severance fund whereby he will receive a severance benefit equal to one year's salary (about $10,000) and the option to buy the auto assigned to him for $1. Pursuant to a resolution passed on New Year's Day 1966, Joint Council 41 established a Severance and Retirement Contract for Presser worth over $50,000.[119] Presser is also the beneficiary of a Severance and Disability Plan established by the Joint Council back in 1958. As of December 31, 1974, that Plan was reported to be worth $42,000. Finally, the Ohio Conference of Teamsters established an account in the early 1970s to "accumulate severance pay for certain officers". In its 1973 report, the Union listed the balance in this account to be $32,474. To date, the Conference has failed to specify which officers are the beneficiaries of this fund.[120] These four accounts will supplement the already generous pension benefits that Presser should be eligible to receive at retirement. In fact, Presser has been accumulating ordinary pension benefits from different Union funds for years. When he retires he may make Jimmy Hoffa's $1.7 million pension settlement seem small.

Joint Council 41 provides several other key benefits to Presser as well as a strong political base from which to launch his various activities. Pursuant to a motion passed by the Executive Board on June 18, 1973, Joint Council 41 became indebted to Presser for a total of $30,000 to be

[119]It is odd that the Joint Council Executive Board should have scheduled an official meeting for New Years Day. The time and place, and identity of those attending, together with all other circumstances surrounding the meeting might prove to be interesting. The Union provided only the sketchiest information about this transaction in its LM-2 report. While the Department of Labor instructions for completing the reports require union officers to "describe in detail the transactions or events resulting in the contingencies and include the identity of the claimant or creditor", the Joint Council reported only the following: "The Wellington Fund Investment was established as a funding reserve but is in no way pledged or encumbered for this obligation." In another section of the report, the Union listed an investment in the Wellington Fund of $56,816. Although the Department of Labor has never required the union to clarify this information, it is clear that Presser did arrange the creation of a special fund for his own retirement.

[120]Indeed, in its 1974 LM-2 report, the Conference did not even specify the value of this special severance account. It has never shown clearly how much money was deposited into, or withdrawn from, this account in any year. Under law, the Conference is obliged either to create a trust for this "accumulated severance pay" and file a D-1 report describing the beneficiaries, or it must provide "the details of the transaction giving rise to" these encumbered funds when filing its LM-2 reports. In either case, the Conference is under a legal duty to provide considerable additional information and the Department of Labor has taken no action to require it to comply with the law. As a result, Ohio Teamsters have no way of knowing how much of their money is being spent on special "severance" funds, or for which officials. Their only recourse under the circumstances where the government will not cooperate is to file suit to force the Conference to open its books. See 29 U.S.C. 431.

paid in annual installments of $5,000 as partial compensation for the "three years he worked without compensation." PROD checked through all the LM-2 forms on file at the Department of Labor going back to 1959, when they were first required to be filed and failed to find a *single* year in which Presser did not receive compensation from the Joint Council. In 1969, the Joint Council loaned Presser $30,000 from its Business Agent's Pension Fund. According to the 1970 D-2 Report filed on behalf of that Fund, Presser repaid just over $4,200 of the loan that year. Thereafter, the Funds's D-2 reports make no reference to the loan which may either have been abruptly paid off by Presser or simply written off as a gift by the Fund.[121]

Yet another benefit Joint Council 41 has bestowed upon its President can be found in the bylaws Fitzsimmons approved just prior to Presser's announcement of his support for Fitzsimmons' candidacy for the office of General President in 1971. Article II, Section 5 of those bylaws merits special attention.

Presidential Travel and Maintenance

(a) Consistent with a Resolution passed on September 21, 1970, at a meeting of the delegates of Joint Council 41, and more specifically, the President for the purpose of promoting the general interests and welfare of Joint Council 41, both within the labor sector and in other sectors of our society, *and for the purpose of preserving and refreshing his health and general well being, may, at his discretion, travel in this country or,* with the approval of the Joint Council Executive Board, travel abroad and may take periodic rests. The Joint Council Executive Board shall provide for all expenses and allowances of the President when performing the services mentioned in this Section, or when taking periodic rests; the said expenses and allowances shall include travel and *full and complete maintenance of his wife so* that she can accompany the President and *all secretarial help, assistants and/or aides and services which he deems necessary while so engaged.* The expenses and allowances provided for herein are in addition to all other compensation and allowances. *All of the*

[121]The legality of the loan in the first place is highly doubtful. 29 U.S.C. 503 provides in part: "No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000."

A labor organization should not be able to circumvent the intent of this provision by creating a trust fund and making loans to officers from it instead.

In the event this loan to Presser was written off or treated as a gift, the trustees of the Business Agent's Fund most assuredly violated their common law fiduciary duty as trustees. They may also have violated 29 U.S.C. 501 which is a criminal statute. Presser may have induced the action, and thereby conspired to violate the law.

A list of all loans to Union officials from this particular fund appears in Appendix "A" at the end of this Report.

provisions of this Section shall be applicable to any other officers and employees so named by the President with the approval of the Executive Board. Expenses shall include, but not be limited to *travel*, both by plane, auto, or rental car, to and from any of the fifty states, including Florida, *apartment or hotel-motel living accommodations, utilities, telephone, gas and car expenses, entertainment and miscellaneous expenses, and* such expenses as are incurred when travel is approved outside of this country.

(emphasis added)

This lavish provision is so broadly worded that it is possible the Joint Council may even be making the payments on Presser's Florida condominium, picking up his bar bill — indeed, meeting every expense he might incur in sustaining a luxurious life style thousands of miles from the Joint Council and the Ohio rank and file who must ultimately pick up the bill.

Just as the International Union's General Executive Board is supposed to serve as a check on the General President, so too are the members of the Joint Council 41 Executive Board supposed to prevent financial mismanagement and other abuses by its president, William Presser. However, just as the IBT Constitution gives Fitzsimmons the ability to dictate to the General Executive Board, the Joint Council 41 bylaws give Presser a similar kind of leverage to insure that his Executive Board will function as a rubber stamp also. In the first place, Presser has the authority to set the salaries of all Joint Council officers and employees, including himself.[122] Creative use of the travel provision we have just examined permits Presser to earn even more gratitude from his colleagues on the Board. Remember, that provision permits Presser to invite an unspecified number of aides to accompany him on his travels, and so long as they are in his company, all other expenses they might incur are also covered. Indeed, Presser may name any individual he may wish to share the benefits of this unlimited expense account, provided that individual is approved by the Executive Board.

The fact that Presser is obviously in favor with IBT General President Fitzsimmons also gives him a political advantage which assists him to reign over Ohio Teamsters. Fitzsimmons has chosen to ignore Presser's many financial manipulations. He has rewarded both William and his son Jackie with the lucrative and prestigious status of General Organizer, and he arranged to have Jackie appointed as his father's replacement on the board of trustees of the giant Central States Pension Fund. Fitzsimmons also appointed Presser as the International

[122]This may explain why Presser's Joint Council salary is high even by Teamster standards. For example, Joe Trerotola received $25,000 in 1974 for serving as president of New York Joint Council 16 which has twice as many members as Joint Council 41 which paid Presser $40,296.

trustee to supervise the affairs of Local 436 when Presser's associate, the long-time president of that Local, Babe Triscaro, died in 1974. In fact, before examining the affairs of the other two principals in the "Cleveland Connection", let us take a brief look at Triscaro and some of the other members of William Presser's supporting cast.

Presser and Nunzio Louis "Babe" Triscaro had a long and profitable relationship. Prior to his death in 1974, Triscaro was Vice-President of Joint Council 41 as well as of the Ohio Conference, both of which are of course headed by Presser. In addition, Triscaro served as president of his own Cleveland Local 436. Many knowledgeable sources have reported that Triscaro served as Presser's liaison to various key figures in organized crime. Triscaro represented many of Cleveland's dump-truck drivers who also reportedly served from time to time as Presser's "muscle".

Like most well situated and loyal Teamster officials, Triscaro managed to receive "just" financial recognition. His three Union posts brought in nearly $1,200 weekly. The Joint Council made him the beneficiary of a severance contract which enriched his estate by $12,619. The Joint Council's Business Agent Pension Plan gave Triscaro a $20,000 loan and apparently said nothing when he neglected to make any payments during 1969.[123]

However, while Presser saw to it that Triscaro received something from the Joint Council, Triscaro really managed to do well for himself at the expense of his Local 436. Like Presser, Triscaro persuaded his Local to create a special severance fund in 1968 which was worth $40,000 at the time of his death. Triscaro along with the other six officers of his Local had personal use of late-model, Union-purchased Cadillacs. The luxurious automobile was not the only form of transportation the Local provided him. Although Local 436 was neither large nor wealthy, Triscaro enjoyed a travel provision he managed to have incorporated in his bylaws which was virtually identical to Presser's Joint Council 41 unlimited expense account and permitted him to travel whenever and wherever he pleased and to bring along whomever he wished.

One of the individuals who frequently benefitted from this travel account was Sam Busacca, the Local's Vice-President who also happened to be Triscaro's son-in-law. However, it seems that the extravagance proved to be too much for the Local treasury. Shortly after Triscaro's death, the Local Executive Board petitioned Fitzsimmons to place the Local into receivership inasmuch as it was on the verge of bankruptcy. When Fitzsimmons appointed Presser as the International trustee for the Local, Presser in turn immediately assigned Busacca to act as the Local's "administrator." Rather than

[123]For a complete list of the loans to Union officials made out of this particular pension fund, and a schedule of payments on these loans, see Appendix "A".

insuring the fiscal integrity of the Local, this series of "assignments" in fact operated only to insure that Busacca would not lose the family business — Local 436.[124] In fact, this was not the first favor Presser had done for Busacca. In 1972, Busacca was the recipient of a $25,000 loan from the Joint Council 41 Business Agents' Pension Plan.[125]

Other important figures in Presser's Joint Council include John Felice and his son, John "Skip" Felice, Jr., a father-son team who run two small Cleveland Locals which collectively give them $120,000 annually for their services.[126A] Skip Felice is a trustee of the Joint Council 41 Business Agents Pension Fund which we have seen making numerous loans to well placed Cleveland Teamster officials, including one to his father for $15,000. John Felice, Sr. made one payment of $1,000 on that loan in 1969.[126B] Thereafter, the Business Agents Pension Fund ceased to make reference in its annual D-2 reports to the loan, just as it did the following year cease to make reference to William Presser's $25,800 loan. As in Presser's case, either Felice abruptly paid off the $14,000 balance on the loan in 1970 or the Pension Fund trustees must have written off that sum as a gift. In addition, Skip Felice has also worked with Presser as the Recording Secretary of Joint Council 41, a committeeman on the *Ohio Teamster*, a Presser publication, and as Treasurer of Ohio DRIVE which is the Union's political arm.

Other important members of Presser's supporting cast include Jack Nardi who was indicted in late 1975 on federal charges of labor racketeering and marijuana smuggling.[127A] Lou Edwards, head of Local 637 in Zanesville, has stepped into Triscaro's position as Vice-President of the Ohio Conference of Teamsters.[127B] Charles Cimino, Sr. serves as

[124]This Local is only one of several in the Cleveland area which have been dominated by a single family. John Felice Jr. followed in his father's footsteps in Locals 73 and 293, and in Joint Council 41. Charles Cimino Jr. serves as Local 400's president; his father is the secretary-treasurer. Harold Friedman took over from his father Harvey as the head of Baker's Local 19, AFL-CIO, a union which, we shall see presently, is completely woven together with the Teamsters. Jackie Presser is, of course, being groomed by his father to take over the Presser Ohio Teamster fiefdom. For other examples of Teamster nepotism in general, see Appendix "B" at the end of this Report.

[125]Once again, this loan would appear to violate 29 U.S.C. 503. See footnote No. 121, above.

[126A] Local 73 is comprised of fewer than 1,000 industrial employees; Local 293 represents fewer than 2,000 beer drivers.

[126B] For a complete list of loans, see Appendix "A".

[127A] In 1974, Nardi's Union salary totalled $67,639. As Secretary-Treasurer of Local 410, he was paid $35,039. Simultaneously, he reportedly worked full-time as a business agent for Local 507, the Local headed by Jackie Presser. For these services, Nardi received $15,600. Finally, Nardi collected $17,000 as an "employee' of William Presser's Joint Council 41.

[127B] Edwards recently executed a substandard, "sweetheart" contract with Howell Transportation which sets the hourly rate at $3.90 as compared with the $7.00 the employees would be earning under the Master Freight Agreement to which virtually every other trucking company must subscribe. Edward's contract also permits Howell to contribute only $12.00 toward its employees' health and pension insurance which under the Master Agreement would total $43.50 a week per employee. Pursuant to Art. XVI, Sec. 4 of the IBT Constitution, this substandard agreement must have been approved by the Ohio Conference. As its Vice-President, Edwards no doubt had little difficulty securing its approval.

the Secretary-Treasurer of Joint Council 41[128] while Robert Cassidy holds the same position on the Ohio Conference.[129] Finally, one other personality warrants special mention. Convicted for white slavery in the 1940s, Joseph Blumetti later became one of Presser's closest associates, serving as a Local 410 business agent and an "empioyee" of Joint Council 41. However, he ran into difficulty once again when he was indicted in 1970 for embezzlement and filing false Union reports with the Department of Labor. His conviction in 1973 on the latter count operated to bar him from holding Union office for a period of five years. Thus, while Blumetti was forced out of his job as a Local 410 business agent, Presser promptly arranged for him to be appointed as a "collections manager" for the Central States Pension Fund — a position with even greater fiduciary duties but from which he was not technically barred by law. This position has permitted Blumetti to improve his financial situation. In 1974, the Fund paid him $33,544 in salary and expenses.

Now let us move on to the other principals in the "Cleveland Connection" — the Friedmans and William Presser's son, Jackie. The Friedmans are Presser in-laws by virtue of William's marriage to Faye Friedman. While Presser was moving up in the Teamster world, Harvey Friedman was establishing himself as the boss of Local 19 of the Baker's Union, an AFL-CIO affiliate. Whatever distinction there may have once been between the Cleveland Teamsters and Bakers thereafter melted as the Presser and Friedman families merged. Just as Harvey Friedman made a place in the Bakers Union for young Jackie Presser, so too did William Presser assist Harvey's son, Harold, to get a foothold in the Teamsters Union. In 1966, he assisted Jackie and Harold to obtain a charter to create their own Teamster Local (#507). Today, Local 19 of the Bakers Union and Teamster Local 507 not only share quarters in the same building, the two Locals even share three officers, Harold Friedman, Jackie Presser and John Rusnak. Economically, all three do extremely well for themselves as a result of their multiple union "holdings".[130] In fact, some of the manipulation of finances of these two Locals provide interesting reading. Let us look first at Baker's Local 19.

[128]In 1974, Cimino was paid $15,500 by the Joint Council in addition to his $31,955 salary as Secretary-Treasurer of Local 400.

[129]In 1974, Cassidy was paid just under $20,000 by the Ohio Conference in addition to his $28,809 salary as head of Canton Local 92.

[130]During 1974, Harold Friedman earned $181,985; Baker's Local 19 paid him $100,051 and Teamsters Local 507 paid him $81,934 for serving as its president.

As secretary-treasurer of Local 507 Jackie Presser received $84,616 of his 1974 total of $176,571. The remainder of his salary is accounted for as follows: $12,705 from Baker's Local 19 (financial secretary); $19,675 from Bartender's Local 10, AFL-CIO (president); $16,590 from the Bartenders International, AFL-CIO (Organizer); $6,270 from Joint Council 41 (vice-president); $800 from the Ohio Conference (recording secretary); and $35,815 from the International (General Organizer).

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Harvey Friedman and his son Harold had served together as the two principal officers of Local 19 for two decades when Harvey died in 1974. Like his close friend and in-law William Presser, Harvey made certain that in the event he should die or retire from his Baker's Local, it would pay him a handsome sum of money. Although the Friedmans did not get around to creating a Baker's severance fund (for unnamed officers) until 1969, that fund was worth $207,000 by 1973 and it paid Harvey Friedman's estate $141,730 when he died in January of the following year. Upon his father's death, Harold moved from Local 19 vice-president where he had earned $50,000 in 1972[131] to president where he fully doubled his salary in 1974. In addition to the salary the Bakers gave Harold Friedman in 1974, they also reported a future liability that year of $103,153 for "severance pay due officers."[132]

Nineteen hundred and sixty-nine was a busy year for Cleveland severance funds. Not only did the Friedmans create such a fund in the Baker's Local, so too did Harold Friedman and Jackie Presser create such a fund for certain (once again, unnamed) officers of Teamster Local 507, the young Local they had only created a few years before.[133] In fact, while the Local 507 Executive Board did not actually vote to create the fund until April 12, 1969, they indebted the Local to the unnamed beneficiaries retroactive to January 1st of the preceding year. By the end of 1971, the Local's liability to the beneficiaries of this severance fund had grown to more than $100,000. The following year, the Executive Board decided not to wait for their severance and voted to disburse the fund at once. In 1972, the salaries of three members of the Executive Board leaped, only to settle back to previous levels the

Rusnak's 1974 salary totalled $64,649: $14,501 from Baker's Local 19 (treasurer); $24,000 from Local 507's Health and Welfare Fund (Administrator); and $26,148 from Local 507 (trustee). This last sum of money is exceptionally high, assuming this was his only task as reported by the Local, inasmuch as trustees are generally paid very modest sums since they need only review the Local's books once a year or so. Rusnak's two Local 507 jobs involve exceptionally high fiduciary duties to the Union's members since he is in a position to handle or monitor the handling of large sums of money.

[131]Harold Friedman's "modest" Baker's salary in 1972 was augmented by the $124,000 he received that year as president of Teamster Local 507.

[132]In considering whether these huge sums of money are justified, one must take into account that Local 19 is not a particularly large local union and takes in only a half million dollars annually, only as a result of dues increases between 1970 and 1975 which have increased the members' monthly liability from $9 to $16.

[133]The Teamster and Baker severance funds were created within a week of one another.

following year.[134] Thus, we assume that the severance fund was distributed in the form of salaries. The three individuals who received these salary "adjustments" were Jackie Presser, Harold Friedman and a second Friedman, Allen, who serves as the Local 507 Vice-President.[135]

Finally, some mystery surrounds the Baker's Local 19 and Teamster's Local 507 pension funds and another Baker fund known as the "Charitable, Educational and Recreational Fund" which lists its purpose as providing "members with benefits as indicated by the name of the fund." Unlike every other pension plan examined by PROD, the Local 19 and 507 funds have traditionally listed on their annual D-2 reports a special "Retirement Benefits" liability which is entirely independent of their normal pension liability to member-beneficiaries. Those accountants PROD consulted about these unusual entries speculated that the two Cleveland pension funds may have created special retirement funds for their own trustees and/or employees. Harold Friedman and Jackie Presser are trustees of both pension funds. As of 1974, the Bakers pension fund reported $613,013, and the Teamster fund listed $219,931 as falling into this special category.

The Bakers Recreational Fund seems to have served in recent years as a conduit and repository of both Baker and Teamster monies.

[134]Local 507 disbursements to its three principal officers for the years 1971-1974 are listed below.

Name & Office	Year	Salary	Expenses	Total
Jackie Presser	1971	$ 57,200	$7,954	$ 65,154
Secretary-Treasurer	1972	123,981	1,685	125,666
	1973	70,200	7,717	77,917
	1974	82,300	2,316	84,616
Harold Friedman	1971	57,200	6,476	63,676
President	1972	122,881	1,930	124,811
	1973	68,900	7,857	76,757
	1974	82,300	2,316	84,616
Allen Friedman	1971	31,200	1,361	32,561
Vice-President	1972	58,741	1,211	59,952
	1973	36,400	1,224	37,624
	1974	36,400	—	36,400

[135]In addition to serving as Vice-President of the Teamster Local, Allen Friedman has created his own union which may well be competing with Local 507, raising a serious conflict of interest. This new union is called the Warehouse, Industrial and Service Employees Local 752. Apparently it is not affiliated with any other union or with the AFL-CIO. The union claims jurisdiction over all "warehouse, industrial and service workers in Northeast Ohio." Judging from the full title of Teamsters Local 507 (The Warehouse, Manufacturing, Processing, Assembling and Installer Employees Local Union 507), the jurisdiction of the two unions would appear to overlap. If any conflict does exist, Friedman would certainly be vulnerable to discipline and expulsion from the Teamsters Union under Article XIX of the IBT Constitution. However, his trial would be conducted by the Local 507 Executive Board, including Jackie Presser and Harold Friedman, and any appeal would have to be taken to the Joint Council 41 Executive Board dominated by Jackie's father, William.

PROD's inquiries to the Union produced no information about the purpose or workings of the Fund. According to Local 507 reports, the Teamsters gave interest free loans to the Baker's Recreational Fund ($40,000 in 1973 and $100,000 in 1974) for the reported purpose of providing "additional working capital for an affiliated fund". The Baker's Local, itself, also loaned $90,000 to the Recreational Fund in 1974. Although both Teamster loans have reportedly been paid off, not only was the Baker's loan not paid off in 1974, no arrangements were noted for repayment. Why this anonymous union fund should require $190,000 in "working capital" in 1974, who handles, controls and audits this fund, all remain a mystery. Without considerable additional information, explanation and justification, however, as Secretary-Treasurer of Teamster Local 507, it would appear that Jackie Presser's interest free loans of Teamster monies to the Baker's Recreational Fund were violative of his fiduciary duty "to hold [the Local's] money and property solely for the benefit of the organization and its members."[136]

The "Cleveland Connection" on its surface makes out a strong case against the Pressers, Friedmans, *et al*, for engaging in a lengthy string of financial improprieties which have benefitted themselves, not Ohio Teamster members. The arrogance implicit in these dealings is stunning. Apart from whether many of these deals may have run afoul of various state and federal criminal statutes, it would appear that a substantial percent are violative of the Landrum-Griffin Act which was designed as the union-members' tool for enforcing high fiduciary principles upon their elected, union officials. However, before Ohio Teamsters can be expected to use this law, they must first know what their officials are doing, and most have been kept ignorant of the details of their leaders' many wheelings and dealings. By keeping Union offices "in the family", and by conducting all executive board meetings in total secrecy,[137] the Cleveland "gang" have been able to vote themselves enormous benefits which the Ohio rank and file have had to pick up unknowingly.

Once the shady dealings do become known, there are still many obstacles to a successful "shape-up" or "clean-up" drive by the Union membership, not least of which is fear. Moreover, corruption runs deep and the task may be physically, legally and financially overwhelming for the members. Teamster involvement in Ohio politics over the years must inevitably have won influential support for the Pressers, Friedmans, and others in high quarters. What is certain, however, is that

[136]See Landrum-Griffin Act, 29 U.S.C. 501

[137]Art. XXII, Sec. 2 of the IBT Constitution, as amended in 1971 permits all Teamster organizations to conduct their Executive Board meetings in secrecy. The only accounting to members that officials must do is to provide the sketchy financial data required by law, as enforced, or more often not enforced, by the U.S. Department of Labor. Even with this information, it is often difficult if not impossible even for professionals to reconstruct what those officials have done. The Teamster rank and file certainly stand at no better advantage.

what may not have been widely known by Ohio Teamsters, has long been generally known by Frank Fitzsimmons. And, while Ohio Teamster Union reform might take law enforcement officials and the rank and file years to accomplish, Fitzsimmons could wield his vast powers to investigate, audit and discipline those Union leaders who have been responsible for political abuse and financial mismanagement in short order. In fact, he has not, and has shown no inclination to do so. To the contrary, he has gone out of his way to confer recognition and rewards upon those responsible. The Cleveland Connection illustrates a very fundamental malady in the Teamsters Union.

CHAPTER 8

Top Teamster Officials: A Study of Multiple Offices and Multiple Salaries

The International General President's salary is set by the Union Convention. In light of the tremendous powers the President has to influence Convention delegates, it is no surprise that Teamster General President Frank Fitzsimmons draws an annual salary of $125,000, plus allowances and expenses[138] — far and away more than other unions pay their top officials.[139]

In addition to the large cash disbursements Fitzsimmons receives annually, the Teamsters provide him with a host of other benefits whose value is difficult to calculate. For example, Fitzsimmons and other Teamster officials and employees enjoy "haute cuisine" prepared for them by the two French chefs employed at the IBT headquarters in Washington, D.C., known to most members as the Union's Marble Palace.[140] The Union furnishes Fitzsimmons with a home in a nice residential suburb of Washington, D.C. for which it paid $98,051 in 1971.[141] To aid him in commuting to and from the Teamster

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[138]In addition to providing for his salary and allowances, the IBT Constitution appears to give the General President an open ended expense account, namely: "All expenses of the General President and General Secretary-Treasurer shall be paid by the International Union." Art. V, Sec. 1(a). This provision would appear to authorize the General President to charge his groceries on a Union credit card. We have no knowledge that he does so and wish only to stress that the presidential expense provision could be so abused.

[139]The presidents of the next three largest unions received the following amounts during 1974: I.W. Abel (United Steel Workers), $75,621; Leonard Woodcock (United Auto Workers), $62,939; Floyd Smith (Machinists), $46,205. These sums compare to the total cash disbursements the IBT reported giving to Fitzsimmons that year — $133,309. Union records show that a number of other Teamster officials actually managed to earn more than Fitzsimmons in 1974. These included Murray Miller, Donald Peters, Bernard Adelstein, William Joyce, Jackie Presser and Harold Friedman. Such salary levels have been described as "country club unionism" by Ed Sadlowski, United Steelworker District President who has been a frequent critic of I.W. Abel.

[140]In 1974, the principal chef was paid $27,000, and his assistant was paid $12,000. By comparison, the Union's salary expenditures during the same year for its Safety Department were $30,000 for the director and $11,000 for his lone assistant.

[141]Fitzsimmons is obliged to pay income tax on the rental value of the property. In 1975, the IBT claimed that the rental value was $9,375. In fact, real estate experts agree that a conservative estimate of the annual rental value of residential property is 8% of its fair market value. Real estate values in the Washington, D.C. area have been appreciating at an annual rate of 15% during recent years. Thus, the value of Fitzsimmons' home in 1975 would have been approximately $160,000, and the rental value on which Fitzsimmons should have paid taxes was $12,200, or roughly $3,000 more than Fitzsimmons presumably declared. In fact, the IBT, itself, estimated the value of the house, alone, for insurance purposes to have been worth $128,000. Fitzsimmons may accordingly be liable for understating his income and may owe back taxes.

In addition to the purchase price of the home, the Union's 1971 LM-2 report shows on the very next line an expenditure of $143,919 for "furniture and fixtures". It is unclear whether this form of benefit, namely providing Fitzsimmons with a rent-free, possibly furnished house, is lawful under the Union Constitution. Art. V, Sec 2(g) permits the Union only to "provide

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headquarters, the Union makes available a new Lincoln or Cadillac each year. When travelling out of town, Fitzsimmons has use of the Union's fleet of airplanes.[142] In fact, the Union even picks up the tab whenever Fitzsimmons wants to take a vacation in this country or abroad, not only for him, but for his wife, secretaries, and any others who can provide "services which he deems necessary while so engaged." The International's "Travel Provision" is very similar to the unlimited expense accounts finagled by William Presser and Babe Triscaro.[143]

The International Teamsters Union does almost as well by its General Secretary-Treasurer. His salary is set at $100,000 and he, too, enjoys the use of luxurious automobiles and aircraft owned by the Union as well as being able to qualify under the same travel provision as the General President for all-expense-paid vacations wherever and whenever he pleases. In his first couple of years in the office, Murray W. "Dusty" Miller managed to supplement these handsome rewards as a result of a series of highly questionable financial transactions, a subject to which we will return at the end of this chapter. First, let us proceed to discuss our principal subject — accumulating large Union salaries as a result of multiple office holding by other high Teamster officials.

Fitzsimmons and Miller are not the only two Teamster officials who manage to collect kingly ransoms from Union treasuries. During 1974, at least 17 Teamster officials topped the $100,000 mark, and that number would have been greater had not at least 5 other officials slid temporarily below it.[144] In fact, if we were to focus upon a more reasonable salary level, say $40,000 for example, we find that a total of at least 147 Teamster officials topped that figure in 1974.[145] There are two basic reasons why Teamster salaries are so high. First, the rank and file have no control above the Local level. Secondly, the IBT Constitution, written and modified by Local union officials, specifically provides for those officials to hold multiple offices, and receive multiple salaries, in the Union's extensive organizational hierarchy above the Local level.

A strong case can certainly be made for allowing certain union officials to serve on committees or district councils that may meet from time to time to develop union policies or negotiate contracts. However, most other major unions like the Auto Workers, Steelworkers and Mine Workers shun the notion that these officials should be paid an entirely separate salary for performing such functions. Obviously, there are limits to what a human being can accomplish in a workday or week and Teamster officials are no exception. In fact, some Teamster officials really make no pretense about working full-time on just one job, yet they continue to hold other positions for which they are paid full salaries.[146] Others manage to hold multiple offices which are all designed for the purpose of accomplishing the one job they actually perform.[147] However, the more usual situation is that high Union officials will also hold down a Local Union office plus some position (elected or appointed) on either or both a Joint Council and Conference (or Trade Division). Finally, in their capacity as the principal official of any one or more of these various organizational

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accommodations to house officers and employees while on official union business, and require the use thereof." Such provisions generally authorize only out-of-town expenses.

[142]See Chapter 9 for a discussion of the multi-million dollar "Teamster Air Force".

[143]The full text of this Travel Provision which appears in Art. V, Sec. 2 of the IBT Constitution follows:

> The General President, for the purpose of promoting the interests and welfare of the International Union and the making of diplomatic contacts with other organizations and institutions, *and for the purpose of conserving his health, may at his discretion travel in this country or*, with the approval of the General Executive Board, *abroad, and may take periodic rests*. The General Executive Board *shall provide for all expenses and allowances* of the General President when performing the services mentioned herein or *when taking periodic rests*; the said expenses and allowances shall include travel in this country and abroad, *the full and complete maintenance of his wife* so that she can accompany the General President, *and all secretarial help and services* which he deems necessary while so engaged. *The expenses and allowances provided for herein are in addition to all other constitutional compensation and allowances.*
>
> All the provisions of this Section shall be applicable to the General Secretary-Treasurer. (Emphasis Added.)

[144]Marked fluctuations of income are by no means rare among Teamster officials. For example, look to the individual financial portraits in Part IV of Roy Williams, Salvatore Provenzano, Rudy Tham, Jesse Carr, Lester Connell and R.C. Cook. While multiple salaries from different Union entities generally account for the high salaries, several Teamster officials have managed to collect more than $100,000 from their Locals alone. For example, in 1974, Chicago Local 710 paid William Joyce (Sec.-Tres.) $134,579 and John Kelahan (Pres.) $112,533; Chicago Local 781 paid Joseph Bernstein (Pres.) $107,731; and, as we have seen, Cleveland Local 507 paid both Jackie Presser and Harold Friedman each more than $125,000 in 1972.

[145]In addition to the 17 officials making more than $100,000, PROD found that 13 made more than $75,000 and less than $100,000, another 45 received incomes between $50,000 and $75,000, and at least 72 earned between $40,000 and $50,000. Since PROD did not examine the LM-2 reports for every single Teamster organization or the D-2 reports for every Teamster fund, the total number of Teamster officials in each category may well be significantly understated. Moreover, since Canada does not require Teamster officials in that country to file such financial reports, we have no way of knowing what those officials earn. For a list of individuals and their salary levels, see Part IV.

[146]For example, International Vice-President Weldon Mathis lives and works full-time in Washington, D.C., as Fitzsimmons' Executive Assistant. Nonetheless, Mathis received $20,000 from Atlanta Local 728 during 1974 for supposedly running that Local as its President. Mathis is also supposedly a full-time, salaried International General Organizer despite the fact he only leaves his desk to attend meetings with other officials.

Similarly, during 1972 Frank Murtha was the Administrator of the Union's giant Central States Pension Fund located in Chicago, a full-time job if ever there was one. Nonetheless, he too collected a full salary from the International for "organizing". He received $66,000 from the Fund, and $35,000 from the Union.

[147]A classic example of this form of duplicative payments is Joe Morgan who serves as both the International Director of the Southern Conference and as Chairman of the Conference's Policy Committee. In 1974, Morgan received $66,563 from the International and $54,939 from the Conference.

Another example is Sam Ancona who was paid salaries by various Teamster organizations all for the same basic job, organizing under IBT Vice-President Roy Williams. His 1974 gross salary came to $75,872, $39,677 from the International, $35,195 from Williams' Joint Council 56, and $1,000 from the Missouri-Kansas Conference which Williams also heads. One point to bear in mind is that no Teamster member has ever elected Ancona to these positions.

entities, some Teamster leaders, like the Pressers, also appoint themselves as salaried trustees or administrators of various Teamster funds, or create deferred compensation or severance plans and make themselves the beneficiaries. The subject of special trust funds is understandably complex and will be dealt with in Chapter 10. So, let us focus further on multiple salaries for Union, as opposed to "fund", offices.

Eleven of the fifteen International Vice-Presidents also hold office in both a Local and Joint Council and enjoy the benefits accompanying each office. General Executive Board meetings and International Union matters alone have come to require a substantial percent of their time and attention. How these men can also devote sufficient time to running their Locals and Joint Councils to justify collecting full salaries from those organizations is difficult to imagine. As we shall see when studying the financial profiles of the Vice-Presidents in Part IV, some do make half-hearted attempts to apportion their salaries to reflect the time they spend at their many different jobs. However, most do not.

Kansas City Teamster boss Roy Williams is a case in point. His International duties include serving as a Vice-President, Director of the Central Conference, head of the Freight (trucking) Division, General Organizer and Trustee of the Central States Pension Fund. In addition, Williams also heads Local 41, Joint Council 56, the Missouri-Kansas Conference, the Missouri-Kansas Drivers' Council and the Central States Drivers' Council. Despite the fact Williams, himself, cannot obviously fill all of these positions, they enabled him to gross $111,155 in 1973.[148] Another case in point is Robert Holmes, the Vice-President from the state of Michigan who presumably has some responsibilities to the International for troubleshooting and coordinating Teamster activities in that state to justify the $40,000 plus which he was paid as a General Organizer in 1974. At the same time, Holmes headed up the 15,000-member Local 337 which paid him nearly $1,000 each week in

[148]Williams was appointed Director of the Central States Conference in January of 1976 and the salary which goes with that job will augment his annual earnings still further. Williams 1973 salary total was made up in the following manner. The IBT paid him $40,195, Local 41 paid him $35,900, Joint Council 56 gave him $17,249, and the Central Conference gave him $17,631, reportedly for "expenses". This latter sum of money is peculiar in light of the fact no other officer of the Conference received more than $700 in expenses and the disbursement to Williams was not shown in the Conference's original LM-2, but rather in a subsequent amendment to that report.

Williams gross salary in 1974 dropped to $91,000 because the Conference paid him only $1,479 that year and his Local salary was cut back to $5,200. These two pay cuts were, however, largely offset by a $26,000 raise he received that year from his Joint Council. Interestingly, this raise from the Joint Council came during the same year his Local loaned the Joint Council $45,000 and the Central Conference gave the Joint Council a $54,000 organizing grant. The Local indicated no arrangements for repayment of the loan on its LM-2 form.

Williams has been linked to organized crime in various newspaper accounts. For example, in a series of articles on the Central States Pension Fund which appeared in the *Oakland Tribune* in 1969, Williams was said to have met with known mobsters and to have helped them in his capacity as a Fund Trustee, to secure loans for which he allegedly received a kickback. According to the newspaper accounts Williams' highly paid protege, Sam Ancona, arranged the meetings and functioned as Williams' link with the mafia. *Oakland Tribune*, September 26, 1969.

salary and allowances. Holmes also received several thousand dollars more for heading up Michigan Joint Council 43 and for serving as a Union trustee of the Central States Pension Fund.

One of the biggest financial boondoggles in the Union is the office of International General Organizer. Nowhere are the duties of General Organizers laid out. Judging from those who have held this largely "honorary appointment" from Fitzsimmons in recent years, General Organizers in fact do little or nothing to justify their $30,000 salaries which are further increased by whatever allowances and expenses Fitzsimmons may choose to allow.[149] Of the 52 individuals who held that post in 1974, only a dozen or so were in a position to devote substantial time to the position without shirking other important and demanding Union responsibilities. For example, 29 General Organizers held a Local elective office, and 21 of these individuals held at least one additional office in the Teamster organizational hierarchy. Other General Organizers held various appointed Union jobs which consumed their full time.[150]

In fact, the IBT's expenditures for organizing might raise quite a few eyebrows for several reasons in addition to the fact a substantial part of its annual allowance has gone to pay the salaries, allowances and expenses of high-ranking officials who did absolutely no organizing. In the first place, an alarming number of the men who hold the "rank" of General Organizer are hardly up-and-up trade-unionists inasmuch as they have previously been involved in various criminal activities, including the taking of illegal payoffs from their members' employers.[151]

[149]Art. V, Sec. 1(d), IBT Const. sets a $30,000 ceiling only for "salary". This limit was apparently disregarded by Fitzsimmons in 1975. See footnote No. 56 in Part I, above.

[150]Sam Ancona is one such individual. See footnote No. 147, above. Another is Vincent Trerotola, IBT Vice-President Joe Trerotola's son. In 1974, Vince worked for his father in several capacities (administrative assistant to the Eastern Conference, assistant office manager to Joint Council 16, and employee of the Joint Council's pension fund) and grossed $31,364 in addition to the $26,359 he received from the International for "organizing". W. Fleming Campbell, another General Organizer ($39,120 in 1974), likewise worked for the Eastern Conference as an administrative assistant ($12,811).

[151]For example, T.R. Cozza (Pittsburgh), William Presser (Cleveland), Rolland McMasters (Detroit), Don Gillette (Miami), and Jack Jorgensen (Minneapolis) have all been convicted of taking illegal payoffs yet all continue to serve as Fitzsimmons' General Organizers. Special Organized Crime Strike Forces of the U.S. Department of Justice have secured indictments against General Organizer Elvin Hughes (Southern Illinois), Rudy Tham (San Francisco), and F. J. Roberto (New Haven). Hughes was accused of arranging kickbacks from the Illinois Conference Welfare Fund. Tham faced charges of extortion and interstate transportation to promote bribery. Roberto and several of his colleagues on Joint Council 64 were accused of embezzlement.

Other General Organizers have also had run-ins with the law. Rocco dePerno figured prominently in the case which led to Tony Provenzano's recent indictment. DePerno allegedly demanded a kick-back on the loan he started to arrange for Tony Pro from the New York State Conference Pension Fund. IBT Vice-President and General Organizer Roy Williams was indicted in February of 1974 for filing false information in the Union's financial reports. Should he be convicted, he will be barred from holding any Union office. See 29 U.S.C. 504(a). In spite of this, Fitzsimmons recently appointed Williams as International Director of the Central Conference in addition to General Organizer.

Moreover, a large percent of the huge sums of money the International has spent recently on "organizing" are largely unaccounted for. From 1971, the year of the last Teamster Convention, the amount of money expended from the International treasury increased from $2.9 million to $8.6 million in 1974.[152] Owing to the fact the Union did not break down how or where it spent all this money, the rank and file have absolutely no way of knowing whether it was spent on legitimate organizing or whether it was wasted or illegally converted to the private use of certain individuals.[153]

Now let us return to examine the various transactions and multiple salaries which enriched former General Secretary-Treasurer Dusty Miller during the first two years he held that office. Prior to his appointment as Secretary-Treasurer by Fitzsimmons in 1972, Dusty Miller had run the Southern Conference for two decades. Like the current head of the Southern Conference Joe Morgan, Miller had occupied both positions of International Director and Policy Committee Chairman of the Southern Conference and had collected two full salaries for what was, and is, essentially one job. His gross salary from those two sources grew steadily to the point he broke through the six-figure barrier in 1971 when he received $48,738 directly from the IBT-controlled Conference, and $61,887 from the International for serving as Fitzsimmons' emissary and directing Conference affairs.[154]

Miller was sworn in as General Secretary-Treasurer on March 31, 1972. At the time, he still had 17 months to go in his term as Chairman of the Southern Conference Policy Committee. While he resigned as the International Director of the Conference when he became Secretary-Treasurer of the International, he retained his post on the Policy

[152]On its 1971 LM-2 form, the Union reported spending $2,912,513 on organizing; in 1972 that sum rose to $3,931,907; in 1973 to $7,434,550; and in 1974 to $8,558,357. In fact, the Union has consistently underreported its "organizing" expenditure in its annual report to the members which it publishes in the *International Teamster* magazine sent to every member. Thus, the Union told its members it spent only $7.5 million in 1974, and $6.4 million in 1973.

[153]For example, it is possible that Roy Williams' 1974 salary increase was skimmed off the International's organizing allowance. Remember, the $26,000 salary increase he received that year from his Joint Council coincided with the $54,000 organizing grant the Joint Council received from the Central Conference which, as we have seen, is an arm of the International.

Due to the possibly suspect nature of the International's huge allocations for "organizing" in recent years, it would seem that members should be entitled to force the IBT to open its books, pursuant to the Landrum-Griffin Act, to justify every expense charged off to organizing. 29 U.S.C. 431(c). If any misappropriations should be discovered, members can maintain suits against those officials responsible for wasting or converting their dues-monies to recover the the funds. 29 U.S.C. 501. Attorney fees will be awarded against the wrong-doing officials, not the Union, where the plaintiff-members are successful in their suits.

[154]In fact, Miller evidently gained influence rather rapidly under Fitzsimmons. In 1970, his salary from the Conference was only $32,074. The following year it jumped 50 percent. During the 1960s, Miller held the Conference Policy Committee meetings aboard the Yellow Rose of Texas II, a yacht owned by the Conference. Between 1964 and 1968, the Conference reported expenditures of $27,861 on "Boat and Entertainment Expenses".

Committee and the $54,801 salary that went with it. Moreover, although Miller was not sworn in as the General Secretary-Treasurer until the beginning of the second quarter of the year 1972, Miller also collected the full $100,000 annual salary that went with his new position in spite of the fact the International also paid Miller's predecessor, Thomas Flynn, his pro-rated portion of the $100,000 salary or $26,802 for his services during the first 3 months. Thus, during the year 1972, the International Teamsters Union under its new General Secretary-Treasurer expended a total of $126,802 for a position for which the Union's Constitution only authorized $100,000.[155] As a result, Miller was able to gross $169,029 in salary, allowances and expenses from the International and the Southern Conference in 1972.

The year 1973 also proved to be a rewarding year for Dusty Miller. In spite of the fact Joe Morgan took the reins from Miller as Chairman of the Southern Conference Policy Committee in August of that year, Miller again received his full, annual salary for the job. Thus, in 1973 Dusty Miller once again grossed more than $160,000.[156]

In 1974, Miller was yet again the beneficiary of Southern Conference largesse. During that year, the Conference gave him a condominium apartment in the Canongate development located in North Miami, Florida which was built by Calvin Kovens who was convicted in 1964 along with Jimmy Hoffa of defrauding the Central States Pension Fund.[157] The Conference had purchased the apartment in 1972 for $48,452 and Miller was the regular tenant until he became the technical owner on April 26, 1974. Interestingly however, the Southern Conference Policy Committee actually adopted the resolution to make the gift to Miller at the meeting the preceding August when Miller stepped down and Joe Morgan was sworn in as Chairman.[158]

While Frank Fitzsimmons undoubtedly knew exactly how well his appointee Dusty Miller was doing financially during these years, neither he nor the Union's trustees, whose job it was to monitor the International's books and stop such practices, even bothered to

[155]In fact, even more was spent if one includes the additional $14,228 the Union paid Miller in allowances and expenses in 1972. The most Miller should have been paid by the International in 1972 was roughly $89,000. For serving as General Secretary-Treasurer for 9 months, the Union should have paid him $75,000. For serving as International Director of the Southern Conference for 3 months he might have been expected to earn $14,000 (¼ of the $55,000 Conference Directors are normally paid). The fact that he paid himself considerably more might well constitute a breach of his fiduciary duty. See 29 U.S.C. 501.

[156]He received $57,298 from the Southern Conference and $107,541 from the International.

[157]Canongate was once the popular Teamster resort that LaCosta has now become. Miller's apartment number was 718. According to news accounts, Allen Dorfman stayed close by in apartment 716. Cleveland financier and Bally Corporation treasurer Sam W. Klein stayed next door to Miller in apartment 719. Frank Fitzsimmons and William Presser stayed in apartments 602 and 302 respectively.

[158]Miller probably paid no income tax on the value of this "gift".

mention, much less question them.[159]. Because the Conferences are not independent legal entities, and are technically and financially nothing more than extensions of the International Union, it may be argued that Dusty Miller, as Secretary-Treasurer of the International, lined his own pockets during the first couple of years he held office. Not only did the Teamster rank and file never authorize or ratify the excessive payments Miller received, their "delegates" never even elected him to the office of General Secretary-Treasurer.

[159]The three IBT Trustees were Frank Matula (Los Angeles), Maurice Schurr (Philadelphia), and Louis Peick (Chicago). Fitzsimmons recently elevated Peick to Vice-President. Interestingly, while Matula and Schurr each received less than $1,000 in allowances in 1970, their allowances shot up during 1971 and 1972. Matula received $17,095, just in allowances, in 1971, and $15,182 in 1972. Schurr received $13,015 in 1971, and $12,860 in 1972, again just in allowance, excluding salary and expenses. Incidentally, Matula was convicted of perjury in 1959.

CHAPTER 9

Other Teamster Benefits: Expense Accounts, Severance Plans, Automobiles and Airplanes

Depending upon a Teamster official's rank and his proximity to power(most frequently in Joint Councils and other organizations where he is not directly accountable to the rank and file) the official may well be able to maintain a standard of living which bears no resemblance to the salary he is being paid. Salaries must be attributed directly to the recipient on the Department of Labor LM-2 reports each and every Teamster organization must file annually. On the other hand, many of the other benefits officers receive at Union expense are simply not calculable since they are lumped together under various vague designations and are not attributed directly to the officers.[160] Thus, while we will have no way of knowing exactly how well off many Teamster officers really are, let us examine some of the various forms of benefits they receive. Remember, the rank and file must ultimately pick up the tab for each and every allocation of Union funds.

Allowances

The creative use of union "allowances" can often insure that an officer takes home considerably more cash each month than the rank and file think they are providing him. If an official thinks he deserves a raise or simply wants more money than he is receiving but the rank and file would disapprove of a raise, the increase can often be arranged in the form of some allowance or another.

The model bylaws which the International circulates to Local Unions urge the adoption of a provision whereby the Local Executive Board may vote themselves "additional compensation and allowances" from time to time as needed. In many Locals, the Executive Board's powers are exercised in fact by just one official. At the International level, while we have seen that the Constitution imposes a $30,000 ceiling on General Organizers' salaries, the International automatically pays these individuals at least an additional $5,137.50 in allowances each year. To begin with, Organizers receive a $7.50 per diem "incidental allowance" and a $200 per month automobile allowance.[161] In addition, when they travel out of town, General Organizers are automatically

[160]This information clearly should be broken down further so the rank and file could get a more accurate picture as to what their officers are receiving.

[161]As we shall see later in this Chapter, the Union frequently owns the automobiles its officials use and provides them with gasoline credit cards. Therefore, this $2,400 annual automobile allowance to General Organizers may be a pure windfall.

paid another $40 allowance each and every day they are away in spite of the fact their credit cards can be used to cover almost all of their expenses. This form of pay is frequently a pure windfall for Organizers.[162]

We make no effort here to present a complete account of the allowances paid to the many hundreds of Teamster Joint Council and Conference officials. Much of this information can be found in Part IV in their individual profiles. We do wish to note, however, that IBT Vice-President Arnie Weinmeister's Joint Council 28 was scrupulous to indicate on its 1974 LM-2 report that the $7,610 allowance it paid Weinmeister,[163] and the various allowances it paid its other officers were "considered to be additional compensation to the recipients for income tax purposes and are so reported by the Joint Council." This language on Teamster LM-2 reports appears very rarely and while most allowances paid to Teamster officials are, indeed, taxable income under the Internal Revenue Code, the omission of this acknowledgment by most officials suggests the possibility that they may not be reporting all of their lawful income. In fact, as an "employer", each union entity is obliged to withhold tax on all "income" they pay Teamster officers and employees. It is possible that those organizations may not have included "allowances" as well as "salaries" in the income category in which case they would not have withheld the proper tax. As a consequence, the Local or Joint Council, etc., may be directly liable to pay stiff penalities. In such a case, the Teamster rank and file would, once again, have to pick up the financial burden created by their officers.

Expense Accounts

Many Teamster officials have virtually unlimited use of Union credit cards. The sums charged to these Union accounts are never attributed to the individual officials and are lumped into various other Union expense categories on their LM-2 reports. There simply is no way of calculating the value of this benefit to any given official without asking the Union to open its books to a member so he can inspect who signed for what.[164] The only time the Union is required to report an "expense"

[162]See Art. V, Sec. 1(e), IBT Constitution which authorizes these various allowances not only for International Organizers, but also for International Vice-Presidents, Trustees and "executive officers". It is not known whether the Union interprets this latter designation to include high-ranking, staff employees.

[163]Weinmeister also received $5,737 in allowances from the International in 1974 bringing his total for allowances that year to $12,947. Other high ranking Teamster officials who happened to break the $10,000 allowance barrier in 1974 included IBT Vice-Presidents George Mock, Robert Holmes, William Presser and Andy Anderson. Another eleven Eastern Conference "representatives" and nearly two dozen General Organizers and International Auditors also topped this mark in 1974. Many other officials may also have run up equally high allowances.

[164]Should the Union balk, members may force the Union to open its books "for just cause" to verify the LM-2 figures. 29 U.S.C. 431(c).

figure for particular officials is when it has reimbursed those officials for sums they reportedly spent out of their own pockets on union business.[165]

In spite of this very narrow reporting requirement, PROD found that various Teamster organizations have reimbursed certain officials for rather sizable expenses they reportedly incurred.[166] For example, in 1974 Andy Anderson, the International Director of the Western Conference was reported to have been paid $17,318 in Expenses alone. Two other Western Conference officials received even more. John J. Sheridan, Chairman of an unspecified trade division of the Conference was reported receiving $19,690 in "expenses" on top of his $33,635 salary.Ralph Cotner, a Western Conference "representative" actually received more in expenses than he did in salary ($23,531 vs. $23,269). And, as we have already seen, Roy Williams received $17,631 in "expenses" from the Central Conference during the same year in which no other Central Conference official received more than $428 in expenses.[167]

Travel Accounts

Travel accounts are just one form of expense account which a number of Teamster officials have the privilege of enjoying in varying degrees. Nonetheless, they warrant special mention. Fitzsimmons, Miller and now Schoessling, Presser, Triscaro and now Busacca, as well as Jesse Carr[168] may all travel whenever they please to posh, warm

[165]The Department of Labor instructions for completing the LM-2 reports state that unions should *not* include "expenses for hotel room or for transportation of the officer on official business by public carrier for which payment was made by your organization either directly or through its credit arrangements" in the "expense" column next to the officer's salary. The government goes on to make it clear that the sum which must appear in this column is only that amount which the officer paid out of his own pocket for "expenses necessary for conducting union business."

Those expenses which are charged directly to Union credit cards or which are paid directly by the secretary-treasurer are listed instead under a heading, "Office and Administrative Expenses", which include such items as rent, bonding premiums, utility bills, etc. No further breakdown is required. As a result, the category can function as a catch-all, concealing certain questionable expenditures. The sums appearing in the category can vary radically from one year to the next without explanation. The Central Conference, for example, reported spending the following amounts in this category during the years indicated:

1971	$790,842
1972	$1,072,614
1973	$379,775

Why these enormous variations?

[166]For a detailed summary of "expenses" reported by various Teamster organizations for a large number of Teamster officials, see the profiles in Part IV.

[167]Another example of a wasteful expense account which Roy Williams may tap at his pleasure without the money being attributed directly to him as an "expense" is the Missouri-Kansas Conference bylaw (Sec. 8.01) which authorizes Williams (President), Ed Dorsey (Vice-President) and Karl Rogers (Sec.-Treasurer) to spend Union funds to "provide entertainment for themselves and their friends during non-working hours on out-of-town trips." Remember, the General President is empowered to reject any Teamster organizational bylaws.

[168]Carr is the President of Alaska Local 959 who was recently appointed an International Trustee by Fitzsimmons.

weather resorts and may bring along wives and/or secretaries or in some cases any number of business associates. The Teamsters membership must pick up the entire tab for their frequent and luxurious vacations. Other Teamster officials enjoy less expansive travel provisions. For example, St. Louis Local 618 permits its president, Ed Dorsey, unlimited travel for the purpose of establishing and maintaining contacts that will benefit the Local. With a little imagination, such a travel provision could arguably cover trips to join Teamster officials who might be golfing at La Costa.

Automobiles

The one benefit most frequently enjoyed by high Teamster officials is personal use of Union-owned automobiles. And, judging from the make and model of car purchased by most officials, the common attitude is "nothing but the best."[169] For example, not only does Frank Fitzsimmons drive a late model Lincoln or Cadillac, so do his two assistants, Walter Shea and Weldon Mathis, who both traded their 1973 Cadillacs for $12,000 Lincolns in 1974. Chicago Joint Council 25, presided over by Louis Peick, outdid the International when it spent $13,957 for a single automobile in 1974.[170]

In addition to providing officials with union-owned automobiles to drive, a number of Teamster organizations have made outright gifts of these cars to their officials. In the early 1970s, nine Teamster officials from the Cleveland area "purchased" late model cars from the Union for the total sum between them of $13. During the ensuing trial for misusing Union funds, William Presser's attorneys pointed out that it was a common practice to *give* automobiles to retiring officials. Retiring Local 407 President, John Kalnicki, was one official who purchased his Cadillac for $3, yet he immediately came out of retirement to become an organizer for the Central Conference. Other "retiring" Teamster officials who received gifts of automobiles include the Union's General Secretary-Treasurer, Ray Schoessling, who received a vehicle valued

[169]Some Locals do exercise restraint when spending their members' dues money on automobiles. For example, Winston-Salem Local 391 and Seattle Local 741 both require their officers and business agents to use their own cars for Union business and simply provide them with a fixed monthly allowance for this transportation expense.

However, typical language appearing in Union bylaws seeks to justify the personal use of union-owned automobiles:

> It is recognized that such officers or employees are required to be on call at all times, may be required to garage such automobiles and are responsible for their safeguarding. Accordingly, for the convenience of the union and as partial compensation for such additional responsibilities, such officers shall be permitted private use when the automobiles are not required on Union business.

This language can hardly excuse the officials from reporting the value of the personal benefit they derived and from paying income tax on it.

[170]Peick's Joint Council also reported giving $15,281 in 1974 to Peick's Local 705 as "reimbursements for auto expenses". Other examples of such extravagance are provided by Newark Local 641 and Cleveland Local 436. Local 641 purchased seven $9,000 autos while Local 436 supplied each of its seven officers with brand new Cadillacs.

at $7,450 when he stepped down from the presidency of Joint Council 25 now headed by Peick.[171] The Southern Conference gave a $4,915 automobile to Norman Goldstein when he "retired" from the position of "organizer" in 1974 to become "administrative assistant" to the Conference's Policy Committee Chairman Joe Morgan. Various other officials, including IBT Vice-President George Mock, and General Organizers W.W. Teague and C. Howard Jones,[172] have received automobile gifts for no apparent reason.[173]

The Teamster Air Force

Expensive automobiles are not the only form of transportation that Teamsters are providing their officers. In 1969, the Union began assembling a fleet of airplanes which has grown to the point where today it includes five luxurious jets and two turboprops worth over $13 million at 1974 values.[174] In the private sector, the Teamster's private "air force" is exceeded in numbers only by the nation's largest corporation, General Motors, which owns six jets and six turboprops.

The Union acquired its first airplane in 1969 when it leased a jet from Allen Dorfman's Union Insurance Agency for the annual sum of $1.2 million.[175] During the same year, the Southern Conference, then headed by Dusty Miller, sold its $44,000 yacht and purchased its first plane for $227,850. The following year, the Conference began "trading up" in the executive jet category by trading in this jet for one that cost $663,850. The difference between the cost of the new plane and the trade-in on its old plane (roughly $450,000) was financed by a grant from the International. In 1972, the Southern Conference again moved up to another jet which cost the Conference $932,850.

[171]When Schoessling gave up his job as Joint Council 25 President in 1973, he stepped immediately into another Joint Council position — Trustee — yet continued to draw the exact same salary ($28,500) that he had received as President. The other Joint Council trustees received only $15,500.

[172]Jones received this car in 1969 from the Southern Conference which his father-in-law, Dusty Miller, then ran. When Miller became the International's Secretary-Treasurer, Jones was elevated to Secretary-Treasurer of the Southern Conference Policy Committee. Inasmuch as Jones was also on Fitzsimmons payroll as a General Organizer, he was able to gross $69,491 in 1974 ($43,052 from the International and $26,439 from the Conference).

[173]For a listing of 31 similar automobile transactions, see Appendix "C".

[174]Scripps Howard reporter Dale McFeatters has identified the aircraft to be: 1 Grumman Gulfstream II, 2 French-built Dassault Falcon 20s, 1 Falcon 10, 1 Learjet 35, and 2 Swaringen Merlin II turboprops. McFeatters' investigation also uncovered a Hawker Siddeley 125 jet technically owned by the Teamsters Central States Pension Fund.

[175]This arrangement apparently generated such bad publicity that the International cancelled the lease. After the 1970 LM-2, there is no more mention of the agreement. A 1972 Chicago Sun-Times investigation revealed that the Union Insurance Agency bought singer Frank Sinatra's 12-passenger Grumman Gulfstream jet for $3-million and then turned around and leased it to the Central States Pension Fund. Sinatra's jet reportedly replaced two planes used by the fund which were found to be too small. *Chicago Sun-Times*, June 18, 1972.

During the same year (Fitzsimmons' first year as the *elected* President), the International purchased a plane costing $3,390,443. Two years later in 1974, Fitzsimmons purchased a second jet for the International at a cost of $1,470,625. In the meantime, he had assisted the Central States Conference to purchase its first plane in 1970 for $552,477 by giving it a grant of $500,000 from the International treasury. The Central States Conference sold this plane in 1972 in order to help finance its purchase of a Hawker Siddeley jet for $717,299. Interestingly, although their old plane had a book value of $497,000, they sold it for only $390,000 to an unidentified buyer. And finally, not to be outdone, the Western Conference purchased a plane in 1974 for $831,340.[176]

The initial cost of these planes of course represents only a part of the total cost to the rank and file. There are also salaries for pilots and mechanics, as well as insurance premiums, storage costs and landing fees which must be paid, not to mention the cost of fuel and parts. Pilots and mechanics salaries alone during 1974 came to nearly a quarter of a million dollars. The Central States Conference is the only Teamster organization which clearly reports the full operating expenses of its aircraft.[177] During two recent years, the Conference reported spending nearly half a million dollars to keep their one jet aloft. The total annual cost of operating the entire Teamster air force is estimated to be at least $2 million.

The tremendous cost of acquiring and operating these aircraft must inevitably be pondered by the rank and file who wonder whether the planes, particularly such luxurious planes, are really necessary to assist their leaders to represent them. Indeed, they may wonder whether the jets are being used solely for Union business or perhaps as a shuttle service for officials travelling between resorts and their several homes.[178] While Fitzsimmons has been generous with the rank and file's monies to provide himself and his colleagues with a fleet of swift, jet aircraft, he did not, by comparison, spend one cent to insure job health

[176]Other Teamster organizations have also tried to get into the aircraft business. Even the tiny Georgia-Florida Conference which operates on only $150,000 annually was involved in an attempt to purchase its own plane. In December 1971 they bought a Beechcraft for $55,000 plus $19,250 in interest. Shortly thereafter however, they sold the plane for a small profit. Alaska Local 959 reported purchasing a plane in 1972 for $115,000. The corporation which owns Local 959's buildings also reported spending $365,488 for airplanes in 1974 and the Local reported paying the salaries of two pilots that same year.

[177]For example, the Southern Conference lumps the operating expenses of their jet into a category entitled, "Airplane, Travel, Entertainment & Dinner."

[178]Several top Teamster officials have had second homes in warmer areas of the country. Frank Fitzsimmons, Dusty Miller, William Presser and the late Thomas E. Flynn all had condominiums in the luxurious Canongate development in North Miami. While in office Dusty Miller reportedly had a home in Palm Springs, California as well as Great Falls, Virginia while Fitzsimmons now has a house in La Costa in addition to his Union-owned residence in Bethesda, Maryland. Milwaukee Teamster official Frank Ranney reportedly maintains a residence in Coral Springs, Florida.

and safety for his 2.3 million members until late 1973 when he hired the Union's first Safety Director at an annual salary of $30,000 — a few pennies compared to the huge sums expended on the Union's air force.

Loans

As we saw in the "Cleveland Connection", Teamster officials occasionally manage to obtain sizable loans from different Union treasuries. Sometimes it is impossible to determine the terms of the loan, whether for example they are more advantageous than the terms available for money in the open market. Indeed, it is sometimes impossible to determine even if the loans were ever repaid.

A close look at the International's LM-2 reports from 1959 to 1974 reveals that 9 top Union officials have been repaying real estate loans ranging from $5,000 to $40,000 which were made out of the Union's general treasury.[179] The Landrum-Griffin Act of 1959 made it illegal for unions to loan, either directly or indirectly, more than $2,000 to any officer or employee. This provision would appear to forbid the Union from making loans to its officials out of its various pension and health insurance funds as well as the Union treasuries, themselves.

Gifts and Bonuses

In addition to the other forms of compensation Teamster officials receive, certain officers have also received handsome gifts from time to time from various segments of the Union. We have already seen examples of automobiles being given (sometimes for a nominal price) to officials as retirement presents or in appreciation of their services. Let us now take a look at a few examples of other gifts PROD detected in certain Union financial reports. Once again, no systematic effort was made to uncover every gift which may have been lumped into the LM-2 form's "Other Disbursements" category by every Teamster organization during recent years. The following "gifts" simply caught our attention and were easily verified during our research.

In 1974, Chicago Local 781 gave away $72,000 to just three individuals who all had the same last name — Bernstein. Joseph Bernstein, the Local's President, was awarded a $36,000 "other disbursement" on top of the $63,505 salary he already received from the Local. His son, Joseph L. Bernstein, the Local's Secretary-Treasurer,

[179]The officials who received the loans, and the amount of the loan are: James Casey, former administrative assistant to Dusty Miller, $17,000; Thomas E. Flynn, the late General Secretary-Treasurer, $29,000; T.L. Hughes, $6,000; D. Kaplan, $23,000; Joseph W. Morgan, $26,000; W.T. Mullenholz, former comptroller of the IBT, $13,000; Frank J. Murtha, $40,000; and F.A. Tobin, $24,000. The International did not clearly report this information until 1962. It is assumed, however, that all the loans were made prior to the effective date of the Landrum-Griffin Act, September 14, 1959. For a more complete listing of IBT loans, see Appendix "D".

and Local Business Agent Robert Bernstein each received $18,000 gifts.[180]

The Teamster Conferences have, under Fitzsimmons' overall supervision, been particularly generous over the years. In 1974, the Western Conference gave its retiring Director Einar Mohn $11,872 in addition to the cash bonus of $862 it gave to each of 25 "employees" that year.[181] That same year, the Eastern Conference gave its long-time official Richard Bell an $11,000 retirement gift.

The Southern Conference appears, however, to have been the most generous. We have already seen that it gave Dusty Miller a furnished, luxury condominium apartment in Florida and that it gave automobiles to his son-in-law C. Howard Jones and to W.W. Teague.[182] During his first year as acting General President in control of the Conferences, Frank Fitzsimmons was the recipient of a $8,119 "gift" from the Southern Conference, then under the direction of Dusty Miller.[183] After Miller moved up from Conference Director to General Secretary-Treasurer of the International, the Conference gave $16,000 to M. Ralph Dixon who retired as Secretary-Treasurer of its Policy Committee to be replaced by Miller's son-in-law, Howard Jones. This all occurred at the same time that Miller finally relinquished his job as the Chairman of the Policy Committee.[184]

Over the years, various other gifts of cash were awarded to loyal Teamster officials by the Southern Conference. Veteran International General Organizer W.C. Smith received $1,000 cash bonuses in 1971, 1972 and 1973. In 1974, the Conference gave $5,000 gifts to R.C. Cook

[180]Joseph Sr. also received $8,226 in expenses from the Local, $15,500 from Joint Council 25, and $10,417 from the Central Conference. Including the gift from his Local, he grossed $133,648 in 1974. His son grossed $87,478 and Robert Bernstein grossed $76,743.
Robert Bernstein grossed $76,743.

[181]During the same year that Fitzsimmons was able to suddenly "promote" Andy Anderson to take Mohn's place, the International also gave Mohn a $10,000 "other disbursement."

[182]During the same year in which it gave away these cars, it also gave the same two individuals $1,000 bonuses. 1969 must have been a good year, indeed! Jones received another $1,000 bonus in 1971 even though he was not listed as a Conference employee that year.

[183]Whether this was a "gift" or "income" for which Fitzsimmons was liable for taxes is debatable in light of the fact the Conferences are under the President's sole direction and control. Similarly, one might also question the validity of numerous other "gifts" in one form or another which Teamster officials have received from organizations they control.

[184]The Southern Conference under Miller also made a sizable real estate loan ($110,000) which it reported in 1969. The loan was described by the Conference as a "1st Mtge Sale of Trust Prop. 20 yrs transferred from aff." and was made to two individuals identified only as N. Trent and D. Trent. As of 1974, only $13,446 of the principal of this mysterious loan had been repaid.

After Joe Morgan became Director of the Conference, it reported spending in 1974 $85,873 in contributions to civic and charitable causes. This sum was more than twice the amount the Conference had ever before spent for such causes. Because the expenditure was not itemized, there is no way to determine who, or what organizations were benefitted. Teamster members would, however, be entitled to examine the Conference's books and receipts to verify these expenditures. See 29 U.S.C. 431(c).

and Odell Smith. Cook retired the previous year after a long career as an Atlanta Teamster leader. Smith had been ousted by a reform slate from Little Rock Local 878, the Local he had created and dominated for many years. Smith had also served as a Union trustee of the Central States Pension Fund.

The Texas Conference is one more Teamster organization which is in the practice of making gifts to officials although it seems to specialize in giving money to higher officials who might be in a position to do it some favors. For example, from 1962 to 1971 the Texas Conference made the annual $720 payments for an insurance policy for Dusty Miller, then Director of the Southern Conference. In addition, it gave Miller $1,500 in 1967, $2,500 in 1969, and $1,500 in 1970 outright. Moreover, when Joe Morgan replaced Miller in 1973, the Texas Conference immediately came up with a $3,795 welcome gift for the new Southern Conference Director.

Retirement Benefits & Severance Funds

Although most Teamster officials are eligible to receive comfortable pensions upon retirement, quite a few in addition to William Presser will be able to retire in splendid luxury. Once again, because the Department of Labor requires little information on the subject and does not require unions who fail to provide even this paucity of financial data to comply with the reporting requirements, we frequently cannot determine exactly what any given official will receive and can only put together a rough picture.

To begin with, the IBT Constitution (Art . IX, Sec. 10) expressly authorizes the International Executive Board to adopt any pension or health and welfare plan it deems to be in the best interest of "the officers and employees of the International Union or subordinate bodies." In fact, the IBT has created two such plans — the Teamster Affiliates Pension Plan, and the Retirement and Family Security Plan. Both are funded exclusively out of the IBT general treasury. The Affiliates Plan covers every officer and employee in every Local, Joint Council and Conference in the country. The Family Protection Plan covers only International officials and employees. Under this latter Plan, IBT personnel are eligible to receive pensions, lump severance benefits or death benefits (to survivor) after just 5 years of service.[185] The death or severance benefits to which participants are eligible are "equal to the reserve calculated on the basis of 75% of the accrued pension.[186] (Form D-1, May, 1973). The formula used for computing the annual pension

[185]Since elections for International officers occur only once every five years, every officer will qualify even if he should only serve one term in office.

[186]The Union's Plan description does not specify how the "reserve" or "accrued pension" value is computed for purposes of determining lump severance or death benefits.

benefit is: (3-1/3% x average annual union salary[187] for all years prior to 1970 x number of years employed) + (2-1/2% x average annual union salary during and after 1970 x number of years employed) = annual pension. Thus, if an International official were to retire after 25 years of service in the Union, 15 of which was at the IBT level, and if his average annual salary were $50,000, he would be eligible to retire on an annual pension of $48,750.

Since the Constitution grants the International General Executive Board authority "to adopt, maintain or amend any pension or health and welfare trust agreement or plan which it deems to be in the interest of the officers. . .", these seventeen individuals are empowered to sit around a table and decide just exactly how much they would like to receive when they retire. There is no requirement that they submit the plan to the Union's rank and file for approval much less that they even inform the rank and file of its existence. Moreover, due to the incredible flexibility vested in the Executive Board to modify their pension plans, or even tailor make them to the needs of specific individuals, it would appear that the Board could easily induce the departure of a member it might want to ease out or that members could scratch one another's backs as they plan for their own retirements.[188] The IBT Constitution, as it is currently worded, simply makes all this possible.

The second IBT pension plan, the Affiliates Plan, covers every officer or employee of every affiliated Local, Joint Council and Conference "who has completed three years of employment". Since the most frequent elections held in the Union are held no more frequently than every third year, every official who is ever elected to any Teamster office and who serves his entire term is covered by this Plan. This includes most of the International officers inasmuch as most of them simultaneously hold some position in a subordinate, affiliated Teamster organization as well. Accordingly, they are eligible to collect benefits under both plans.

Bear in mind that since the contributions into these plans are made out of the IBT treasury, every Local Union official automatically has a stake in seeing that the per capita dues their organizations must pay to the IBT are sufficient to make the required payments into their Affiliates Plan. Remember also that the IBT dues structure is part of the IBT Constitution (Art. X, Sec. 3) which is subject to modification at Conventions. Who are the delegates to the Conventions? Yes, of

[187]Evidently an official's "salary" is not limited to just his IBT salary but may be the total accumulation of salaries for holding office in multiple organizational entities.

[188]In the International's 1975 LM-2 report, there appears the following mysterious entry under the heading "contingent liabilities":

"On October 24, 1975 the International Brotherhood of Teamsters entered into an agreement with the Retirement and Family Protection Plan for Officers and Employees of the International whereby the International Union agreed to set aside $698,064 in a deposit account for a contingent liability which will be determined by December 31, 1977."

course, the Local Union officials. How large is their stake in the IBT dues structure? In 1975, thirty-three cents of every dollar the Locals contributed to the IBT were plowed back into this special plan for the benefit of their officers. While the Teamster rank and file may in some instances have a little authority to approve the salaries they pay their officers out of the Local treasuries, they are virtually powerless to affect these pension, death and severance benefits their officials will receive. They are entirely frozen out of the decisional process by the rules of the IBT Convention which enable their officials to line their own retirement pockets. Nonetheless, it is the rank and file who must pick up the tab.

Just how nice are the benefits which may flow from the Affiliates Plan to all Teamster officials? According to the plan description (Form D-1) filed in June of 1973, all Union officials and employees are eligible to retire at age 50 if they have worked for the Union for 15 years. If they retire at age 57 and have 15 years of service, they will receive an annual pension computed according to the formula: 2-1/2% x average annual salary up to $40,000[189] x number of years employed = pension. Thus, if an official were to retire after 20 years with an average annual salary of $30,000, he would be eligible to receive a pension from the Affiliates Plan of $15,000 per year. But, that is just the beginning of the benefits to which he is eligible under the Plan.

Other benefits for which all Teamster officials are eligible under the Affiliates plan include disability insurance, lump-sum severance pay, and lump-sum death benefit (to survivor or beneficiary). To qualify for the disability insurance, an officer need only have had 9 years of service to receive an annual payment computed according to the same formula used for figuring the level of pension payments. To be eligible for the death and severance benefits, the officer need only have had 3 years of service. The death payment is 7-1/2% of all earnings after 1961. The severance payment is 5% of all earnings during the first 10 years of service plus 7-1/2% of all earnings after 10 years. Thus, the death benefit to the survivor of the official who worked 20 years in the above example would total $45,000. In addition, when that official left the Union voluntarily, or when he was "severed" by his members in an election, he would have received $37,500 as his lump-sum severance benefit.

In addition to the two International pension plans, various other organizational units in the Teamsters Union also have separate retirement plans for their officials who may simultaneously be beneficiaries of one of the International's plans. The essential point to understand is that there is no limit on the number of pension plans a

[189]The salary ceiling listed in the Union's 1973 D-1 report was $20,000. Although the Union had not filed an amended D-1 report when this Report was published, PROD learned from a reliable source inside the Union that the ceiling had been raised to $40,000 and that the period of time for 100% vesting had been shortened from 15 to 10 years.

Teamster official might line up to tide him through his retirement years.[190] For example, all of the officers of Chicago Local 710 appear to be covered by the plan that covers the Local's over-the-road drivers, the Local's own special plan for officers, and the Joint Council 25 plan, in spite of the fact they are not all officials of the Joint Council.

Another method used by a number of Teamster officials to soften the financial impact of their individual separation from the Union is the severance fund earmarked for their benefit. For example, we have already seen this device used successfully by various Cleveland Teamster officials in Chapter 7. While these officers may have been innovators of the severance plan, they by no means have a patent on it.[191] In Baltimore, Leo Dalesio had his Local 311 set up a special trust fund in 1966 to provide him with benefits in the event he should be voted out of office.[192] As of 1974, the trust had accumulated $130,489 in assets. St. Louis Local 618 has created a similar severance fund for its president, Ed Dorsey which, as of 1974, was worth $85,313 which the Union has labelled as an accumulation of unpaid compensation from 1944 through 1962.[193] The officers of Local 295 in Jamaica, N.Y., voted themselves a special lump-sum severance pay award plan several years back which paid Harry Davidoff $52,000 when he retired from that Local in 1972 in order to devote his energies to Teamster Local 851 which he

[190]The "model" Teamster bylaws contain an open-ended provision conferring unlimited discretion upon subordinate Union officials to create special trust funds for their own personal benefit. The following is a typical provision:

Benefits. The Executive Board may from time to time provide fringe benefits for officers, employees and representatives of this organization, including but not limited to such fringe benefits as vacations with pay and expenses thereof, holidays, sick leave, time off for personal leave, and in connection therewith, any disability or sickness, health and welfare and retirement benefits and activities and facilities relating thereto, and may from time to time provide changes therein as well as additional compensations and allowances. Art. VII, Sec. 4, Local 728 Bylaws. (Local 728 is the Atlanta Local headed by IBT Vice-President Weldon Mathis.)

[191]For example, a business agent or officer in Cleveland Local 407 may be covered by the Local's own Severance Fund, the Joint Council 41 Business Agent's Pension Plan, and the IBT Affiliates Plan. The officers in Pontiac, Michigan Local 614 appear to be covered by their Local's severance fund as well as the Michigan Joint Council 43 fund and the IBT Affiliates Plan. Salvatore Provenzano and his fellow Local 560 officers and agents have the protection of the generously funded Local severance plan in addition to the benefits of the Joint Council 73 and IBT plans.

[192]This and all other severance funds which have become quite popular among Teamster officials, appear to be intended as a financial backstop to cushion the officials from the effects of union democracy. With such financial security, one may question the extent to which the officials will continue to be motivated to represent the will of their electorate.

[193]This fund was not even created until 1962. Whether this sum of money was actually earned, but deferred, or whether it was simply created and then spread back over a number of years in order to make it appear to have been more modest is a question which should be asked by the Union's members. The answers may well determine whether the law has been violated. See 29 U.S.C. 501. They may also establish whether when, and how much income tax the beneficiary should have, or did pay.

had recently chartered. In 1974, Michigan Joint Council 43 set up a special severance account for its officials, and local officers in the state and funded it in that year alone with $176,000.

Other Local Teamster officials have made similar arrangements for themselves. Newark Local 863 — the bailiwick of reputed mafioso Joseph Pecora — reported a "reserve for Retirement Benefits" in 1974 which was worth $377,142. Typically, the Union did not report for whom these benefits were intended. St. Louis Local 688 maintains a special trust fund for the benefit of its former Secretary-Treasurer, Harold Gibbons. In 1974, the principal in this trust fund was listed as $159,966. A 4,000-member New York City Local 816 gave its president, Lester Connell, a 125% salary increase in 1974 (from $24,268 to $54,226) which the Union's bookkeeper indicated included a severance pay settlement.[194]

New Jersey Teamster leader Tony (Pro) Provenzano was one of the originators of the deferred compensation scheme. In late 1962, 2 percent of Local 560's members approved a salary increase from $19,500 to $44,500, and several months later they reportedly approved yet another raise bringing his annual salary (just from his Local) to $94,500. After Tony Pro went to prison in 1966 for extortion, he began receiving $25,000 annually from his Local which had reportedly built up a $250,000 deferred compensation fund from his "unpaid" salary during the few years immediately preceding his imprisonment. After his release, Tony Pro was forbidden by law from holding any Union office for a period of 5 years.[195] Nonetheless, Local 560 continued to pay him $25,000 annually and while his "deferred compensation fund" was still worth $98,785 at the end of 1974, Tony Pro went back on the Local's payroll the next year when his statutory period of Union exile ended.

In addition to making provision for his own direct remuneration, Tony Pro evidently created a "Local 560 Officers and Business Agents Deferred Service Payment Fund".[196] The existence of that fund first became known in 1963 when Local 560 filed its LM-2 report for the preceding year. That report showed that the fund was then on deposit at the Hudson City National Bank and was worth $93,818. Throughout the 1960s, Local 560 poured large sums of money into what it vaguely described under the heading, "Bank and Welfare".[197] In 1971, the Local

[194]This phenomenon might also account for the fact that Atlanta Teamster official, R.C. Cook, received a salary increase from $32,203 to $50,541 the year immediately prior to his retirement.

[195]See 29 U.S.C. 504.

[196]Once again, the Local has never divulged either to its members or to the government in a financial report exactly for whose benefit this fund was intended, what amounts have been paid from it, and of course to whom.

[197]For example, in 1962 the Local reported expenditures under this general heading of $79,802; in 1963, $79,907; and 1964, $54,323; and in 1965, $48,851. Because the heading, "Bank and Welfare", is so vague, PROD had no way of knowing whether it referred to just the Hudson Bank Deferred Service Fund or to that fund as well as some other welfare fund. Between 1966 and

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transferred this fund to the Garden State National Bank under an account it described as the "Officers and Employees Severance Pay Plan".[198] The purpose and value of this fund, and those for whose benefit it is intended, remain a mystery.

1970, Local 560 reported making major payments only into an unspecified "welfare fund". It was during these years that Tony Pro was incarcerated.

It is reasonable to conclude that the Local 560 rank and file have no knowledge whatsoever of the existence of these funds much less how much principal there is in the fund or funds and who draws, or is eligible to draw that money. The U.S. Department of Labor has failed to require Local 560 to fully report this information. It is possible that two business agents may, for example, have received sizable "severance payments" while in jail in recognition for their former services and loyalty. Salvatore Briguglio went to prison for counterfeiting, a charge that was originally filed against Salvatore Provenzano. Some say that Briguglio took the "fall" for Provenzano, currently an IBT Vice-President whom Fitzsimmons brought in to replace Tony Pro when he went to prison. Another business agent is Steven Andretta, an individual who has figured prominently in the investigation of Hoffa's disappearance.

[198]The amounts the Union reported contributing into this account are: 1971-$11,942, 1972-$77,164, 1973-$51,619, and 1974-$55,043.

CHAPTER 10

Pension and Welfare Funds: Further Sources for Enrichment

The AFL-CIO Code of Ethics explicitly forbids salaried officials of its member unions from accepting any additional compensation for managing union funds since "such service should be regarded as one of the functions expected to be performed by them in the normal course of their duties . . . ." Teamster officials are restrained by no such code of ethics, and a substantial number of them appear to regard pension and welfare funds as an attractive opportunity for enrichment. In this Chapter, we will present a number of cases where Teamster officers are profiting from such funds by drawing additional salaries or paying themselves lavish fees. We make no effort here to address, however, the subject of misuse of funds — a topic which deserves separate treatment.[199]

The model bylaws adopted by most Teamster organizations contain a provision authorizing officials to create trust funds "to provide benefits for members or their beneficiaries." Given this authority, a number of officers have set up pension and/or health and welfare trust funds, and in most instances they have appointed themselves to remunerative positions in the funds. As entirely separate legal entities — apart from the Union — the Teamster membership has no direct control over these trust funds, the way they are managed and their funds invested, or the salaries or fees they pay. Indeed, the rank and file frequently are not even aware that their officers are also trustees, administrators, or employees of such funds, much less that they are deriving additional income from the funds. The reason, once again, is because this information is not required by the Department of Labor to be reported by their officers in one place. Instead, this type of information has been reported by the funds, themselves, directly to the Department of Labor on D-2 forms, and it does not show up on the Local Unions' LM-2 reports which members can examine at their Union halls.[200]

[199]These funds are set up in trusts which are legal entities in and of themselves, totally apart from the Union which is the subject of this Report. Misuse of trust funds, kickbacks, unsecured loans to corrupt businessmen at extraordinarily low interest rates, etc., have been widely attributed to various Teamster officials and joint Teamster-employer funds such as the Central States Pension Fund *See e.g. Wall Street Journal*, July 22-24, 1975. This is an entire and separate subject which we do not attempt to present herein.

[200]Similarly, since Joint Councils and Conferences and other Teamster organizations file totally separate LM-2 reports with the Department of Labor, and since these reports are not available at the Local Union hall even though the Local official may also be an officer in other organizations, the rank and file who periodically "elect" these officials simply are not customarily aware how much money they are paying them in one fashion or another.

Who are some Teamster officials who are drawing additional salaries or fees from pension or health and welfare trust funds? In Chapter 7 *(Cleveland Connection)* for example, we saw that John Rusnak augmented the $26,148 salary he received for serving as a Local Trustee of Jackie Presser's Local 507 with another $24,000 for serving as "administrator" of the Local's health and welfare fund. John Trunzo supplemented his union salaries with an additional $24,700 salary for serving as "administrator" of Presser's Local 507 pension fund. The three top officers in another Cleveland Local (407), Thomas Lee, John Tanski and Cecil Kinney also sit as trustees of the "Local 407 Insurance Fund". During 1973, they each paid themselves a $5,416 trustees' fee which they increased the following year to $11,250.

A number of New York State Teamster officials also do very well by their Local trust funds. Utica Teamster boss Rocco dePerno drew nearly $20,000 in allowances and expenses from the various funds affiliated with his 3,000-member Local 182 on top of the $46,216 salary he received directly from the Local and the $30,897 he received from Fitzsimmons for serving as a General Organizer. Down in New York City, Local 805 president Abe Gordon supplemented his $26,000 salary in 1974 from that 3,000-member Local with an additional $32,000 which he drew from the Local's health and pension funds for serving as the "administrator".

Across town, the Crapanzano family dominates another small Teamster Local 27 and profits handsomely from its two pension funds. The senior Crapanzano, Patsy, serves as the secretary-treasurer of the Local; his son Robert is the president; his wife Marie is the recording secretary; and another son Patrick is a business agent. Patsy, Robert, Marie and Patrick are all trustees of the principal pension fund which Patsy "administers". Robert administers the second fund. All together, the Crapanzano family received $160,000 in 1974 for their various union related activities. Of this sum, nearly $40,000 came from the two pension funds.[201]

Bernard Adelstein is another New York Teamster official who, we have already seen, runs more than one Local with Fitzsimmons' express permission; he also runs their various trust funds. His Union positions include: secretary-treasurer of Local 813 (2,000 members), president of Local 1034 (3,000 members), and trustee of Joint Council 16. In addition, he is both a trustee and the administrator of Local 813's Pension Fund, Insurance Trust Fund, and the Severance and Retirement Trust Fund which also covers Local 1034. Bernard's two sons, Alan and Martin, serve as trustees of the three funds to protect the

[201] See Chapter 14, *Profiles*, for a more detailed breakdown. Those portraits will also disclose other officials who receive fees from trust funds. See e.g. Frank deBrouse from Washington, D.C. Local 639 who received $10,800 in 1974 for serving as a trustee of his Local's two trust funds.

funds' beneficiaries and assure that their father's conduct meets the highest fiduciary standards. In 1974, the three Adelsteins netted a total of $233,000 for their various Union related activities on behalf of their 5,000 members. Of this sum, $46,200 came from the three trust funds.

The giant Central States Pension Fund, which covers a majority of the Teamsters who work in the nation's freight trucking industry, has been a particularly lucrative watering trough for a number of Teamster officials over the years. As we saw in Chapter 7, William Presser received $28,800 from this Fund in 1974 for serving as a Union Trustee. He has since been forced to "retire" as a trustee due to his conviction for accepting illegal payments from employers in exchange for selling his members short, a crime which the lawmakers decided proved that a labor official was not worthy of the high fiduciary trust expected of a pension fund trustee.

Frank Ranney and Donald Peters are two other Central States Fund trustees who have received substantial sums from the Fund for their services. Ranney barely qualifies as a Teamster official since the only position to which he is elected by the rank and file is trustee of Milwaukee Local 200, a secure, albeit obscure, position which entails only a few days work each year and which carries with it very little responsibility or authority. Nonetheless, Ranney obviously has the confidence of high ranking International Teamsters inasmuch as he has been given positions as a General Organizer, and member of the Central States Drivers Council, in addition to his position as a Fund trustee. In 1972, Ranney received a $15,300 allowance from the Fund. The following year that figure leaped to $65,100. In 1974, Ranney collected a $59,840 allowance, plus another $16,519 in expenses from the Fund which, combined with his other Union salaries, brought his total "take" that year to over $125,000.

As president of Teamster Local 743, the largest in the country with roughly 32,000 members, Don Peters is a very busy official. Nonetheless, he apparently devotes considerable time as a trustee of the Central States Fund which paid him $15,000 in 1972, $41,480 in 1973, and $33,144 in 1974.[202] In this latter year, Peters also drew his full $80,000 salary from Local 743, which together with his compensation from the Pension Fund and the $31,000 he received from Fitzsimmons for holding the title of General Organizer pushed Peters over the $140,000 mark in total Union disbursements in 1974.

Not only do many Teamster officials find their services to various Teamster trust funds to be rewarding, so also do a number of other

[202] The $33,144 figure breaks down as follows: $27,980 in allowances, and $5,164 in expenses. Since the Fund was paying a $400 per diem allowance, Peters must have devoted 69 days in 1974 to Fund business or a total of at least 27% of all working days that year.

individuals who serve as consultants, lawyers and administrators.[203] For example, the Pressers' Ohio Drivers' Welfare Fund paid their administrator, Dayton, Ohio attorney Robert Knee, Jr. $878,915 in fees during 1974. This sum amounted to approximately 5½% of the total assets in the fund. During 1973, this fund also gave $191,857 in special "fees" to each of two companies owned by Allen Dorfman, Amalgamated Insurance Service Agency and Health Plan Consultants. Although Allen Dorfman was convicted of taking a $55,000 kickback for a loan made by the Central States Pension Fund, his companies have thrived as a result of all the "consulting" business they have provided various Teamster funds. For example, Amalgamated provides various services for Teamster welfare plans including the IBT employees' Health and Welfare Fund,[204] Don Peters' Local 743 plan, Jackie Presser's Local 507 plan, and William Presser's Joint Council 41 plan, not to mention the Central States Health and Welfare Fund which, alone, paid Amalgamated $3,278,206 in "service fees" during 1974. In addition, the Central States Health and Welfare Fund paid the following amounts to other Dorfman companies that year: Conference Insurance Consultants, $373,206; Health Plan Consultants, $413,942; and Dental Health, Inc., $47,121.

Cleveland Locals' 407 and 545 welfare funds paid Bernard S. Goldfarb, Inc. a total of $222,202 in 1974 for "office salary, rent, utilities, and maintenance of funds". It so happens that Bernard Goldfarb is a management labor lawyer who represents a substantial number of trucking firms in the Cleveland area. Surprisingly, the trustees of these funds have elected to headquarter their trust funds in his law offices.[205] By itself, this fact might not be so remarkable since the trusts are jointly administered by management, as well as union trustees.[206] However, as a practical matter, those who administer health funds are in daily contact with union members with various claims as well as their Local Union officials who may be assisting them to collect on their claims. It might seem a little odd that these members and the Local officials

[203]The former administrator of the Central States Pension Fund, Frank J. Murtha, was paid a $66,000 salary in 1972, the last full year during which he held the post. During that year, Murtha also received $35,145 for serving as a Fitzsimmons' General Organizer. It is interesting to note that Murtha owed the IBT $10,000 on a note it had given him to purchase real estate at the time Fitzsimmons put him on the IBT payroll, a convenient means of facilitating repayment. Moreover, while Daniel Shannon replaced Murtha in 1973 as administrator of the Central States Pension Fund, it nonetheless continued to pay Murtha $35,000 in 1973 and $22,000 in 1974 for services as "retired administrator".

[204]This IBT fund also paid longtime Dorfman business associate, Sol C. Schwartz, $11,216 in direct fees in 1974. Schwartz has reportedly been associated with Abe Chapman, a "consultant" whose real name is Abraham "Trigger Abe" Chapalowitz, a one-time hit man for Murder, Inc.

[205]The firm of Goldfarb & Reznick is located at 1825 The Illuminating Bldg., 55 Public Square, Cleveland, Ohio.

[206]In 1974, Goldfarb received trustee's fees of $6,250 from the Local 293 Welfare Fund, and $5,000 from the Local 545 Health and Welfare Fund.

should have to "consult" on such a regular basis with the law firm which represents management and is generally considered to be an adversary.

In addition to serving as a trustee and providing legal and managerial services to these Cleveland Local trust funds, Bernard Goldfarb is also one of the management or employer trustees of the Central States Pension Fund.[207] Serving with Goldfarb as employer trustees are Thomas J. Duffey, Herman Lueking, William Kennedy, John Spickerman, Jack Sheetz, Albert Matheson and John Murphy. Each of these men is actively involved in the day-to-day operations of truck companies which are covered by Teamster collective bargaining agreements.[208] The principal concern of these trucking executives is *not* the investment policy of the Central States Pension Fund under which their employees might some day qualify for a pension, *but rather* with their current costs of doing business, a substantial part of which result from Teamster collective bargaining contracts. Assuming that their Union counterparts may also desire something which they have the capacity to provide, trustee meetings afford their members a golden opportunity to arrange various mutually advantageous deals. More on this in a moment.

At first glance it would appear that except for trustee allowances or fees, the Union trustees ostensibly have nothing to gain by their positions as trustees. Presumably, the only reason they serve as trustees is because it is an honor to hold such a high fiduciary responsibility and because, as dedicated trade unionists, they welcome the opportunity to serve the Teamster rank and file in yet another capacity. In fact, there may be other reasons why Teamster officials have been eager to serve as fund trustees.

The Central States Pension Fund, along with numerous other Teamster trust funds, is unusual in that the trustees have, themselves, assumed the responsibility for making all investment decisions (e.g. select loan applicants, banks, etc.) rather than assigning this sophisticated and demanding task to professional investment experts.[209] As a result, the trustees are in a position to make huge sums

[207]In addition to his other trustee fees, Goldfarb received a $13,420 "allowance" and $4,053 in expenses from this Fund in 1974.

[208]Goldfarb represents the Cleveland Drayman Association and the Northern Ohio Motor Trucking Ass'n. Duffey is associated with the Motor Carriers Labor Advisory Council of Milwaukee. Lueking operates Lueking Transfer out of St. Louis. Kennedy runs Supreme Express and Transfer, also out of St. Louis. Spickerman was until late 1975 the Chief executive officer of Terminal Transport based in Atlanta. Murphy is head of Gateway Transportation out of La Crosse, Wisconsin. Sheetz is with the Southern Operators Ass'n. Matheson is secretary of the Michigan Motor Carriers Ass'n.

[209]In stark contrast is the Teamsters Western Conference Pension Fund which was an "insured plan" administered entirely by the Prudential Life Insurance Company. It is totally independent

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of money available to their friends or business associates even though those individuals may be involved in exceptionally high risk ventures and may put up very little collateral and in spite of the fact other more secure and deserving loan applications must be rejected. The opportunity for arranging kickbacks from such individuals or businesses is always present for the trustee who pushed the loan through or for his family members, whether in the form of cash or stock, present or future. The temptations are inevitable and great in such situations.

Now, let's take a look at the trustees' balance sheet. On the surface, the Union trustees stand to gain absolutely nothing of economic value by serving as trustees except in some cases a fee or allowance. Below the surface, however, there may be opportunities to arrange kickbacks or special favors which they may seek. Theoretically, the employer trustees also have this same opportunity. However, since in the real world they are all competitors, they are much less likely to work together closely and to vote as a block than the Union trustees who are all colleagues and work together day in and day out. Therefore, the employer trustees are not really in a position to be able to arrange loans for friends. The employer trustees do, however, have their own more immediate economic concerns which stem from their labor contracts. Since the cost of labor is the single greatest cost of doing business in the trucking industry, if these men can persuade the Union trustees to "relax" some of their commitments under those contracts, the employer trustees can save their companies millions of dollars. Therefore, the *quid pro quo* is: "you give me a sweetheart contract or at least guarantee that I will not have to live up to the letter of my contract, and I will approve loans to your buddies and ask no further questions." Each has something the other wants.[210] When this form of callaboration occurs, the Teamster rank and file are, of course, double loser's. On the one hand, those who work for the employer trustees' companies do not get what they are entitled to, and every Teamsters' pension equity is endangered when their funds are not wisely invested.

To be more specific, let us focus once again upon the Central States Pension Fund as an example. Who are the Union's trustees and what are their relationships with the employer trustees whom we have already

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of the Central States Fund. Following an interview with Einar Mohn, former Director of the Western Conference, the Oakland Tribune quoted him as saying:

"If we had a funded plan (similar to the one in Chicago) I would want it to be an irrevocable condition of the trust that the decisions on investments be made by a bank or some other financial institution, perhaps even a blue ribbon committee of financial experts .... I don't think a layman has any business trying to sweat out the market. Our pension fund trustees aren't qualified to make those kinds of investment decisions, and I think they'd agree with me." *Oakland Tribune*, Sept. 28, 1969.

[210]No doubt, the Union and employers will quickly point out that the Taft Hartley Act requires that employee trust funds be jointly administered by employer and Union trustees. However, the Act does not require the trustees to manage the funds amd make the underlying investment

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identified. Due to the lack of current data, we will concentrate upon the trustees during calendar year 1974 before William Presser was ousted by the U.S. Department of Justice. In addition to Presser, the other Union trustees were Frank Fitzsimmons, Roy Williams, Joe Morgan and his lieutenant W. W. Teague, Frank Ranney, Don Peters and Robert Holmes. Morgan and Teague are out of the Southern Conference whose jurisdiction embraces Terminal Transport whose chief executive officer, Spickerman, sits with them as an employer trustee. Spickerman's executive in charge labor relations, Rudy Pulliam, sits on the opposite side of the bargaining table from both Morgan and Teague during the negotiations for the National Master Freight Agreement which are supposed to be conducted "at arm's length". Consider the fact that during the term of the 1973-1976 contract, Terminal Transport was allowed by the Southern Conference to layoff large numbers of regular employees and use "casuals" instead, a means of cutting many labor costs to the company.

The only Union trustees on the Central States Fund who do not also participate in the negotiation of the National Freight Agreement are Ranney and Peters. However, Ranney does sit on the Central States Drivers Council along with Roy Williams, Fitzsimmons, and William Presser and it is in the Central States area that the opportunities for collusion are the greatest. Because these Union officials effectively control the grievance machinery in the Central States, they can easily arrange the necessary "protection" for the companies — not members — either owned or represented by trustees Goldfarb, Murphy, Lueking, Kennedy and Duffey.

Regardless how much "hanky panky" may actually go on between Union and employer trustees of the many Teamster trust funds, the fact is that their many, nonadversarial meetings to consider investment decisions and conduct other fund business are conducive at the very least to the development of close cooperative friendships. Whatever else may be said, the principal role of a union official is to understand and represent the interests of the rank and file to whom he owes his total loyalty. The "understandings" or friendships which are nurtured over the years in the cooperative atmosphere of trustees meetings give rise to the most fundamental conflict of interests possible for a professional trade unionist.

Oddly, many high ranking Teamster officials make no effort to hide, and even flaunt their camaraderie with management officials. For example, at the much publicized Frank E. Fitzsimmons Invitational Golf

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decisions. Nor does the Act require the Union and employer trustees to be the very same individuals who are responsible for negotiating and administering contracts. These are the circumstances which pave the way for collaboration which is unique to Teamster funds. Most unions appoint outside legal counse: or other "representatives" to serve as their trustees who rarely participate in the actual process of investing the funds.

Tournament at La Costa in 1975, Fitzsimmons asked Central States Fund trustee John Murphy to join the lead party which also included Dusty Miller and Joe Trerotola. At the time, Murphy also headed Gateway Transportation, a company which has received loans from the Central States Fund, and was treasurer of the American Trucking Associations. Finally, Murphy happens to be one of the nine individuals representing management who negotiate the Master Freight Agreement covering 450,000 Teamsters.[211]

Of course, if the Teamsters Union were a truly democratic institution, its constituents would quickly oust any official displaying such camaraderie with their employers. The fact that many Teamster officers have been so brazen in their display of friendship toward their members' adversaries is further proof of the fact they know they cannot be held accountable to the Teamster rank and file. They are insulated by the Union constitution and bylaws. Moreover, while the membership might be inclined to mutiny under other circumstances, they are afraid for their persons and their jobs due to the form of "representation" their officials may afford them.

[211] Investigative reporter Jim Drinkhall has identified some of the more congenial groupings among the 1974 tournament participants. Drinkhall reported that Fitzsimmons and Murphy teed off together with Moe Dalitz, Allen Dorfman, and Las Vegas gambling figure Ross Miller. Other Central States employer trustees (in addition to Murphy) who were present were Jack Sheetz and John Spickerman. The president of Spector Freight, Wilfrind Stanhaus, played as did Bill Wolff, the official with Youngstown Cartage who made the illegal payoffs to Fitzsimmons' Special Organizer, Roland McMaster. Alex Maislin (Maislin Transport, a big company in the East) teamed up with New Jersey Teamster bosses, Salvatore and Tony Provenzano. Rudy Pulliam (Terminal Transport) joined the party which included IBT lawyer David Uelman (Goldberg, Previant & Uelman, the Milwaukee firm which has masterminded the affairs of the IBT under Hoffa and Fitzsimmons). *Overdrive Magazine*, April 1975.

PART III

THE CLEANUP — WHERE AND HOW TO BEGIN

CHAPTER 11

A Shopping List of Weaknesses and Guide to Reform

In this Part of the Report, we will *not* make a comprehensive effort to propose solutions to each and every problem touched upon in the foregoing Parts. We will, however, attempt to recapitulate and identify certain of the more fundamental political and financial weaknesses in the Teamsters Union and offer some very general suggestions which may be considered as possible approaches to reform by those interested in undertaking the task. We stress the fact that we intend our proposals to be considered merely as suggestions — food for thought.

The principal responsibility for reforming the International Brotherhood of Teamsters must lie with the Union's rank and file. They possess four basic tools for achieving reform. In the first place, they can become more organized and active at the Local level. Corrupt or unresponsive officials who may also hold higher offices can be ousted at the Local level. The second tool available to the rank and file is their power to amend their Local bylaws. In this same category is their indirect power to amend the IBT Constitution. Currently, this can be achieved only by their Local elected officials. The third basic tool available to the rank and file is the internal union disciplinary procedure. Charges may be preferred against officials for their actions which are not in the best interests of the membership. The final basic tool the rank and file have available for remedying political and financial abuse by the Teamster leadership is the right to utilize the federal judicial system, with the aid of their own lawyers, to gain access to Union receipts and other financial data, and to prosecute offending officials who have abused the trust placed in them by the rank and file or who have violated the Union's constitution or bylaws.

A major share of the responsibility for the state of affairs in the Teamsters Union today must also, however, be borne by the executive branch of the federal government and the United States Congress. As a purely practical matter, the Teamster rank and file simply do not possess adequate information, on a regular basis, to alert them to the many problems and abuses taking place within their Union. Obtaining this information under the current laws as they are administered by the Department of Labor is arduous, if not impossible for the rank and file. Accordingly, before truly meaningful reform can get underway in the Teamsters Union, "outsiders" in the federal government will have to undertake a thorough review of the realistic problems which the Teamster rank and file will confront and either provide them with direct or indirect assistance. Direct assistance could take the form of more

aggressive investigative and law enforcement activities. Indirect assistance could take the form of insuring that the rank and file would have adequate information and legal tools to go about the task of reforming the Union themselves.

Let us proceed now to consider a shopping list of some of the more flagrant problems in the Teamsters Union which cry out for solutions. In constructing our list of problems and possible approaches to remedying them, we will group them in the same two categories, namely political and financial, in which they were presented in the foregoing Parts of this Report. Our treatment will be necessarily abbreviated. The problems are frequently very complex and interrelated. Constructing solutions to these problems which will not create their own problems or seriously weaken the Union is a demanding chore which will require both vision and technical expertise.[212]

Political Weaknesses and Suggested Remedies

Since, as we discovered in Part I of this Report, the International Brotherhood of Teamsters and its leadership may accurately be described as "the tail which wags the dog," let us begin our list, and concentrate upon the political structure of the IBT.

1. The General Executive Board functions as a rubber stamp to approve the actions of the General President and Secretary-Treasurer. The Vice-Presidents owe their primary allegiance to the General President. The Vice-Presidents are not inclined to exercise independent judgment. The General Executive Board does not, therefore, function as the principal governing body of the IBT.

An underlying reason for this phenomenon is the fact that the Vice-Presidents are elected "at large" by every delegate to the International Convention. Because the Union is composed of such a large number of members working in diverse industries, convention delegates have no way of judging the qualifications of candidates for Vice-President. The Vice-Presidents are accountable to no specific constituency of members within the Union. This problem could easily be corrected if the Vice-Presidents were in fact elected by the rank and file within specific segments of the Union, divided either along geographic, or particular industry or craft lines. The Vice-Presidents would accordingly be accountable to the membership in their particular constituencies. By the same token, they would not be dependent on the General President for their office, and would accordingly be able to exercise independent judgment. Votes on particular kinds of subjects or issues during Executive Board meetings should be recorded and

[212]The PROD staff will be available to anyone who wishes to discuss such matters generally, or to obtain technical assistance in drafting desired amendments to the Constitution or any bylaws.

published so that the Vice-Presidents' constituents could appraise their representatives' actions on the governing board of the International Union.

2. The delegates to International conventions do not necessarily represent the interests or will of the Union's rank and file.

In the first place, a number of delegates who vote on such sensitive and key matters as amendments to the Constitution are representatives from Joint Councils, Conferences, and the International (organizers and auditors). These individuals are inclined to vote their own individual, or Union institutional interests, rather than the interests of the Union membership. They should not be entitled to attend the convention as delegates.

The bulk of the delegates are Local union officials. These individuals were elected by the rank and file up to several years before the convention, not on a platform which addressed the fundamental constitutional issues involving the International Union, but rather on a platform addressing either their prior performance, or their promised approach to the process of negotiating and administering collective bargaining agreements covering the Local membership. Local union officials should not be entitled automatically to attend International conventions as delegates. Rather, special elections should be held a short time before the convention so that the rank and file may select the delegates they wish to represent them during the International convention. Some might argue that delegates who have not served as Union officials will not know enough about the business of running a union to pass judgment on fundamental questions which affect the running of the International Union. This argument has no merit for many reasons. The most simple answer is, however, that if a Local union official could win one election, he should presumably be able to win another. To the extent that the Union's rank and file should send a number of delegates who are not serving in Local union office, the convention will become a considerably more independent, supreme governing body. Non-officer delegates would not confront the prospect of internal union reprisals from a disgruntled IBT leadership. They would arrive at the convention without any of the conflicts of interest which can compromise Local officials. They would not have been on the receiving end of a steady stream of benefits, favors or privileges from the Union's principal leadership over the years.

3. Convention delegates are unable to ascertain the sentiments of the Union's rank and file on issues they will be required to vote upon during the convention. Neither candidates, nor matters of convention business, are announced prior to the commencement of convention proceedings.

This should be changed, particularly if there should be special elections for delegates prior to conventions. Individuals seeking to

represent the Union's rank and file at conventions should be able to develop platforms addressing the basic issues which will arise during the convention proceedings and declare their position on those issues. In the first place, if the Vice-Presidents have already been elected by their geographic or trade divisions, the only officers who would be elected during the International convention would be the General President and Secretary-Treasurer, and the three International trustees. New eligibility rules should be established for determining who may run for these offices. For example, any Vice-President might be eligible to run without facing the prospect of losing his Vice-Presidency in the event he should not succeed. Other individuals accumulating a certain number of signatures on a petition might also be eligible to run. As in national and state politics, all candidates would have to declare their candidacies in advance of the convention. So too would all proposed amendments to the Constitution have to be announced in advance. Candidates should thereafter be guaranteed a certain amount of space in the *International Teamster* magazine to describe their qualifications and declare their positions on issues affecting the International Union. Proposed amendments should also be published in the magazine. Thereafter, during elections for the many delegates to the International convention, the sentiments of the Union's rank and file with respect to these candidates and proposed amendments could be expressed. In this fashion, the rank and file could effect its will upon, and once again gain some degree of meaningful control over, the International Union and its chief executive officers.

4. The rank and file have no way of knowing how their delegates voted on issues and candidates during the IBT conventions.

If the International Brotherhood of Teamsters and its principal officials are to be made accountable to the Union membership in any way whatsoever , then the intermediaries, namely the delegates to the IBT conventions, must first be made to be accountable to the Union's rank and file. Accountability could be achieved in two ways. One, only those delegates who reflect the will of the majority of the Union's members would be sent to the convention were there elections for delegates prior to the convention. Secondly, where the votes which the delegates cast during the convention are a matter of public record, the rank and file can assure themselves that indeed their delegates did vote as they would have themselves. While it may be too late after a convention to change a delegate's vote, at the very least the Union's rank and file can express their displeasure by evicting him from office during the next local election in the event that the delegate was an officeholder.

5. Teamster Locals do not have proportionate representation on Joint Councils and Conferences which accordingly are not representative Union organizations.

Each Local is entitled to send the same number of representatives to Joint Council and Conference conventions as every other Local within the jurisdiction of these "supervisory" organizational units in the Union's hierarchy despite the fact some Locals may only represent a few hundred members and others may represent many thousands. Nonetheless, these Teamster organizations have the power to tax the Locals on a per capita basis. Such taxation should occur only where there is equal representation. Locals should be entitled to send a number of delegates to Joint Councils and Conferences which is proportionate to the size of the Local.

6. Internal Union discipline is a one way street. The disciplinary procedures permit officers to squelch dissent among the rank and file. The membership lacks a meaningful procedure for disciplining corrupt officials. The power of the General President to mete out discipline is excessive.

There can be no doubt that disciplinary procedures are an important ingredient in a successful labor organization. Principal officers need to be able to discipline either members or subordinate union officials who jeopardize the union's legal commitments or expose it to lawsuits which might result in substantial damage awards. Both officials and members need to be able to discipline those officers who abuse the fiduciary trust vested in them by the rank and file.

In the Teamsters Union, disciplinary procedures can only be used successfully by officers to punish members, not by members seeking to hold an official in line. Indeed, judging from the list of punishable offenses, the procedures appear almost to have been designed to intimidate the rank and file and any political adversaries of the Teamster leadership. Under no circumstances should disciplinary procedures operate to squelch dissent or political opposition. Teamster disciplinary procedures need to be overhauled so they cannot function as a political weapon. While such procedures may need to be strong and effective, they must also be fair and impartial. Examples of some needed changes follow.

The grounds upon which the General President can throw a Local or Joint Council into trusteeship need to be spelled out in detail. Trusteeships should automatically lift within 6 months during which time new elections should be run. Union charters should not be revoked except following hearings and the issuance of a written statement of reasons pursuant to procedures similar to those used when imposing trusteeships. The negotiation of sweetheart contracts should be grounds for discipline of an officer and/or imposition of trusteeship

permitting the Union to abrogate the invalid contract. Any substandard contract must be approved in writing by the General President and all contracts must be submitted to the membership covered by those contracts.[213]

7. Eligibility requirements for holding Union office are in most instances so strict that only a very small percent of the Union membership is entitled to run for office. These requirements frequently preclude the more talented members from opposing unresponsive incumbents.

Teamster bylaws generally require a member to have been a member of the particular organization in which he is running for office for a period of years and to have attended 50% of the membership meetings of the organization. Such requirements do not appear to have been designed to insure that only competent members would qualify to run for office. On the contrary, they generally operate to disqualify most potential opponents of incumbent Teamster officials. These overly strict requirements should be substantially modified and generally overhauled.

Financial Weaknesses and Suggested Remedies

The financial disclosure requirements of the U.S. Department of Labor are woefully inadequate. Without information, the rank and file have no way of knowing whether or not a problem even exists. Not only do they need to be able to identify problems or areas of financial abuse

[213]Art. XII, Sec. 1, and Art. XVI, Sec. 4 of the IBT Constitution do purport to require rank and file approval of all contracts by a majority vote. As a matter of fact, however, most sweetheart contracts somehow escape these ratification requirements. Union officials eager to execute such agreements frequently claim that they are simply contract amendments or riders which do not require submission for rank and file approval.

Moreover, while the Constitution appears to require majority approval of contracts, Union officials can claim approval where only one-third vote their approval by claiming that the contract constitutes the employer's "final offer" and by tying the vote to reject the offer with a vote to strike. Strikes require a two-thirds authorization. In the absence of a successful strike vote, Union officials proceed to execute the contract.

The single largest collective bargaining agreement negotiated by the Teamster Union — the National Freight Agreement — is not in fact a single contract, but rather a collection of some 32 significantly different agreements under a single "umbrella" agreement containing generally inconsequential provisions. Rather than offering each of the 32 separate agreements to just those members covered by them, the IBT provides every member employed in the freight-trucking industry in the entire country with the same ballot asking them whether they approve or disapprove of the National "umbrella" Agreement and their Supplemental Agreements. Under this method of voting, members are not voting upon just their own contract; instead, they are voting upon everyone's contracts even though they have no idea whatsoever what are contained in those contracts. While members covered by certain contracts may vote overwhelmingly to reject their agreements, the Union will still execute the contracts and force the members to live under what they consider to be totally unacceptable and offensive contracts if an absolute majority of all voting members vote to approve their contracts.

These procedures which permit the Union Leadership to execute substandard and highly unpopular collective bargaining contracts should be reformed. It is not only in the best interests of the members, but also the Union and the public. Otherwise, there will be, sooner or later, some reaction by the members to their state of involuntary, contractual servitude.

by their officials, the rank and file need to know exactly what the dimensions of the problem are so that they will be able to tailor an appropriate solution. *The lack of adequate reporting requirements is the threshold problem.*

8. On the subject of salaries, it appears that many Teamster officials believe that the sky is the limit. Exceedingly large incomes are amassed through a process of holding multiple union jobs and collecting multiple salaries from different organizational entities in the Union's hierarchy and also from various Union trust funds.

A) Government Assistance. Mandatory financial disclosure by all individual union officials of their gross receipts from all union sources, together with a breakdown of those receipts, would not by itself eliminate the problem. It would, however, give the Union's rank and file sufficient information to address the problem where it exists. Currently, officials do not themselves report their earnings. Rather, the various organizational entities which contribute to their income must report how much they are compensating their employees and officials each year. However, because of the fact Teamster officials frequently hold office in many different Teamster organizations, the membership has no way of determining how much the individual may be grossing from all union sources without making a systematic survey of many hundreds of Union LM-2 and D-2 reports. The Department of Labor should revise their reporting requirements to require that each elected official of any union entity prepare and attach a certified statement of his full earnings from all union (including trust fund) sources during the given calendar year as an addendum to the LM-2 reports filed by every organization in which he is an officer. Such a reporting requirement would, at the very least, permit the rank and file to learn readily how much they are actually paying their officials.

This relief would not directly remedy the problem of excessive, multiple salaries. It would simply enable the rank and file to measure and perhaps remedy the problem on its own.

B) An Internal Union Solution. One possible remedy to the problem of multiple salaries would be for the rank and file and their delegates to amend the IBT Constitution to impose ceilings upon salaries from all union sources, including trust funds. Ceilings would eliminate the incentive to "collect" titles and salaries. In addition to conserving Union funds, this remedy would also discourage officers from taking on jobs they have inadequate time to faithfully perform. As a result, the officials might simply concentrate upon performing a superior job in just one or two capacities. A sliding salary scale could be made a part of the Constitution. For example, the General President's salary might be set at $100,000; the Secretary-Treasurer's salary could be limited to $75,000. The ceiling upon a Vice-President's salary might be set at

$60,000, Joint Council presidents might be limited to $50,000 from all Union sources, etc.

9. One device frequently used by Teamster officials to jack up their income is the "allowance".

This category of remuneration should simply be abolished from the Teamster vocabulary. Without question, Teamster officials should be paid fair salaries and the Union as a whole can easily afford to pay all of its officers adequate salaries. Beyond these salaries, there is absolutely no need for further remuneration under the disguise of an "allowance". To the extent officials may incur expenses which are both reasonable and necessary to promote legitimate Union objectives, then they should be fully reimbursed for such "expenses". *Salary* and *expenses* are the only necessary words in the Teamster financial vocabulary. While the Union has sought to describe allowances as a form of reimbursement for expenses theoretically incurred by officers who must travel a great deal, much of this money is never spent and it simply ends up in their officials' pockets. The rank and file should be willing to cover all reasonable expenses (not including luxury apartments, first class air fare, and lavish entertainment expenses) for which receipts are presented. That is all that is necessary, and that is all that should be paid. Unlimited travel accounts to cover personal, as well as Union trips result in totally unjustifiable waste of Union resources.

10. Another form of unjust enrichment some Teamster officials enjoy is the occasional "gift" of a car, luxury apartment, cash, etc.

Like the allowance, the term "gift" should be abolished from the Teamster vocabulary. Gifts to Union officials out of Union treasuries should be prohibited by the IBT Constitution and all Union bylaws. If fellow officers and members should think enough of a retiring official, then let them pass the hat. At the very most, the treasury should not be taxed for any gift which is more than a token of respect and appreciation (e.g. an engraved watch).

11. The term "organizer" is frequently just an honorary title which permits its holder to collect a sizable salary in addition to whatever remuneration he is already receiving for performing other full-time, elected Union jobs.

Organizer jobs are not elective; rather, they are appointive. Teamster organizers should therefore be considered to be full-time employees of the elected Union officials who appointed or hired them. Organizers should be professionals who render valuable services to the Union. In addition to organizing unrepresented workers, organizers might also function as advisors or counsellors either directly to the officials who hired them, or to subordinate Union officials and members. There is no need for there to be an overlap between elected officials and

organizers. Organizers should not hold any elective positions which might detract from their ability to serve as full-time organizers. To the extent that elected officials are supposed to serve the rank and file who elected them and should owe their only loyalty to their Union member-constituents, a serious conflict of interest arises when they accept an appointive organizer job and must "report" to the official who hired them instead.

12. Severance and deferred compensation funds operate to immunize Teamster officials from their members.

It is one thing for the many, various Teamster organizations to provide their employees and elected officials with pension plans and disability insurance in addition to their salaries and expenses. It is an entirely different matter to award them with sizable, and in some cases huge, lump-sum payments when they leave their Union positions — even as a result of their being voted out of office. Severance and deferred compensation plans should be banned by the Union's Constitution and all bylaws. All existing plans should be abolished and their funds should revert to the treasuries of the organizations which theoretically created the plans and which have funded them over the years.

Severance funds operate to erode union democracy. When the financial impact of being voted out of office is softened to the point it may make very little difference to an official whether he should survive any particular election, his incentive to represent his member-constituents is undermined. Yet, *representation* is what trade unionism is all about! A union which is structured so that its elected officers can forget what its members need is a union which has ceased to perform the role for which it was created.

At the very most, Teamster organizations might wish to provide defeated officials with a month's salary to tide them over while they locate other employment. Any additional remuneration is excessive and totally unwarranted.

13. Union officials who both negotiate and administer collective bargaining contracts on behalf of their members and who also sit as trustees on Teamster pension or health and welfare funds may be confronted with tempting opportunities for wheeling and dealing with employers and for arranging kickbacks for themselves.

Since these opportunities arise primarily where the trustees actually make investment decisions, one obvious solution would be to amend the IBT Constitution and all organizational bylaws to prohibit any Union official from serving as a trustee on any trust fund where these circumstances pertain. The ideal solution would be for the Union to select "outside" trustees to represent their member-beneficiaries' interests on the joint union-employer boards of trustees. However, in

lieu of bringing in outsiders with impeccable credentials, the Union trustees should at the very least be required to relinquish all responsibility for making investment decisions to skilled professionals. Their roles should be limited to the normal role of a trustee who only participates in making the very general decisions in his capacity as an overall supervisor of the fund management.

CHAPTER 12

The Landrum-Griffin Act — A Potentially Powerful Tool for Reform

When enacting the Landrum-Griffin Act in 1959, the United States Congress offered the following declaration of findings, purposes, and policy:

> . . . it is essential that labor organizations . . . and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations . . .
>
> . . . from recent investigations . . . it appears that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generallly as they relate to the activities of labor organizations . . .
>
> The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations . . . and their officers and representatives . . .
>
> [29 U.S.C. 401]

Seventeen years later — in 1976 — it does not appear that the Congress succeeded in its mission, at least insofar as it related to the Teamsters Union. Part of the reason for failure lies in the weakness of the statute, itself. A large part of the blame must however be borne by the federal government, particularly the Department of Labor which has simply refused or failed to fully implement and aggressively enforce the statute. Finally, a very small portion of the blame must be shouldered by the Teamster rank and file for not having utilized the legal tools provided in the statute to reform their Union and hold its officials to "the highest standards of responsibility and ethical conduct."

It must be recognized, however, that working Teamsters are not lawyers. Despite the statutory requirement that all unions educate their members about their legal rights under the statute,[214] most Teamsters are totally unaware of their rights. Indeed, while the statute does require that unions provide their members with copies of their collective

[214]See 29 U.S.C. 415 which provides: "Every labor organization shall inform its members concerning the provisions of this chapter." We know of no effort by the International Brotherhood of Teamsters to comply with this provision.

bargaining agreements, there is no requirement that they provide their members with copies of their constitutions and bylaws.[215] Very few Teamsters have copies of the IBT Constitution or bylaws of their Local, Joint Council or Conference. Thus, despite all of the disclosure requirements in the Landrum-Griffin Act, the Teamster rank and file do not in fact have meaningful access to the information which they would need to have before they could be expected to utilize the legal tools provided in the Act.

We will not attempt a thorough discourse of the Landrum-Griffin Act in this Chapter. For those who are interested in a more complete explanation of the law, this information is already available and may be obtained from a number of sources.[216] However, we will attempt to list and discuss very briefly a number of the members' rights under the Act and how they can go about securing their rights and holding their officers accountable at law.

A Union Member's Rights[217]

1. All members must have equal rights and privileges with all other members within the Union. They must be guaranteed equal voting rights in particular.

2. All members have an almost unqualified right to assemble with other members and to speak freely even where their speech (written or verbal) is highly critical of their Union officials.

3. All members have a right to vote by secret ballot for all Local dues increases.

4. All members have a right to institute legal proceedings to secure these and other statutory rights without any interference or disciplinary

[215]Compare 29 U.S.C. 414 and 431. All unions are supposed to permit their members to examine copies of their constitutions and bylaws upon request. There is, however, a big difference between actually providing each and every member with a copy and merely making one available for his examination at the union hall. In fact, many Teamster organizations refuse even to give their members this access to their bylaws.

[216]In its Newsletter to members, PROD from time to time analyzes different portions of the Act and how to go about using them to secure members' rights vis a vis the Teamsters Union. The Association for Union Democracy has also assembled a series of very useful documents explaining the law. Inquiries may be addressed to the Association at 215 Park Avenue South, New York, N.Y. 10003. Finally, the Department of Labor has published several booklets describing union members' rights and their officials' duties under this and other laws, including the recent Pension Reform Act (ERISA). They may be obtained by writing to: U.S. Department of Labor, Labor-Management Services Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

[217]The Landrum-Griffin Act also contains two entire chapters dealing solely with trusteeships and elections of officers. We do not touch upon either of these two chapters in this Report. The member rights discussed in this Chapter attach also to Union officials. Generally speaking, they too are privileged to exercise all of these rights in meetings and proceedings before Joint Councils, Conferences and the IBT and to obtain enforcement against higher officials infringing their rights.

action from the Union. Before instituting legal actions, members may be required to exhaust *reasonable* internal Union procedures. Where the Union Constitution or bylaws do not provide for reasonable procedures to obtain redress, or where 4 months have elapsed after attempting to use available procedures, members may go directly into court. The Union or its officers may be required to pay the member's attorney fees where he prevails in demonstrating that his statutory rights were infringed.

5. All members are entitled to receive a copy of their collective bargaining agreements. If the Union should fail or refuse to provide them with a copy, the Department of Labor is supposed to intervene and force the Union to provide them with copies. Any refusal to provide copies of contracts must be reported to the U.S. Department of Labor.

6. Every Teamster organizational entity (Locals, Joint Councils, Conferences, etc.) is required by law to have bylaws which govern the operation of the organization and spell out their officials' rights and responsibilities. All members are entitled to examine copies of the IBT Constitution and their Local bylaws at their Union hall. Copies of the Joint Council and Conference bylaws may be available only at their headquarters although they might also be available at the Local. Members may request copies of these legal, governing instruments either from the Union or from the Department of Labor.[218] The Union is not obliged to provide members with their own copies; the Department of Labor may charge a fee to copy the document.

7. Every Teamster organizational entity must also file an annual financial statement with the U.S. Department of Labor and make copies of these statements available for examination by their members at the organization's principal office. If, after examining any of these financial statements, a member should discover any entry which raises his suspicions or any failure to provide required information, he is entitled to examine the Union's actual books, accounts, records and receipts which the Union is required to retain for a minimum of 5 years and to make available to the member. If the Union should refuse the member access to this financial "raw" material, he is entitled to secure, with the aid of a lawyer, a court order compelling the Union to open its books. Whenever a member is forced to obtain such a court order, the Union or its officers will be required to pay his attorney fees. Members seeking to evaluate the accuracy of Union books who are not, themselves, knowledgeable of financial accounting principles would be well advised to secure the assistance of either a lawyer or accountant when

[218]All requests for information or copies of Union legal documents and financial statements from the Department of Labor should be addressed to:

U.S. Department of Labor
Labor-Management Services Administration
200 Constitution Ave., N.W.
Washington, D.C. 20210

examining these financial statements. Students or faculty at nearby universities might be solicited to provide this assistance either gratuitously or for a nominal sum. The information developed during these investigations may prove to be very valuable in pursuing charges against officers for breach of fiduciary duties.

8. Members are entitled to utilize the courts to sue Union officials who have breached their fiduciary duty in order to recover damages or secure an accounting or other appropriate relief for the benefit of the rank and file. Before instituting such suits, members or officers are generally required first to attempt to obtain redress through internal Union disciplinary procedures. Where such an attempt would be futile, or where the Union has ruled adversely on the member's charges or has failed to take action within four months, the members may go directly to court. All costs of litigating, including attorney's fees, will generally be awarded to successful rank and file litigants.

What is this fiduciary duty which Union officials may have breached? Let us look to the language of the statute:

> The officers, agents . . . and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person . . . to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws . . to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . .
>
> [29 U.S.C. 501(a)]

O.K. What does all this language mean? In the first place, it means that an officer cannot put his hand in the Union till. It also forbids an official from spending excessive amounts of money on unjustifiable expenses which primarily benefit himself personally, rather than the rank and file generally. It also means that the official cannot violate the Union's Constitution or bylaws even when he may personally derive no special benefit by his violative conduct. In other words, the fiduciary duty may be violated even though there is no money involved.

On the other hand, if the Constitution or bylaws purport to sanction some forms of conduct by officials which are not truly in the best interests of the Teamster membership, or if some Executive Board should attempt to ratify, and thereby make lawful, some conduct by an officer which is not in the best interests of the membership, the conduct still constitutes a breach of fiduciary duty which is punishable in the courts. Such exculpatory language in the Union's governing instruments or by its governing bodies is simply void. It should not

discourage Teamsters from bringing otherwise valid suits under this provision.

The fiduciary duty also forbids Union officials from engaging in any activities or undertaking any commitments which would create conflicts of interest which might impinge upon their undivided loyalty to their members or weaken their incentives to represent their members' best interests. Officials are prohibited from accepting any benefits or favors from employers or their agents. Blatant sweetheart contracts certain Teamster officials have executed with some companies may well be indicators that they are returning favors. Union officials and their family members may not own stock or any other interest in any company that employs any of their members. This principle applies equally where the company does not actually employ their members but where Teamsters may indirectly be affected by its economic welfare. As a general matter, Union officials may not use Union funds to make loans either to Teamster employers or their companies, or to other Union officers. Nor may Union officials use Union funds to pay for any fines or costs of legal representation when they are found to have violated their duties under the Act.

In certain instances where Union members may have been successful in their lawsuits in prying out information which demonstrates that their officials have intentionally violated their duties under the Act, this same information may subsequently be used by federal prosecutors to obtain criminal convictions of the officials. For example, filing false information or deliberately omitting information from the LM-2 reports is a criminal offense. Evidence of this type of offense can be gathered by members when seeking to verify the information in the LM-2 reports by examining Union accounts, books and receipts. Such evidence should be made available to federal authorities whether or not the member goes forward with his own suit for breach of fiduciary duty. The effect of a criminal conviction is to bar the guilty official from holding any union office whatsoever for a period of five years following his conviction or release from prison.[219]

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[219]One of the most glaring deficiencies in the current law is that it does not bar from office those union officials who have been found guilty of taking illegal payments from employers. Clearly, the omission of this particular offence from the list of offenses which prohibit individuals from holding union office is a serious oversight. Accepting an illegal employer payment is one of the most serious crimes a union official can commit against his members.

PROD uncovered several examples of Teamster officials who have been found guilty of accepting illegal payments from employers, yet these individuals were allowed by the Union leadership to continue, and even expand their influence in the Union. See Part IV profiles of T.R. Cozza, William Presser, Rolland McMaster, Donald Gillette and Eli Schutzer. Even were the Teamster rank and file successful in voting these and other officials who make sweetheart arrangements with management out of office, they could still be "appointed" to fill various Union positions and continue to wield their influence — possibly even over the individuals elected by the rank and file to replace them. Those union officials who voluntarily accept illegal employer payments compromise themselves as employee representatives so entirely that they should not be permitted to continue to hold any union office.

Finally, it must be stressed that any member or officer who utilizes these provisions to prosecute a Teamster official for wrongdoing cannot be disciplined or subjected to any form of discrimination whatsoever by the Union. Moreover, it is a crime to use force or violence, or even just to threaten the use of force or violence to attempt to intimidate any Union member or to interfere or prevent him from exercising any of his rights under the Landrum-Griffin Act. Any act by anyone whosoever, whether a Union official or his " muscle", or even some company official, which threatens a member seeking to exercise a right to which he is entitled under the Act should be reported at once to local FBI agents, the United States Attorney and to the U.S. Department of Justice, Labor Section, Criminal Division, Washington, D.C. 20530. All three should be notified.

PART IV

PROFILES OF TOP TEAMSTER OFFICIALS

CHAPTER 13

International Officers: How Much Do They Make?

Chapter 13 consists of a series of individual profiles containing chiefly financial information about the Union's General President, General Secretary-Treasurer, fifteen Vice-Presidents and three Trustees. The Chapter first discusses Frank Fitzsimmons then recently retired General Secretary-Treasurer Dusty Miller and his successor Ray Schoessling, followed by the fifteen International Vice-Presidents in order of their seniority and the three International Trustees. Chapter 14 contains similar, although generally less detailed profiles of nearly 200 other Teamster officials in alphabetical order.All figures are reproduced exactly as the Union listed them on reports filed with the Department of Labor except that PROD rounded off figures to the lowest dollar by dropping all references to "cents". The same categories of disbursements, Salary, Allowances, Expenses, Other and Total, as appear on Schedule 8 and Schedule 9 of the LM-2 form are used throughout Part IV.

The following abbreviations are used throughout Part IV:

Divisions of the Union

IBT — the International
ECT — Eastern Conference of Teamsters
SCT — Southern Conference of Teamsters
CCT — Central Conference of Teamsters
WCT — Western Conference of Teamsters
OCT — Ohio Conference of Teamsters

JC — Joint Council
LU — Local Union
Conf — Conference
Pol Cee — Policy Committee

Offices and Positions

Pres — President
VP — Vice-President
R/Sec — Recording Secretary
S/T — Secretary-Treasurer
Tee — Trustee
BA — Business Agent
Org — Organizer
Rep — Representative
Adm — Administrator
AA — Administrative Assistant
Chm'n — Chairman
Int Aud — International Auditor
Gen Org — General Organizer

Frank Fitzsimmons
Washington, D.C.
General President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Gen Pres	125,000	2,737	5,602	$133,339

Comments: The International also reported that Mr. Fitzsimmons received the private use of a 1974 Lincoln which cost $887 to operate in 1974 as well as the use of a home in Bethesda, Maryland which the Teamsters estimated to have a yearly rental value of $8,292 in 1974.

It was impossible to determine what the $5,602 expense figure on the LM-2 actually represents since the Union did not break it down further. The IBT Constitution authorizes the General Executive Board to pay for *all* the expenses of the General President as well as any costs he incurs in his unlimited travels. Many of these expenses may be reported elsewhere on the LM-2 form. See generally, Chapter 8.

Although Frank Fitzsimmons has been a trustee of the Central States Pension Fund for many years, the Fund has not reported disbursing any allowances or expenses to him for the past three years, while other trustees, such as Frank Ranney and William Presser are listed as receiving substantial sums of money. PROD's inquiries to the Department of Labor on this matter have not been answered by the Department of Labor.

Murray W. "Dusty" Miller
Washington, D.C.
General Secretary-Treasurer (Retired)

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1970	IBT	VP, Conf Chm'n	47,916	7,162	1,068	–	56,147
1970	SCT	Chm'n Pol Cee	32,874	–	–	–	32,874
1970	Texas Conf	–gift–	–	–	–	2,720	2,720
1970	TOTAL						$ 91,741
1971	IBT	VP, Conf Chm'n	52,396	6,657	2,033	–	61,087
1971	SCT	Chm'n Pol Cee	48,738	–	–	–	48,738
1971	Texas Conf	–gift–	–	–	–	720	720
1971	TOTAL						$110,545
1972	IBT	VP, Conf Chm'n General S/T	100,973	4,295	8,960	–	114,228
1972	SCT	Chm'n Pol Cee	54,801	–	–	–	54,801
1972	Texas Conf	–gift–	–	–	–	240	240
1972	TOTAL						$169,269
1973	IBT	General S/T	100,000	2,737	4,803	–	107,541
1973	SCT	Chm'n Pol Cee	57,298	–	–	–	57,298
1973	TOTAL						$164,839
1974	IBT	General S/T	100,000	2,737	6,309	–	109,047
1974	SCT	–gift–	–	–	–	45,787	45,787
1974	TOTAL						$154,834

Comments: General Secretary-Treasurer Miller enjoyed the same two unlimited expense accounts as the General President. See generally Chapter 8 above. The International also furnished Miller with a car for his private use. In 1974 he drove a 1974 Ford part of the time until he traded it in for a 1975 model. Both cars were reported to have cost a total of $1,128 to operate in 1974.

The $45,787 in "Other" disbursements from the Southern Conference of Teamsters in 1974 represents the value of a furnished condominium in Florida that the Conference gave to Miller as a "retirement gift". Miller reportedly is receiving $60,000 to $80,000 a year as a pension although some knowledgeable observers feel that it may be higher.

Ray Schoessling
Washington, D.C.
General Secretary-Treasurer

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen Org, VP, Conf Chm'n	55,000	5,137	665	–	60,802
1974	CCT	S/T Pol Cee	24,462	–	1,526	–	25,998
1974	JC 25	Tee	28,500	–	–	–	28,500
1974	LU 744	Pres	5,000	–	–	–	5,000
1974	Nat'l Brewery Conf	S/T	–	–	–	5,000	5,000
1974	TOTAL						$125,300

Comments: Schoessling was formally sworn in as the Union's new General Secretary-Treasurer at the end of January, 1976. It is not known if he had relinquished all his other posts when assuming this position.

In 1973 Chicago Joint Council 25 gave a car with a fair market value of $7,450 to its "outgoing President" Ray Schoessling even though Schoessling merely switched positions with Joint Council 25 Trustee Louis Peick and continued to receive the exact same salary as he was making

as President, $28,500; his responsibilities were, however, diminished considerably. (The other two trustees of the Joint Council received only $15,500 each in 1974). PROD could find no justification for this gift in the Joint Council 25 bylaws in effect at that time.

The bylaws of Local 744 permit the President to appoint and set the salary of its Business Agents. Accordingly, Schoessling appointed his son, James Schoessling, a Business Agent in 1968 and later helped him get elected a Trustee of the Local, a job which paid him a $25,000 salary in 1974.

Einar Mohn
Burlingame, California
First Vice-President (Retired)

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1973	IBT	VP, Gen Org & Conf Chm'n	55,000	5,137	12,464	–	72,601
1973	WCT	Chm'n Pol Cee	–	–	6,315	–	6,315
1973	TOTAL						$ 78,916
1974	IBT	VP, Gen Org & Conf Chm'n	34,998	3,847	6,032	10,000	54,877
1974	WCT	Chm'n Pol Cee	–	–	–	11,872	17,809
1974	TOTAL				5,937		$ 72,686

Comments: Mohn retired as Director of the Western Conference in early 1974 and was succeeded by Maurice E. "Andy" Anderson but he did not relinquish his International Vice-Presidency until October, 1974. The 1974 disbursements listed in the "other" column most likely represent retirement gifts to Mohn. Unlike his colleagues in the Southern and Central Conferences, Mohn did not take a separate, full salary in 1973 for serving as the Chairman of his Conference's Policy Committee.

Mohn's son Bruce received $36,280 as an International Auditor in 1974 while a certain Ellen Mohn was listed as a receptionist on the Western Conference payroll that same year.

George Mock
Sacramento, California
First Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org	30,000	11,977	2,530	44,507

Comments: Mock and Harold Gibbons were the only two International Vice-Presidents who did not hold office at other levels of the Union in 1974.

In 1972 Mock received title to a 1969 Cadillac with a book value of $2,200 from Sacramento Joint Council 38 as a gift.

Harold Gibbons
St. Louis, Missouri
Second Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1971	IBT	VP, Conf Chm'n	36,824	–	27,143	–	63,968
1971	CCT	S/T	30,000	–	302	–	30,302
1971	Mo-Kans	Conf Pres	– not available –				
1971	JC 13	Pres	– not available –				
1971	LU 688	S/T	22,100	–	500	–	22,600
1971	TOTAL						$116,870

(Con't. on following page)

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1972	IBT	VP, Conf Chm'n	55,000	–	16,958	–	71,958
1972	CCT	S/T	30,000	–	338	–	30,338
1972	Mo-Kans	Conf Pres	—not available—				
1972	JC 13	Pres	1,575	–	371	–	1,946
1972	LU 688	S/T	3,735	–	–	–	3,735
1972	TOTAL						$107,977
1973	IBT	VP	18,000	2,977	1,691	–	22,668
1973	CCT	Member Pol Cee	–	240	428	–	668
1973	JC 13	Pres	1,400	–	52	4,406	5,858
1973	LU 688	S/T	31,700	–	2,474	–	34,174
1973	TOTAL						$ 63,368
1974	IBT	VP	18,000	3,937	944	–	22,881

Comments: Gibbons entered the Teamsters in 1949 and quickly established himself in the St. Louis area. From 1953 to 1958 he ran St. Louis Joint Council 13. He prevailed in a very close election for the Joint Council Presidency using tactics that Bobby Kennedy, among others, strongly criticized. During the 1950s he formed a working relationship with James Hoffa and eventually became one of Hoffa's most trusted, as well as loyal, lieutenants. With Hoffa's support, he assumed control of the Missouri-Kansas Conference and became active in the affairs of the Central Conference. When Hoffa went to jail in the late 1960s, Gibbons became the Secretary-Treasurer of the Conference and ran it until Frank Fitzsimmons replaced him with Ray Schoessling in 1973. Roy Williams displaced Gibbons as head of the Missouri-Kansas Conference and moved its headquarters from St. Louis to Kansas City in 1973, the same year that Schoessling took Central Conference Headquarters back to Chicago. Gibbons retired from Joint Council 13 and Local 688 at the end of 1973.

While Gibbons was International Area Director of the Central Conference (see the 1971 figures above) the International did not report paying him any of the allowances to which he was entitled under the IBT Constitution. Instead, the International made huge disbursements to Gibbons for "expenses". One must also keep in mind that while he was head of the Missouri-Kansas Conference he was entitled to "spend reasonable amounts to entertain himself and others" while he was on out-of-town trips.

The above figures also show how Fitzsimmons dealt Gibbons a severe pay cut from the International in 1973 that might have staggered Gibbons financially if he had not had his Local and Joint Council there to help cushion the blow. His Local came through with a substantial raise in 1973 while his Joint Council gave him a new car.

In 1970, Local 688 set up a Trust fund to provide a death benefit to the estate of Harold Gibbons the value of which has grown to $159,966 by 1974.

Joseph Trerotola
New York, New York
Third Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org, Conf Chm'n	55,000	5,137	–	60,137
1974	ECT	Chm'n Pol Cee	–	–	1,268	1,268
1974	JC 16	Pres	25,200	–	300	25,500
1974	LU 803	VP	–	–	–	–
1974	TOTAL					$ 86,905

Comments: Local 803 is a very small Local of security guards whose members are the only rank and file Teamsters who ever directly elected Trerotola to office. Joint Council 16 is the second largest Joint Council with over 200,000 members. His son Vincent also has jobs at four levels of the Union which enabled him to gross over $57,000 in 1974 alone. See Vincent's profile below in Chapter 14.

Robert Holmes
Detroit, Michigan
Fourth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org	30,000	8,977	1,270	40,248
1974	JC 43	Pres	3,750	250	427	4,427
1974	LU 337	Pres	51,550	600	–	52,150
1974	Central States Pension Fund	Tee	–	2,420	1,264	3,684
1974	TOTAL					$100,509

Comments: Holmes was one of Jimmy Hoffa's earliest associates who exploited that relationship to rise to the top echelon of the Union's hierarchy. In addition to the above-listed positions, Holmes serves as a member of the Central Conference Policy Committee and as Chairman of the International's Warehouse Trade Division. His son Robert Holmes, Jr. is a Trustee of Local 337 for which he received a salary of $28,608, plus another $342 in allowances and expenses in 1974.

William Presser
Cleveland, Ohio
Fifth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org	30,000	7,097	601	37,698
1974	OCT	Pres	6,000	2,920	–	8,920
1974	JC 41	Pres	34,217	–	6,079	40,296
1974	LU 555	Pres	10,400	200	–	10,600
1974	Central States Pension Fund	Tee	–	26,800	2,134	28,934
1974	TOTAL					$126,448

Comments: Over the years Presser has been the object of continuing criminal investigations. In 1953 Presser was fined $1,500 for restraint of trade when he was executive secretary of the Tobacco and Candy Jobbers Association. A year later he took the Fifth Amendment on all questions pertaining to his personal income before a House Committee probing corruption of the Teamsters. In March, 1958 investigators from the McClellan Committee subpoenaed the books of Joint Council 41 in preparation for hearings later that summer. In the midst of those hearings, which focussed on Hoffa, Presser's Joint Council 41 passed a resolution setting up a severance and disability plan for him. This plan was modified on May 3, 1960, just four days before Presser was found guilty on a charge stemming from his destroying certain union records the government sought. Ten days after this conviction, his Local Union passed a resolution setting up a special severance fund for him. Two weeks later, Presser went on trial on a federal charge of obstruction of justice resulting from the same incident, was convicted and served six months in jail.

Presser became the beneficiary of yet another special account on New Year's Day, 1966 when Joint Council 41 voted to set aside even more of their members' dues money for his old age. The next year Frank Fitzsimmons elevated him from International Trustee to International Vice-President.

In 1969, the Joint Council 41 Business Agent's Pension made Presser a $30,000 loan to finance the purchase of his home in University Heights, Ohio in possible violation of the Landrum-Griffin Act. (See 29 U.S.C. 503 and Chapter 7, "The Cleveland Connection"). In 1970 the fund reported that Presser still owed $25,739 on the loan. That notation was the last thing said about the loan on the Fund's official reports so one must assume Presser either paid off the loan or it was forgiven.

In September, 1970 Joint Council 41 passed a resolution which would later be incorporated into its bylaws, authorizing the Council President to travel anywhere he wanted, with whomever he wanted and to charge whatever he wanted to the Joint Council. A scant four months later Presser was convicted of taking illegal payments from employers in a scheme that involved selling advertising space in an Ohio Teamster publication to employers in exchange for "labor peace". Presser was fined $12,000 on February 22, 1971, but not sent to jail because of his health. Less than a month later the delegates to a Joint Council 41 assembly approved a new set of bylaws that gave Presser virtually dictatorial powers. Frank Fitzsimmons put his stamp of approval on these bylaws

within 30 days even though Presser had just been convicted of breaching his fiduciary duties as a union official and still faced additional criminal charges.

On June 9, 1971 Presser was again indicted, this time on embezzlement and false entries charges. Less than a month later he was elected to the position of International Vice-President on Fitzsimmons' slate. On June 12, 1973 Presser was acquitted of the charges and less than a week later the Joint Council 41 Executive Board (which he headed) reaffirmed Presser's worth to the Joint Council by voting to "remain liable" to him for the payment of $30,000 in back compensation for three unspecified years he allegedly worked without compensation.

The year 1972 started out propitiously for Presser as Bally Corporation Treasurer, Sam Klein of Cleveland, gave Presser 3,750 shares of Bally stock, then worth nearly $100,000 on the open market, ostensibly as a "gift". In January, 1974 Presser voted to give Bally a $12 million unsecured loan from the Central States Pension Fund at 6¼% interest

In early 1975 Presser was barred from serving as a trustee of the Central States Fund by the new Pension Reform Act due to his 1971 conviction. Some sources indicate that he resumed his position as a trustee in February, 1976 as soon as his probationary period expired.

Presser has worked closely with other men with criminal records. His brother-in-law Harry Friedman has a long list of arrests and has served time for filing false affidavits yet apparently Presser hired him as a "Representative" of Joint Council 41. Quite recently another Joint Council 41 employee, Jack Nardi, was indicted for labor racketeering and marijuana smuggling. Presser installed Joseph Blumetti as a business agent of Local 410 and an employee of Joint Council 41 in spite of his conviction for white slavery. After Blumetti's conviction on false entry charges, Presser shifted him to the Chicago-based Central States Pension Fund. Finally, Presser's long-time associate Babe Triscaro was frequently under investigation for a variety of questionable transactions and reportedly had been convicted of robbery twice.

William McCarthy
Boston, Massachusetts
Sixth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org	30,000	5,137	908	36,046
1974	JC 10	Pres	— no compensation reported —			
1974	LU 25	Pres	33,360	120	1,020	34,500
1974	TOTAL					$ 70,546

Comments: McCarthy runs the New England Teamsters Pension Fund which has assets of over $180 million. Rank and file dissidents from Local 25 have severely criticized McCarthy for engineering the removal from office of the Local's Secretary-Treasurer, John Conlon who is McCarthy's chief rival.

Salvatore Provenzano
Union City, New Jersey
Seventh Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1971	IBT	VP, Gen Org	29,012	5,862	833	—	35,707
1971	JC 73	Pres	11,350	—	—	—	11,350
1971	LU 560	Pres	26,000	—	4,859	2,400	33,259
1971	TOTAL						$ 80,316
1972	IBT	VP, Gen Org	30,000	5,145	135	—	35,307
1972	JC 73	Pres	12,000	—	—	—	12,000
1972	LU 560	Pres	52,300	—	2,328	—	54,628
1972	TOTAL						$101,935
1973	IBT	VP, Gen Org	30,000	6,617	376	—	36,994
1973	JC 73	Pres	12,000	—	600	267	12,867
1973	LU 560	Pres	46,200	—	590	—	46,790
1973	TOTAL						$ 96,651

(Con't. on following page)

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	IBT	VP, Gen Org	30,000	5,977	795	—	36,773
1974	JC 73	Pres	15,500	700	30	742	16,972
1974	LU 560	Pres	31,200	—	—	—	31,200
1974	TOTAL						$ 84,945

Comments: Local 560 did not explain on its LM-2 forms why Provenzano was given such generous salary increases in 1972 and 1973. It did not make clear precisely what expenses the Local pays for on Provenzano's behalf. According to the bylaws on file at the Department of Labor, the officers can spend "reasonable amounts" to pay for the meals of themselves and others whenever they work late in their home area and to entertain for the purpose of establishing and maintaining contacts with "persons, organizations and institutions" which tend to foster the good and welfare of the Local. These expenses were not clearly stated.

Salvatore Provenzano appears to be covered by five different severance and retirement plans; the International's Family Protection Plan for International officers, the Teamster Affiliate's Fund for Local officials, Joint Council 73's Fund and two plans set up by Local 560 for its officers and business agents. The Agreement and Declaration of Trust establishing one of Local's 560's officer's severance funds gives the Trustees "full authority to determine all questions of the nature, amount and duration of benefits to be provided on a sound basis without undue depletion or excessive accumulation". In other words, Sal Provenzano and the other trustees can allocate virtually whatever they want for their retirement.

Sal Provenzano has clearly followed in his older brother Tony's footsteps. Sal first appears on the Local's LM-2 as a Business Agent and Trustee of the Local in 1961. On May 12, 1966, the Local Union Executive Board appointed him president to fill the vacancy caused by Tony's resignation. That same year he became a Trustee of New Jersey Joint Council which he took over in 1971. In January, 1971 Fitzsimmons appointed him an International Vice-President and endorsed him for re-election at the 1971 convention. Provenzano also serves on the Policy Committee of the Eastern Conference and on the National Master Freight negotiating team.

In the early 1970s Sal was indicted for conspiracy to counterfeit $250,000 worth of currency, food and postage stamps. Indicted along with him was Thomas Andretta, a Local 560 business agent who is under investigation in the Hoffa case. The charges against Provenzano were dropped due to a case of mistaken identity. Local 560 Business Agent Salvatore Briguglio, another suspect in the Hoffa case, served 18 months for the offense according to press reports.

In 1973, a certain Rose Provenzano served as the office manager of Local 560 and received a salary of $11,034.

Edward Nangle
Reading, Pennsylvania
Eighth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org	30,000	8,257	197	38,454
1974	ECT	S/T	10,192	—	904	11,096
1974	JC 53	Pres	—	4,300	27	4,327
1974	LU 429	S/T	24,170	—	—	24,170
1974	TOTAL					$ 78,047

Comments: Nangle was first appointed Vice-President by Fitzsimmons in early 1971 and then was elected as part of the Fitzsimmons slate at the 1971 convention. Joint Council 53, is headquartered in Philadelphia and covers more than 105,000 Teamster members, making it the fifth largest Joint Council. Local 429 has over 8,000 members and services the large Central Pennsylvania Teamsters Pension Fund. Nangle is one of the Union's chief negotiators of the National Master Freight Agreement and its Iron and Steel riders.

Roy Williams
Kansas City, Missouri
Ninth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1971	IBT	Tee/VP & Gen Org	28,736	12,572	1,565	42,874
1971	CCT	R/Sec	–	–	163	162
1971	JC 56	Pres	12,825	–	360	13,185
1971	LU 41	Pres	39,900	–	900	40,800
1971	TOTAL					$ 97,022
1972	IBT	VP, Gen Org	30,000	10,345	1,145	41,490
1972	CCT	R/Sec	–	–	–	–
1972	JC 56	Pres	11,925	–	403	12,328
1972	LU 41	Pres	37,100	–	–	37,100
1972	TOTAL					$ 90,918
1973	IBT	VP, Gen Org	30,000	9,337	858	40,195
1973	CCT	R/Sec	–	–	17,631	17,631
1973	Mo-Ks Conf	Pres	–	–	226	226
1973	JC 56	Pres	17,325	–	104	17,429
1973	LU 41	Pres	35,900	–	–	35,900
1973	Central States Fund – Tee – not listed on the D-2 form–					
1973	TOTAL					$111,381
1974	IBT	VP, Gen Org	30,000	10,017	307	40,325
1974	CCT	R/Sec	–	–	1,479	1,479
1974	Mo-Ks Conf	Pres	–	–	227	227
1974	JC 56	Pres	43,725	–	55	43,780
1974	LU 41	Pres	5,200	–	–	5,200
1974	Central States Fund Tee		–	–	105	105
1974	TOTAL					$ 91,116

Comments: The dramatic fluctuations in the amounts paid to Williams by various Teamster organizations raise several questions, especially the Central Conference's 1973 disbursement to Williams of $17,631 for "reimbursed expenses". From 1966 to 1972 Williams had served as Recording Secretary of the Conference and had never received more than $163 in any one year. Indeed, on the original LM-2 for 1973, which Conference Secretary-Treasurer Ray Schoessling and Conference Chairman Frank Fitzsimmons signed at the end of March, 1974, Williams was listed as receiving no compensation from the Conference. On April 19, 1974 however, Frank Fitzsimmons signed an amended LM-2 form which claimed that Williams had received the $17,631 in expenses in 1973.

It was not reported why Williams received such a large pay boost from his Joint Council in 1974 nor why his Local salary dipped so sharply that year. Local 41 did, however, loan Joint Council 56 $45,000 in 1974 which could easily have financed Williams' increase in pay. No terms of the loan or arrangements for repaying it were listed on the Joint Council's LM-2. The Joint Council received a $54,000 "organizing grant" from the Central Conference and another $41,538 in unspecified "reimbursements".

Other aspects of Williams' finances remain unclear. Although virtually every other trustee of the Central States Pension Fund reported receiving significant allowances and expenses from the Fund, Williams was not even listed on the Fund's D-2 report in 1973. As President of the Missouri-Kansas Conference, Williams is empowered to spend "reasonable amounts" to provide entertainment for himself and his friends during non-working hours on out of town trips as well as to "entertain persons, organizations and institutions" which tend to foster the good and welfare of the conference. It is not clear where these types of expenditures are listed.

Williams is currently awaiting trial on charges of making false entries on reports that he filed with the government. A conviction on this charge could bar Williams from holding union office for five years. See 29 U.S.C. 504. The indictment charging Williams with this misdemeanor came down on February 28, 1974, a scant sixteen months after Williams was acquitted on charges of embezzling

$16,148 from Local 41. According to a 1969 article in the *Oakland Tribune* by Jeff Morgan and Gene Ayres, Williams was also indicted in 1962 along with six others on charges of embezzling union funds. Four of the seven were convicted but not Williams, whose legal defense fees were paid by the Union. The article also alleges that Williams met in 1962 with notorious Kansas City organized crime figure Nicholas Civella who wanted Williams to use his influence as a Trustee of the Central States Fund to obtain a $7 million loan from the Fund for a Las Vegas hotel in which Civella had an interest.

In spite of Williams' past record, Fitzsimmons recently appointed him as International Director of the powerful Central Conference, a move that will raise Williams' salary from the International at least $25,000 and entitle him to another full salary of $30,000 from the Conference itself.

Williams currently serves as Chairman of the Missouri-Kansas Drivers Council, the Central States Drivers Council, and the International's Freight Division, which effectively makes him the Union's top strategist in dealing with the trucking industry.

Joseph W. Morgan
Hallandale, Florida
Tenth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1971	IBT	VP, Gen Org	28,529	8,217	724	–	37,470
1971	SCT	Member Pol Cee	–	–	–	1,000	1,000
1971	Ga-Fla Conf	Press	7,000	–	–	1,649	8,649
1971	LU 769	Pres	14,800	250	2,481	–	17,531
1971	Central States Fund Tee		–	655	–	–	655
1971	TOTAL						$ 65,315
1972	IBT	VP, Gen Org & Conf Chm'n	48,750	9,785	1,412	–	59,947
1972	SCT	Area Director	–	–	–	1,000	1,000
1972	GA-Fla Conf	Pres	7,000	–	–	–	7,000
1972	LU 769	Pres	15,370	–	985	–	16,355
1972	TOTAL						$ 84,302
1973	IBT	VP, Gen Org & Conf Chm'n	55,000	10,257	1,357	–	66,614
1973	SCT	Chm'n Pol Cee	21,465	–	–	–	21,465
1973	Ga-Fla Conf	Past Pres	500	–	–	–	500
1973	Lu 769	Past Pres	3,400	–	–	–	3,400
1973	Texas Conf	–gift–	–	–	–	3,795	3,795
1973	TOTAL						$ 95,774
1974	IBT	VP, Gen Org & Conf Chm'n	55,000	9,697	1,866	–	66,563
1974	SCT	Chm'n Pol Cee	54,939	–	–	–	54,939
1974	TOTAL						$121,502

Comments: Morgan is a former pro football tackle who became associated with the Teamsters in the late 1940s. He has been a General Organizer since the mid-50s and has steadily worked his way up the ladder to his current spot at the top of the Southern Conference. Morgan hails from Florida and in the late 1950s he received a $25,000 loan from the International to finance a home in the Ft. Lauderdale area (See Appendix D). Morgan's large pay raise in 1972 enabled him to pay off the remaining $8,000 he owed the Union. Morgan recently moved part of the headquarters of the Southern Conference to Hallandale, Florida which is just south of his Ft. Lauderdale home and very close to homes owned by Tony Provenzano, Tony Roma and others.

Why Morgan received $3,400 from Local 769 and $500 from the Georgia-Florida Conference after he had left office in those organizations was not reported. The gift from Texas Teamsters to Morgan also was not explained. Morgan's successor as President of Local 769 was Donald Gillette who had just returned from prison after serving time for taking illegal payments from an employer. Gillette served the Local until 1973 when he took a job under Morgan as an Organizer for the Southern Conference.

Edward Lawson
Vancouver, British Columbia
Eleventh Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1971	IBT	VP & Gen Org	29,012	6,242	6,702	41,957
1972	IBT	VP & Gen Org	30,000	6,185	4,002	40,187
1973	IBT	VP	18,000	5,137	2,344	25,481
1974	IBT	VP	18,000	5,297	2,182	25,479

Comments: Lawson was recently appointed International Area Director of the newly created Canadian Conference. He presides over Vancouver Joint Council 36 and also serves as a trustee of Local 213. Lawson became the first Teamster International Vice-President from Canada when he was elected at the 1971 Convention. The highly respected Lawson is a Canadian Senator who demonstrated some independence from Fitzsimmons by refusing to approve Fitzsimmons attack on Harold Gibbons in 1972. For this, Fitzsimmons stripped him of his General Organizer's post thereby handing Lawson a $15,000 pay cut.

Further details on Lawson's finances are unavailable because Canadian affiliates of the Teamsters do not have to file reports with the U.S. Department of Labor.

Weldon Mathis
Washington, D.C.
Twelfth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org & Exec Asst to the GP	50,000	5,857	3,138	58,995
1974	LU 728	Pres	20,894	–	–	20,894
1974	TOTAL					$ 79,889

Comments: Mathis enjoys the private use of an automobile as part of his compensation from the International. During 1974, Mathis drove a 1973 Cadillac that cost $1,632 to operate until he traded it in for a 1975 Lincoln which had a book value of $12,500. In addition to serving as Fitzsimmons' Executive Assistant, Mathis also functions as the Treasurer of DRIVE, the Union's political arm.

Although he lives and works in Washington, Mathis retains his position as the head of the 5,000 member Atlanta Truck Drivers Local 728. The Local's most recent set of bylaws give the President unusually strong powers including the right to hire, fire and set the compensation for all non-elective employees and the right to delegate any of his powers. Hence Mathis has placed his brother Wilbur and his son W. Lamar Mathis, Jr. on the Local 728 payroll in order to keep a watch over his Local while he is in Washington. See their individual profiles in Chapter 14 below.

Local 728 took in nearly a million dollars in dues revenue in 1974 alone and paid out over 10% ($106,235) of that to an unspecified pension fund, presumably for its officers and employees since the union's rank and file have payments made on their behalf directly to the Central States Pension Fund.

Arnie Weinmeister
Seattle, Washington
Thirteenth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1972	JC 28	Pres	12,938	7,525	232	20,695
1972	LU 117	S/T	32,888	–	–	32,888
1972	TOTAL					$ 53,583
1973	IBT	VP	18,000	5,657	1,032	24,690
1973	JC 28	Pres	17,631	8,189	153	25,973
1973	LU 117	S/T	34,472	–	4,787	39,259
1973	TOTAL					$ 89,922

(Con't. on following page)

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP	18,000	5,337	1,024	24,362
1974	JC 28	Pres	18,870	7,610	543	27,023
1974	LU 117	S/T	37,952	–	5,003	42,955
1974	TOTAL					$ 94,340

Comments: Weinmeister was an All-Pro Football Tackle with the New York Giants prior to his joining the Teamsters in 1956. After a stint as a Western Conference Organizer, Weinmeister became affiliated with Warehouseman's Local 117 in Seattle and the Seattle Joint Council and was appointed by Fitzsimmons in February, 1973 to fill a vacant Vice-Presidential slot.

Joint Council 28 was the only Teamster organization that itemized the expenditures that were included in arriving at the figures listed in the allowance and expenses column of their LM-2. Thus, we know that the $7,610 in allowances that Weinmeister received from his Joint Council consisted of a car allowance of $50 a week (total value $2,600), a $200 a month expense allowance ($2,400), and a $50 per diem ($2,600). The Joint Council paid the following expenses for Weinmeister: $277 in automobile expenses to creditors, $241 in reimbursed expenses, and $24 in restaurant charges.

Maurice E. "Andy" Anderson
Burlingame, California
Fourteenth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	VP, Gen Org, Conf Chm'n	48,750	12,497	5,358	66,605
1974	WCT	Chm'n Pol Cee	–	–	10,914	10,914
1974	JC 42	Tee	5,246	–	–	5,246
1974	LU 986	S/T	44,350	–	1,046	45,396
1974	TOTAL					$128,161

Comments: Anderson officially took over the Western Conference from Einar Mohn in July, 1974 even though he was not sworn in as a Vice President until October, 1974. His appointment to a Vice-Presidency may have violated the Teamsters Constitution which provides that only one VP should come from any one state or province. George Mock of Sacramento, California already was sitting on the General Executive Board when Anderson joined it.

On August 22, 1974, Anderson switched positions with the President of Local 986, M. J. Riley. Riley resigned the presidency and was appointed secretary-treasurer at the same time Anderson resigned as secretary-treasurer and was appointed president.

Louis F. Peick
Chicago, Illinois
Fifteenth Vice-President

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Tee	10,800	2,737	259	13,797
1974	JC 25	Pres	28,500	–	–	28,500
1974	LU 705	S/T	79,572	–	688	80,260
1974	TOTAL					$122,557

Comments: Fitzsimmons appointed Peick an International Vice-President in January, 1976 to fill the gap left by Ray Schoessling when Schoessling became General Secretary-Treasurer. This promotion will increase Peick's income from the International by at least $7,200. Peick serves as a member of the Central Conference Policy Committee and on Mayor Daley's Police Board in spite of the fact that Peick's Local 705 has been publicly accused of "sheer racketeering" in its attempt to organize certain gas station employees in the Chicago area during 1974-1975.

Peick inherited Joint Council 25 from Schoessling and apparently it treats Peick well. It purchased an automobile in 1974 with a book value of $13,957 and reimbursed Local 705 $15,281 for auto expenses in 1974.

Frank Matula
Los Angeles, California
International Trustee

Year	Division	Title	Salary	Allowances	Expenses	Total
1970	IBT	Tee	10,800	650	1,204	12,654
1970	LU 396	S/T	62,778	1,907	140	64,846
1970	TOTAL					$ 77,500
1971	IBT	Tee	11,559	17,095	2,836	31,490
1971	LU 396	S/T	– not available –			
1972	IBT	Tee	10,800	15,182	947	26,929
1972	LU 396	S/T	66,808	–	1,612	68,420
1972	TOTAL					$ 95,349
1973	IBT	Tee	10,800	3,777	606	15,184
1973	LU 396	S/T	78,428	–	1,838	80,266
1973	TOTAL					$ 95,450
1974	IBT	Tee	10,800	3,417	359	14,576
1974	LU 396	S/T	83,381	–	2,364	85,745
1974	TOTAL					$100,321

Comments: Matula was convicted of perjury in 1959 as a result of his testimony before a committee of the California State Assembly that was investigating the garbage removal industry in Los Angeles. Shortly after Matula was sentenced to six months imprisonment, five years' probation and fined $2,500 for this offense, Hoffa appointed him a Trustee of the International.

Matula received abnormally high allowances in 1971, a convention and election year within the Teamsters, and 1972. Since the General President directly controls the amount of allowances a trustee will receive, this may have been Fitzsimmons' way of buying Matula's political support. See also the portrait of Maurice Schurr below.

Local 396 represents about 5,000 package and general utility drivers in greater Los Angeles. No other officer in the Local makes more than $29,000. A copy of its bylaws is not available at the Department of Labor's Washington office.

Maurice Schurr
Philadelphia, Pennsylvania
International Trustee

Year	Division	Title	Salary	Allowances	Expenses	Total
1970	IBT	Tee	10,800	812	557	12,170
1970	LU 929	Pres	23,400	–	1,892	25,292
1970	TOTAL					$ 37,462
1971	IBT	Tee	11,904	13,015	1,092	26,011
1971	LU 929	Pres	27,000	–	3,549	30,549
1971	TOTAL					$ 56,560
1972	IBT	Tee	11,293	12,860	1,788	25,941
1972	LU 929	Pres	27,013	–	3,220	30,233
1972	TOTAL					$ 56,174
1973	IBT	Tee	10,882	4,057	262	15,202
1973	LU 929	Pres	27,931	–	938	28,869
1973	TOTAL					$ 44,071
1974	IBT	Tee	10,800	4,017	280	15,098
1974	LU 929	Pres	29,925	–	3,650	33,575
1974	TOTAL					$ 48,673

Comments: Schurr, like fellow Trustee Frank Matula, received extraordinary allowances in 1971 and 1972 from the International.

Jesse Carr
Anchorage, Alaska
International Trustee

Year	Division	Title	Salary	Allowances	Expenses	Total
1973	LU 959	S/T	49,998	7,600	10,477	68,075
1974	LU 959	S/T	50,575	7,600	–	58,175

Comments: Carr was acquitted on June 18, 1970 of federal charges of embezzling union funds *yet* was appointed an International Trustee in January, 1976 to replace Louis Peick of Chicago who moved up to International Vice-President.

As the head of the only Teamsters Local in Alaska, Carr sits atop a phenomenal empire of pipeline and other workers. In 1974 Local 959 took in nearly $4 million in dues revenue alone, a 100% increase over 1973. Its pension fund listed assets of $53.3 million as of July 31, 1975 and takes in at least a million dollars a week although few pipeline workers will put in enough time to collect any of the large sums being deposited on their behalf.

Local 959's bylaws contain an officer's travel provision similar to that enjoyed by Frank Fitzsimmons which permit Carr to travel anywhere he wants at union expense for the purpose of conserving his health or taking rests. Carr may take along any guests he wants at the Union's expense and may extend the generous terms of this provision to any of the Local's other six officers, 21 Business Agents and dozen other employees.

Carr's travels are facilitated by a small fleet of planes his Local owns or leases. According to one source, Carr's fleet includes two Merlin Turboprop planes and two Lear Jets. The Local itself has two pilots on its payroll while the corporation that holds title to its land and building, the Local 959 Building Corporation, reported spending nearly $400,000 on aircraft.

CHAPTER 14

Other Top Teamster Officials: How Much Do They Make?

Alan Adelstein
New York, New York

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	LU 813	Pres	19,090	–	2,221	21,311
1974	LU 1034	R/Sec	15,145	–	2,290	17,435
1974	LU 813 Ins Fund	Tee	–	900	–	900
1974	LU 813 Pension Fund	Tee	–	900	–	900
1974	LU 813 & 1034 Severance & Retirement Fund	Tee	–	900	–	900
1974	TOTAL					$ 41,446

Comments: See Martin Adelstein below.

Bernard Adelstein
New York, New York

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	LU 813	S/T	40,450	–	7,040	47,499
1974	LU 1034	Pres	40,450	–	6,986	47,436
1974	JC 16	Tee	3,600	–	–	3,600
1974	LU 813 Ins Fund	Adm & Tee	14,000	900	–	14,900
1974	LU 813 Pension Fund	Adm & Tee	14,000	900	–	14,900
1974	LU 813 & 1034 Severance Fund & Retirement Fund	Adm & Tee	10,100	900	–	11,000
1974	TOTAL					$139,335

Comments: See Martin Adelstein below.

Martin Adelstein
New York, New York

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	LU 813	Tee	17,715	–	1,954	19,669
1974	LU 1034	S/T	26,910	–	3,566	30,476
1974	LU 813 Ins Fund	Tee	–	900	–	900
1974	LU 813 Pension Fund	Tee	–	900	–	900
1974	LU 813 & 1034 Severance & Retirement Fund	Tee	–	900	–	900
1974	TOTAL					$ 52,845

Comments: Bernard Adelstein, the father of Martin and Alan, was the subject of scrutiny by the McClellan Committee in the late 1950s. The Committee reported on how Adelstein and organized crime figure Joe Parisi muscled in on the private waste hauling business in the New York area. Adelstein was convicted of extortion but his conviction was overturned by an appeals court. In

spite of his background, Fitzsimmons has specifically authorized Bernard and his two sons to hold office simultaneously in Local 813, the 2,000 member Private Sanitation Workers Union, and the 3,000 member Container, Drum and Miscellaneous Workers Union Local 1034.

Both Locals and their respective Funds have taken good care of the Adelsteins. Section 10.04 of Local 813's bylaws provides that the Local shall furnish its officers with a car and pay all expenses of operating, garaging and insuring it. Furthermore, whenever the Local makes an expense allowance to any person and there is an excess remaining over the expenses, the balance can be pocketed by the individual. Bernard's salary from Local 813, which is high for such a small Local even by Teamster standards, is set by the Local's seven man Executive Board which includes three Adelsteins! The Local also maintains an Officers Retirement Trust Fund which will provide the Adelsteins with another source of benefits when they retire.

Other aspects of the Local's finances are interesting. An attorney and several organizers "affiliated" with the Local's pension and welfare funds are on the Local's payroll. In 1971 another Adelstein, Mel, received nearly $15,000 as an organizer. Oddly enough, Schedule 4 of Local 813's 1974 LM-2 reports that $16,699 in "Deposits from Employers" are carried as an "Other Liability" on the Union's books.

The bylaws of Local 1034 give the Local's officers a blank check to increase their take from the Local any time they want. Thus section 10.04 of those bylaws provide that: "The Executive Board [which currently consists of three Adelsteins and four other officers] may from time to time, and at any time improve the terms and conditions of employment for officers, employees and representatives of this Local Union including . . . additional compensation and allowances."

J. O. Allgood
Dallas, Texas

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	SCT	Org	32,811	8,098	—	40,909

Joseph W. Allgood
Dallas, Texas

Year	Division	Title	Salary	Allowances	Expenses	Total
1973	LU 47	R/S	18,056	605	1,245	19,900
1974	IBT	Org	16,666	13,175	3,641	33,483

Sam Ancona
Kansas City, Missouri

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org	25,000	11,897	2,779	39,677
1974	Mo-Kans	Conf Org	1,000	—	—	1,000
1974	JC 56	Org	34,200	—	995	35,195
1974	TOTAL					$ 75,872

Comments: Ancona is one of the highest paid organizers in the American Labor movement. In 1974 alone he made more than I.W. Abel, the President of the United Steelworkers Union, America's second largest union.

According to a 1969 article in the *Oakland Tribune*, Ancona at least once served as a liaison between top Kansas City mob figure Nicholas Civella and Teamster Vice-President Roy Williams.

Peter A. Andrade
Burlingame, California

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org	30,000	7,857	6,592	44,492
1974	WCT	Chm'n of a Trade Division	—	—	7,343	7,343
1974	WCT Pension Fund	Tee	—	900	670	1,570
1974	TOTAL					$ 53,405

Comments: In 1974 Andrade was chairman of the International's National Food Processing Division.

Henry Aquirre
San Francisco, California

Year	Division	Title(s)	Salary	Allowances	Expenses	Other	Total
1974	LU 860	Pres	34,200	2,831	1,747	862	$ 39,710

Comments: Local 860 has only 3,000 members employed mainly in San Francisco's warehouses.

Joseph Ballew
Washington, D.C.

Year	Division	Title(s)	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen Org	17,500	3,325	3,270	—	24,095
1974	WCT	Tee	26,491	1,133	9,878	862	38,364
1974	TOTAL						$ 62,459

Comments: Ballew served as comptroller of the Western Conference and a trustee of its officers pension fund until Dusty Miller brought him to Teamsters headquarters in Washington, D.C. in early 1975. He currently serves as an administrative assistant to General Secretary Treasurer Ray Schoessling.

Joe Bane
Pontiac, Michigan

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	LU 614	Pres	28,490	2,975	44	$ 31,507

Comments: Bane's Local received an $11,000 grant from the International in 1974 which was used to pay part of the salary of Frank Fitzsimmons' son Don, who received $17,731 from the Local for serving as an organizer in 1974. Bane employed his own son, Joe Bane, Jr., as a Business Agent for the Local and paid him $19,175 in 1974. The Local reported selling an automobile with a book value of $5,290 for $1,700 in 1974.

Robert M. Baptiste, *Esquire*
Washington, D.C.

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	ECT	House Counsel	6,249	—	932	7,182
1974	IBT	House Counsel	26,250	2,062	810	29,122
1974	TOTAL					$ 36,304

W.C. Barbee
Charlotte, North Carolina

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	JC 9	Pres	5,600	—	465	3,571	9,636
1974	LU 71	Pres	26,930	2,305	411	—	29,656
1974	TOTAL						39,292

Comments: The "Other" disbursements Barbee received from Joint Council 9 represent expenses paid to his creditors.

Joe Bates
Kansas City, Missouri

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	Mo-Ks	Conf Org	13,250	4,300	439	17,989
1974	JC 56	Org	11,925	—	318	12,243
1974	TOTAL					$ 30,232

Leo F. Battisti

Year	Division	Title	Salary	Allowances	Expenses	Total
1973	Ga-Fla	Conf Org	14,625	1,850	194	16,669
1974	IBT	Gen Org	25,000	7,657	1,105	33,762

Louis Battone
Philadelphia, Pennsylvania

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	LU 707	Pres	29,184	5,885	6,970	42,039

Comments: Local 107 represents almost 10,000 Philadelphia area freight drivers and dock workers.

Richard C. Bell, Jr.
Silver Spring, Maryland

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Int Aud	30,000	12,097	3,506	45,603

Comments: Bell is the son of veteran Eastern Conference official Richard Bell, Sr. who retired in early 1974.

Joseph Bernstein
Chicago, Illinois

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1973	LU 781	Pres	54,200	50	8,877	36,000	99,127
1973	JC 25	Tee	15,000	–	–	–	15,000
1973	TOTAL						$114,127
1974	CCT	Org	10,417	–	–	–	10,417
1974	JC 25	VP	15,500	–	–	–	15,500
1974	LU 781	Pres	63,505	–	8,226	36,000	107,731
1974	TOTAL						$133,648

Comments: Local 781 represents well over 10,000 Teamster Warehousemen and miscellaneous workers in the Chicago area. The Local does not indicate on its LM-2 form what its "Other" disbursement represents although the official Department of Labor instructions indicate that such "other disbursements" are those essentially for the benefit of the individual rather than the organization and include "cash gifts" and "any personal expenses" paid by the organization to the officer. Local 781 lists a "club membership" costing $5,000 as an assett of the Local Union.

It could not be determined why the Central Conference paid Bernstein over $10,000 to "organize" in 1974 when he was receiving over $100,000 per year from his Local. See also profiles of William Joyce, Joseph L. Bernstein and Robert Bernstein below.

Joseph L. Bernstein
Chicago, Illinois

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1973	LU 781	S/T	57,000	–	1,805	6,000	64,805
1974	LU 781	S/T	66,550	–	893	18,000	87,478

Comments: See Joseph Bernstein, Sr. above and Robert Bernstein below.

Robert Bernstein
Chicago, Illinois

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1973	LU 781	BA	49,000	50	277	6,000	55,327
1974	LU 781	BA	57,850	–	893	18,000	76,743

Comments: Robert Bernstein is one of the highest paid Business Agents in the American Labor movement. Thanks to a $21,000 raise in 1974, Bernstein made more for serving as a Business Agent in 1974 than Leonard Woodcock or I.W. Abel did for leading Unions with well over a million members. The President of Local 781, Joseph Bernstein, has the power to hire and fire all Business Agents.

Paul W. Blinco
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 42	Field Rep	33,479	–	5,420	$38,899

Comments: Blinco used to serve as the Secretary-Treasurer of Los Angeles Local 598. In 1967 Blinco was indicted and later acquitted on embezzlement and false entry charges.

Joseph Blumetti
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	JC 41	Employee	10,575	–	1,033	11,608
1972	LU 410	BA	15,154	–	1,169	16,323
1972	TOTAL					$27,931
1973	JC 41	Employee	13,680	–	108	13,788
1973	Central States	Pension Fund – Collections Manager	5,884	–	1,693	7,577
1973	TOTAL					$21,365
1974	Central States	Pension Fund – Collections Manager	25,822	–	7,722	33,544

Comments: Blumetti was convicted of white slavery in the 1940s and served half of a six-year sentence. William Presser made Blumetti a Business Agent of jukebox Local 410 in the early 1950s and the two have worked closely together since. On June 23, 1970 Blumetti was indicted for embezzlement and false entry charges and convicted on July 12, 1973 on the false entries charge. Since this conviction banned him from holding union office for five years, Blumetti moved over to the Central States Pension Fund as its local collections manager.

Bill Bounds
Danville, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 26	Pres & BA	36,400	2,250	3,700	$42,350

Gabriel Briguglio
Union City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 84	VP	20,800	180	1,980	22,960
1974	LU 84	Welfare Fund Tee	–	1,212	350	1,562
1974	TOTAL					$24,532

Comments: Local 84 is a small Teamster Local representing various industrial workers including many in the aluminum industry. Briguglio became Vice-President of the Local in 1969 and served without much notoriety until he became known as one of the prime suspects in the disappearance of Jimmy Hoffa.

Salvatore Briguglio
Union City, New Jersey

Year	Division		Titles	Salary	Allowances	Expenses	Total
1973	LU 560	BA		14,280	-	257	14,537
1974	LU 560	BA		24,140	-	62	24,202
1974	LU 560 Welfare Fund	Tee		-	900	-	900
1974	TOTAL						$25,102

Comments: Salvatore Briguglio has been mentioned as a suspect in the disappearance of Jimmy Hoffa. Briguglio did serve time in jail for conspiring to counterfeit $250,000 in the early 1970s but was able to step out of prison and back into his role as a Business Agent.

In 1974 Sal also served as a Union Trustee of the Trucking Industry Employees of Passaic and Bergen County Welfare Fund. That fund is under investigation by federal authorities because it lent Thomas Romano $4,627,200 to finance a condominium project near Ft. Lauderdale a month after he had sold a home to Tony Provenzano at a suspiciously low price. The Fund's latest financial report covers the year ending November 30, 1975 and reports an increase in real estate loans and mortgages from $351,105 in 1974 to $6,203,301 currently outstanding.

William Bufalino
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org & Counsel	30,000	5,137	-	35,137
1974	LU 985	Pres	26,500	-	-	26,500
1974	TOTAL					$61,637

Comments: Jimmy Hoffa reportedly obtained the charter of jukebox Local 985 for Bufalino in the late 1940s. Bufalino's marriage to a relative of Detroit organized crime figure Angelo Meli further enhanced Bufalino's influence in the Detroit area. In 1953 a Special Subcommittee of the House Committees on Government Operations and on Education and Labor investigated Bufalino's operations and found a pattern of suspicious activities. The McClellan Committee investigated Bufalino again and levelled harsh criticism of his operations. Bufalino was a highly visible character in many of Jimmy Hoffa's trials and more recently has been counsel to many of the suspects in the Hoffa disappearance.

Elijah Buffington
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	Tee	45,201	-	3,628	$48,829

Comments: Local 743 is the largest Teamsters Local with over 30,000 members. Its officers, led by Donald Peters, are among the highest paid Local officials.

R.B. Bunch
Mesquite, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	SCT	Org	32,811	8,338	-	41,149
1974	Texas Conf	Pres	6,880	-	-	6,880
1974	TOTAL					$48,029

Comments: In 1971 Bunch took over from M. R. Dixon the reigns of the Texas Conference. This Conference made expensive gifts to various Teamster officials including $13,200 to Murray Miller and nearly $4,000 to Joe Morgan. In 1969 Bunch himself received a gift of $1,500 from the Conference.

In the late 1960s and early 1970s the Texas Conference carried on its books a "reserve for future motorcade". In 1972, the Conference's LM-2 reported that: "The Liability Reserve for Future Motorcade in the amount of $76,116 was transferred to net worth during 1972 — said amount represents funds internally appropriated". No further information was given about this bizarre transaction.

Bunch has been a long-time Southern Conference Organizer and recently was "elected" to its Policy Committee. In 1964 and 1968 the Conference lent him $1,200 and $2,000 respectively.

John Burzinski
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	VP	45,230	-	3,016	48,246
1974	LU 743 Welfare Fund	Tee	-	600	-	600
1974	TOTAL					$48,846

Sam Busacca
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 436	VP/Adm	29,470	170	4,743	34,383
1974	JC 41	Director	1,100	-	-	1,100
1974	TOTAL					$35,483

Comments: Busacca is the son-in-law of the late Babe Triscaro. After Triscaro died in August, 1974, Busacca was appointed President by the Local's Executive Board which shortly thereafter petitioned the International to impose an emergency trusteeship because the Local was on the verge of bankruptcy. Fitzsimmons quicky appointed William Presser Trustee who turned right around and appointed Busacca the "Administrator" of the Local at his old salary. Local 436 provided its officers with a late-model Cadillac for their personal as well as business use. Its bylaws also enabled the Local President to travel wherever he wanted, whenever he wanted, and with whomever he wanted.

In 1972 Busacca received a $25,000 home loan from Joint Council 41's Business Agent's Pension Plan, a transaction that may have violated the Landrum-Griffin Act. See Appendix A and Chapter 7 for more details. Contrary to official Department of Labor instructions, the Fund did not disclose terms of repayment.

James A. Calabrese
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 781	Rep	29,182	-	102	$29,284

W. Fleming Campbell
Bethesda, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org	30,000	8,737	382	39,120
1974	ECT	AA	11,564	-	1,247	12,811
1974	TOTAL					$51,931

Anthony Cannestro
Miami, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 769	Pres	32,542	2,812	141	$35,495

Comments: Local 769 is Joe Morgan's old Local.

Vernon Cannon
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 42	Field Rep	44,640	—	—	$44,640

James Casey
Washington, D.C.

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	AA to the GST	47,320	965	349	$48,634

Comments: Casey also received the use of a 1973 Lincoln in 1974 which had a blue book value of $6,050 and which cost $1,149 to operate. Casey continues to pay off a $17,400 loan from the International that he received in the late 1950s for property located in Bethesda, Maryland.

As the Administrative Assistant to the General Secretary-Treasurer, Casey is in charge of all International Auditors.

Robert Cassidy
Canton, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	OCT	S/T	15,000	4,960	—	19,960
1974	JC 41	Tee	1,100	—	—	1,100
1974	LU 92	Pres	28,150	—	659	28,809
1974	TOTAL					$49,869

Comments: Cassidy is one of the Teamsters' leading negotiators for steelhaulers working under Teamster contracts. The bloody battle between dissident steelhaulers belonging to the Fraternal Association of Steelhaulers (FASH) and the Teamsters outside of Youngstown, Ohio in 1969 resulted in Cassidy being fined $2,000 for inciting to riot. By virtue of his status in the Ohio Conference, Cassidy is one of the most powerful Teamsters in the state.

Charles Cimino, Jr.
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 400	Pres	14,025	2,100	1,046	$17,171

Comments: There are three Ciminos on the Executive Board of Local 400 — Charles Cimino, Jr., Charles Cimino, Sr., (see below) and Anthony Cimino, a trustee who received $21,781 in 1974 for his work. In 1973 Ann Cimino was the office manager of the Local for which she received $12,060.

Local 400 has a number of employee welfare and pension funds, three of which paid Cimino and his co-administrator Victor Allianese a total of $95,931 for administrative costs. This amount was intended to cover office rent, utilities, and payroll taxes in addition to the salaries of administrative personnel. No further breakdown was given as to how the money was actually budgeted and spent.

Charles Cimino, Sr.
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 41	S/T	15,500	—	—	15,500
1974	LU 400	S/T	28,620	1,800	1,535	31,955
1974	TOTAL					$47,455

W. D. Clouse
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 41	VP	37,800	2,400	2,153	$42,353

Comments: Local 41 represents freight drivers and dockmen in the Kansas City area and has been the home base of International Vice-President Roy Williams for years.

John Cleuta
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 41	S/T	39,400	2,400	2,677	$44,477

Comments: See W. D. Clouse, above.

Kenneth A. Cook
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 781	VP	32,382	—	5,875	2,500	$40,757

Comments: Local 781 is the home of the Bernsteins, see their profiles above.

Robert C. Cook
Atlanta, Georgia

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1972	SCT	Pol Cee	—	—	—	1,000	1,000
1972	LU 528	Pres.	31,032	682	489	—	32,203
1972	TOTAL						$33,203
1973	SCT	Pol Cee	—	—	—	1,000	1,000
1973	LU 528	Pres.	47,333	320	2,888	—	50,541
1973	TOTAL						$51,541
1974	SCT	Pol Cee	—	Retired	—	5,000	5,000

Comments: Cook retired from Union affairs effective January 1, 1974, yet the Southern Conference still gave him $5,000 in 1974. In light of his retirement, Cook's dramatic salary increase seems questionable. His successor as President of the Local, Joe Vaske, only received $35,603 in 1974.

Several other Cooks have been employed by Local 528. Carl Cook was listed as an "employee" in 1973 making a salary of $30,636 plus expenses totalling $1,728. Barbara Cook became an employee in 1974 at $13,050 a year. In 1973 R. J. Cook was merely an "employee" making $22,621 in salary and another $2,000 in expense money. In 1974 he became the Local's Secretary-Treasurer at a salary of $29,500 plus expenses and allowances of $2500.

Lester Connell
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	LU 816	S/T	23,183	—	1,085	24,268
1974	JC 16	R/Sec	5,842	—	—	5,842
1974	LU 816	S/T	53,943	—	283	54,226
1974	TOTAL					$60,068

Comments: Connell retired as Secretary-Treasurer of Local 816 in 1974. When PROD inquired about the huge increase in pay Connell received in 1974 we were told that the amount contained a "severance settlement". Vincent Connell was a Trustee of Local 816 in 1974 and earned nearly $21,000 for his work.

Ralph L. Cotner

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Representative	23,269	1,800	23,531	862	49,462

Comments: No explanation was given as to why Cotner received so much in reimbursed expenses in 1974.

Theodore R. Cozza
Pittsburgh, Pennsylvania

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org	12,916	4,945	–	27,861
1974	LU 211	Pres	26,000	7,800	277	34,077
1974	TOTAL					$61,938

Comments: According to Walter Sheridan's book, *The Fall & Rise of Jimmy Hoffa*, Cozza has been arrested nine times and convicted on three occasions. In 1959, Cozza was indicted for taking illegal payments from the Pittsburgh Sun-Telegraph while his Local represented its employees. Testimony before the McClellan Committee revealed that Cozza had been on the newspaper's payroll during the 1950s and had received payments totalling $75,000 plus $25,000 in rental fees for a truck he owned. In spite of his record, Fitzsimmons made him a General Organizer and recently supported Cozza in an unsuccessful bid to win the Presidency of Pittsburgh Joint Council 40.

Marie Crapanzano
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 27	R/Sec	20,780	–	–	–	20,780
1974	LU 27 Pension Fund	Tee	–	750	–	–	750
1974	TOTAL						$21,530

Patrick Crapanzano
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 27	BA	19,880	4,800	177	–	24,857
1974	LU 27 Pension Fund	Tee	–	750	–	–	750
1974	TOTAL						$25,607

Patsy Crapanzano
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 27	S/T	33,600	1,200	–	233	35,033
1974	JC 16	Tee	3,600	–	–	–	3,600
1974	LU 27 Pension Fund	Adm. & Tee	18,562	750	–	–	19,312
1974	TOTAL						$57,945

Robert Crapanzano
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 27	Pres.	37,800	4,200	206	411	42,617
1974	LU 27 Pension Fund	Tee	–	750	–	–	750
1974	LU 27 Production Workers Pension Fund	Adm.	15,757	–	–	–	15,787
1974	TOTAL						$59,124

Comments: Local 27 is a small New York Local representing about 3,000 workers. Nearly 40% of it annual dues revenue of $290,000 goes to the Crapanzano family. Father Patsy, Mother Marie, and their two sons also control the Local's pension funds.

Clyde Crosby
Portland, Oregon

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen Org	30,000	9,657	417	$40,075

Comments: Crosby came under close investigation by the McClellan commitee for his role in helping the Portland underworld expand their gambling and jukebox operations in the mid-50s.

Anthony Curcio
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 710	BA	34,518	–	30	34,548
1974	LU 710 Welfare Fund	Tee	12,000	–	–	12,000
1974	TOTAL					$46,548

Anthony Cusano
Newark, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 73	S/T	5,250	400	15	5,665
1974	LU 408	Pres	29,900	264	572	30,736
1974	TOTAL					$36,401

Comments: Local 408 represents about 2,000 Teamsters in the Newark area. Joint Council 73 is the bailiwick of the Provenzanoes.

Leo Dalesio
Baltimore, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 311	S/T	31,800	1,765	4,740	$38,306

Comments: Dalesio became President of Joint Council 62 in early 1975. The $4,740 in "expenses" that Dalesio received in 1974 represent payment to his creditors by the Local Union. In addition, the Local created a Trust fund (#52-6066776 at the Maryland National Trust) in 1966 for Dalesio which will provide severance benefits to him in the event he should lose an election or otherwise be terminated as an elected officer. The market value of the trust was $130,489 in 1974.

Dan Darrow
Akron, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 348	S/T	19,875	425	4,033	24,333
1973	LU 348	S/T	23,175	1,170	5,103	29,448
1974	JC 41	Director	1,100	–	–	1,100
1974	LU 348	S/T	25,918	570	7,195	33,683
1974	TOTAL					$34,783

Comments: Darrow has received several loans from the Joint Council 41 Business Agents Pension Plan (see Appendix A) including an $81,000 loan in 1973. Although it might seem that Darrow does not make enough to justify such a large loan, he somehow managed to pay off $25,872 of the balance in 1974 alone.

Darrow is the administrator of Local 348's health and welfare fund which has made some questionable expenditures recently. In 1974 the fund incurred a "Christmas expense" of $13,173 as well as a convention expense of $10,552. In 1973 the fund spent nothing on "Christmas expenses" and only $6,695 on convention expenses.

Local 348 represents close to 3,000 workers in the Akron area. Darrow has retained his position in spite of a conviction for rioting which he received for his part in the 1969 "FASH shootout" in Youngstown, Ohio.

Harry Davidoff
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1970	LU 295	S/T	58,300	–	–	58,300
1971	LU 295	S/T	57,200	1,300	–	58,500
1972	LU 295	S/T	52,800	–	–	52,800
1972	LU 851	S/T	2,400	200	–	2,600
1972	TOTAL					$55,400
1973	LU 851	S/T	31,200	2,600	885	34,685
1974	LU 295 Pension Fund	Tee	1,299	–	–	1,299
1974	LU 851	S/T	31,200	2,600	–	33,800
1974	LU 295/851 Welfare Fund	Tee	1,299	–	–	1,299
1974	TOTAL					$37,150

Comments: By virtue of a 1966 resolution of Local 295's Executive Board, every officer receives a severance payment equal to one month's wages for every year of service. Thus Local 295's LM-2 reports noted that when Harry retired, the Local assumed a liability of $52,000 for severance pay due an unnamed retired officer. In both 1973 and 1974 the Local reported paying out $19,067 in severance pay to an unnamed retired officer *and* $31,005 in pension payments to unnamed retired officers; all or part of this money each year went to Davidoff.

Harry was replaced by his son Mark as the head of the 2,500 member Local 295 which represents air freight workers at Kennedy International Airport. The $50,000 plus salaries the Davidoffs have paid themselves are high even by Teamster standards considering the size of the Locals.

In July, 1970 the IBT General Executive Board granted a new charter to Harry Davidoff for Local 851 which would have jurisdiction over "Miscellaneous Production and Industrial Employees" of New York City and vicinity. Local 851, with Harry at the helm and Mark Davidoff on the Executive

Board, represents air freight workers at Newark Airport. Harry is the only full-time paid officer of Local 851.

Davidoff received a charter in spite of a long history of arrests and involvement in such activities as the New York City paper local debacle in the mid-50s. In the early 70s Davidoff was indicted for shaking down Trans-Caribbean Air Lines for $9,627 in free tickets. The 1973 LM-2 for Local 295 reports a disbursement of $11,449 for "reimbursement of legal fees to retired officer" which may have gone to pay for Davidoff's legal defense.

A 1973 General Accounting Office report on the operations of Local 295's Severance Trust Fund stated flatly that "The Plan was not originally formulated or administered in the best interests of its members." Among other things the fund bought individual policies for its participants instead of a group policy which resulted in plan members paying $800,000 instead of $10,000 in commissions to the insurance agency. In addition, the administrator of the fund drew an annual salary of $86,877 which meant that each of the fund's 1,300 participants paid the administrator nearly $65 a year.

Mark Davidoff
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 295	S/T	12,600	1,600	–	14,200
1973	LU 295	S/T	37,900	2,600	5,387	45,887
1974	LU 295	S/T	48,800	2,600	6,267	57,667
1974	LU 295 Pension Fund	Tee	1,299	–	–	1,299
1974	LU 295/851	Tee	1,299	–	–	1,299
1974	TOTAL					$60,267

Comments: See the profile of Harry Davidoff, above.

Frank C. DeBrouse
Washington, D.C.

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 55	R/Sec	–	150	–	150
1974	LU 639	Pres	36,480	–	2,368	38,848
1974	LU 639 Pension Fund	Tee	–	4,320	–	4,320
1974	LU 639 Welfare Fund	Tee	–	6,480	–	6,480
1974	TOTAL					$49,798

Comments: DeBrouse has been under intense scrutiny and criticism by a local rank and file group who contend that he has signed substandard contracts, misused union funds, and allowed their pension fund to earn a very poor rate of return.

Anthony dePalma
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	LU 473	S/T	20,250	–	2,464	22,714
1974	LU 473	S/T Local 473	25,700	–	2,183	27,883

Comments: Local 473 represents Cleveland and Akron newspaper drivers. Anthony dePalma is one of Cleveland's lowest paid Teamster officials.

Rocco F. DePerno
Utica, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	5,897	–	30,897
1974	JC 18	Pres	840	–	–	840
1974	LU 182	Pres	41,600	1,820	2,796	46,216
1974	Welfare Fund* (WP No. 065898)	Tee	–	3,648	2,025	5,673
1974	Welfare Fund* (WP No. 077392)	Tee	–	–	1,700	1,700
1974	Welfare Fund* (WP No. 063043)	Tee	–	3,344	2,015	5,359
1974	NY State Conf Pension Fund	Tee	–	–	7,060	7,060
1974	TOTAL					$97,745

[*Refers to Department of Labor file numbers — all funds cover various workers in upstate New York]

Comments: DePerno has been linked with Tony Provenzano in a kickback scheme involving the New York State Conference Pension Fund. According to news accounts, Provenzano told an undercover government informant that he had arranged a $2.3 million loan from the fund which included a 10% kickback for DePerno. Later, DePerno allegedly agreed to arrange the loan in return for a mere 5% kickback.

Rocco F. DePerno, Jr. received $13,172 from Local 182 in 1974 for serving as its "Administrator" as well as $3,100 in fees from the New York Conference Pension fund.

Albert Dietrich
Baltimore, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	15,217	685	$45,903

Comments: Dietrich is a veteran General Organizer whose specialty seems to be running Locals in the Eastern Conference that have been put under Trusteeship. In 1962 he ran Local 71 in Charlotte, North Carolina, in the early 70s he ran Local 800, the Local Fitzsimmons set up Steelhaulers to counter the rising appeal of FASH. Currently Dietrich is the Trustee of Local 592 in Richmond, Virginia. Dietrich's son Robert earned a salary of $20,737 in 1974 plus $11,857 in allowances and $1,616 in expenses (a total of $34,211) for serving as a "representative" of the Eastern Conference.

Anthony DiGrazia
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 781	Rep	20,599	–	4,431	$25,030

A. Distini
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 16	R/Sec	4,350	–	–	4,350
1974	LU 277	Pres	41,600			41,600
1974	TOTAL					$45,950

Comments: Local 277 represents only 1500 members yet it pays its President over $40,000, or just under 20% of its annual revenue.

M. Ralph Dixon
Dallas, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1971	IBT	Gen. Org.	27,356	8,232	708	–	36,296
1971	SCT	S/T	22,072	–	–	–	22,072
1971	Texas Conf.	Pres.	–	700	–	8,150	8,850
1971	TOTAL						$67,218
1972	IBT	Gen. Org.	30,000	5,825	192	–	36,017
1972	SCT	S/T	14,801	–	–	–	14,801
1972	TOTAL						$50,818
1973	IBT	Gen. Org.	30,000	5,137	–	–	35,137
1973	SCT	Retired	–	–	–	16,000	16,000
1973	TOTAL						$51,137
1974	IBT	Gen. Org	12,500	2,132	–	–	14,632

Comments: Dixon was head of the Texas Conference until 1971 when R. B. Bunch took over. He was also the number two man in the Southern Conference until Dusty Miller's son-in-law, C. Howard Jones took over in mid 1972. The Southern Conference gave Dixon a gift worth $16,000 in 1973 and a car worth $4,915 to his widow, Jennie K. Dixon in 1974.

Ed Dorsey
St. Louis, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	Mo-Kans Conf.	VP	2,400	–	–	–	2,920
1974	JC 13	Pres.	3,300	–	859	–	4,159
1974	LU 618	S/T	28,750	3,800	4,889	2,693	40,132
1974	TOTAL						$47,516

Comments: By virtue of his various positions Dorsey enjoys a variety of lucrative fringe benefits. The bylaws of Local 618 authorize Dorsey to travel anywhere he wishes in this country at the Local's expense to promote the interest and welfare of the Union. The Local will also pick up all the expenses of his wife if she cares to accompany him. While on out of town business trips Dorsey may take days off for rest and relaxation, either in the city where he is working or in other areas, and he may entertain for the purpose of establishing and maintaining contacts which may be beneficial to the Union. See Art. XII Sec 2 of Local 618's bylaws. The Missouri-Kansas Conference bylaws also allow Dorsey to take days off while on out of town trips and to spend Union funds to provide entertainment for himself and his friends during non-working hours on out of town trips. Dorsey is also the beneficiary of a deferred compensation fund that his Local established for him. The fund allegedly contains unpaid compensation for the 19 year period from January, 1944 through December, 1962, was worth $85,313 as of December 31, 1974. It was not created until 1962.

Dorsey was recently given a surprise 60th birthday party by St. Louis trucking industry executive Gene Slay that one St. Louis newspaper columnist described as "a night to remember for all hands with a great lineup of talent, a gourmet dinner and a raft of surprises for Dorsey". Slay runs a warehouse and shipping company in the St. Louis area that has a Teamster contract that allows it to pay its dock workers $4.80 an hour and only $21 a week in health and welfare and pension payments while the prevailing hourly rate under the National Master Freight Agreement approaches $7.00 an hour supplemented by $43 per week in welfare and pension payments.

Dorsey also heads up the International's National Automotive, Petroleum and Allied Trades Division.

R. V. Durham
Greensboro, North Carolina

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Safety & Health Director	30,000	6,537	338	36,876
1974	LU 391	Pres	12,410	–	1,128	13,538
1974	TOTAL					$50,414

Comments: Fitzsimmons established the Union's Safety and Health Department and appointed Durham its first director in October, 1973 in response to pressure generated by PROD. Today Durham has only one assistant, a recent college graduate who receives only $11,000 a year, to help him tend to the safety and health concerns of the IBT's 2.3 million members. Durham himself devotes only part-time to his safety post as he still holds the Presidency of an 8,000 member Local and commutes weekly between Washington and Winston-Salem.

Lou Edwards
Zanesville, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	OCT	VP	–	3,460	–	3,460
1974	JC 41	Director	1,100	–	–	1,100
1974	LU 637	S/T	25,436	–	3,175	28,611
1974	TOTAL					$33,171

Comments: Edwards has signed a contract with Howell Transportation, Inc. that provides for wages of $3.90 an hour for truck drivers at a time when the National Freight Agreement called for $7.00 an hour. This contract makes no provision for a pension plan and only requires a health and welfare contribution of $12.50 a week when drivers covered by the National Freight Agreement have $21.50 per week paid on their behalf.

Will P. Evans
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int Auditor	30,000	7,657	266	$37,923

Thomas L. Fagan
Pittsburgh, Pennsylvania

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 40	Pres	–	6,544	7,337	13,881
1974	JC 40 Pension Fund	Tee	–	1,125	530	1,655
1974	LU 249	Pres	22,780	3,430	2,868	29,078
1974	TOTAL					$44,614

Comments: Fagan also serves on the Policy Committee of the Eastern Conference. Fagan was passed over for the position of General Organizer in favor of T. R. Cozza because Fagan supported George McGovern instead of Richard Nixon in 1972.

James A. Farrington
Seattle, Washington

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int Auditor	30,000	8,657	1,774	$40,432

John Felice, Sr.
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 73	Pres	10,400	800	215	11,415
1974	LU 293	Pres	33,020	5,348	1,738	40,106
1974	LU 293 Welfare Fund	Tee	–	7,250	–	7,250
1974	TOTAL					$58,771

Comments: According to the official proceedings of the 1971 Teamster Convention, the elder Felice was a delegate from both Local 73 and Local 293 in apparent violation of the IBT Constitution. Local 73 is a small Local of "Industrial and Allied Employees" formerly presided over by Babe Triscaro. Felice's salary from Local 73 in 1974 was double the $5,200 it paid him in 1973. Local 293 represents about 2,000 beer drivers in the Cleveland area yet it manages to pay Felice and his son $40,000 each.

Local 293's welfare fund makes relatively high payments to its trustees considering the other Union incomes of their trustees and the relatively small size of the fund. Both Felice and his son, John Felice, Jr. received $7,250 each while Central States Pension Fund Trustee Bernard S. Goldfarb received $6,250. Cleveland attorney Moses Krislov received at least $46,500 in legal fees from the small funds affiliated with Felice's two Locals. According to one source, Krislov is associated with the troubled Canadian Javelin Ltd company which has been the recipient of a $3.9 million loan from the Central States Fund and the object of repeated investigations by Federal authorities.

The elder Felice received a loan from the Joint Council 41 Business Agent's Pension Plan. The only information that the fund provided was that in 1969 the face amount of the loan was $15,000, the balance outstanding at the end of the year was $14,000 and that it was secured by his home. In 1970 the exact same information was provided which meant that Felice did not make repayments during that year. After 1970 there is no further mention of the loan to Felice which indicates that he either paid the loan off or it was forgiven.

John J. "Skip" Felice
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 73	VP	10,625	500	–	11,125
1974	LU 293	S/T	24,024	9,866	4,130	38,020
1974	JC 41	R/Sec	4,100	–	–	4,100
1974	LU 293 Welfare Fund	Tee	–	7,250	–	7,250
1974	TOTAL					$60,495

Comments: Skip Felice is a Trustee of Joint Council 41 Business Agents' Pension Plan, the Secretary-Treasurer of Ohio DRIVE, the Union's political arm in Ohio, and an Executive Committeeman of the *Ohio Teamster* newspaper. It is not known whether he receives any additional compensation for these duties.

Local 293 gave away two cars in 1972 to retiring officers. In 1974, the Local incurred "Christmas Expenses" of $17,799.

Edward Fenner
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Chicago Truck Drivers Union	Exec. Dir.	84,000	–	28	84,028
1974	CTDU Production Workers Local	Exec. Dir.	12,000	–	–	12,000
1974	TOTAL					$96,028

Comments: Fenner's Union is totally independent from the Teamsters even though it represents some Chicago-area truck drivers.

Fenner's son Edwin, is a Field Representative for his father's Union and received a salary of $26,151 in 1974 along with $6,000 in allowances.

Donald Fitzsimmons
Pontiac, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 614	Organizer	15,990	75	1,306	$17,371

Comments: Donald Fitzsimmons is the son of the Union's General President. The International gave Local 614 an $11,000 subsidy in 1974 to help defray the cost of hiring the young Fitzsimmons.

Richard Fitzsimmons
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	28,750	6,147	34	35,202
1974	LU 299	VP	30,784	250	64	31,098
1974	TOTAL					$66,300

Comments: Richard Fitzsimmons is the son of Frank Fitzsimmons, the Union's General President.

Howard Floyd
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 25	Tee	15,500	–	–	15,500
1974	LU 330	Pres	24,896	–	1,134	26,030
1974	Northern Illinois Teamster Pension Fund	Tee	–	2,100	–	2,100
1974	TOTAL					$43,630

Robert T. Flynn
Bethesda, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	7,497	452	37,950
1974	ECT	Member Pol/Cee	16,600	–	2,517	19,197
1974	TOTAL					$57,147

Comments: Flynn is the son of the late General Secretary-Treasurer of the IBT, Thomas E. Flynn. He sits on the National Master Freight bargaining committee and is reputed to run the affairs of the Eastern Conference on a day-to-day basis.

William Fountaine, Jr.

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Org.	24,154	1,800	16,470	862	$43,286

Comments: It was not reported why Fountaine had so many "expenses" in 1974.

George French

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Chm'n of a Trade Div.	30,173	1,800	11,063	862	43,898
1974	LU 117	VP	3,350	–	1,092	–	4,442
1974	TOTAL						$48,340

Comments: French stepped down from his position as Vice-President of Seattle Joint Council 28 at the end of 1973 and cut back his responsibilities in Local 117 (which recently merged with Local 353) in order to devote more time to Conference affairs.

Allen Friedman
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1971	LU 507	VP	31,200	–	1,361	32,561
1972	LU 507	VP	58,741	–	1,211	59,952
1973	LU 507	VP	36,400	–	1,224	37,624
1974	LU 507	VP	36,400	–	–	36,400
1974	Warehouse Local 752	Pres	1,000	–	2,023	3,023
1974	TOTAL					$39,423

Comments: Allen Friedman is a long-time officer of Teamsters Local 507 and was one of the beneficiaries of the $100,000 severance pay that was distributed among the top officers of that union in 1972. (See Chapter 7, "The Cleveland Connection" above and Harold Friedman below.) In 1973, Allen Friedman started his own Local, Warehouse, Industrial and Service Employees Union Local 752, which is not affiliated with the Teamsters or the AFL-CIO. Its stated jurisdiction would seem to conflict with at least two other Teamster Locals, Warehouseman's Local 507 and Service Employees Local 244, and thus make Friedman guilty of dual unionism. Local 752's 1973 LM-2 reported that the Local was liable to Friedman for $20,800 in "accrued wages", however, the 1974 report indicates that Friedman collected $1,000 of that amount in 1974 and then notified the Local's Executive Board that he was cancelling any claim or interest in the remaining $19,800 due him.

Also serving with Allen Friedman on Local 752's Executive Board is Presser's lieutenant Andy Suckart. See his profile below.

David Friedman
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Bakers Local 19	VP	10,750	–	–	$10,750

Harold Friedman
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1971	Bakers Local 19	VP	49,099	–	1,635	50,734
1971	Bakers Local 56	BA	2,000	–	–	2,000
1971	Bakers International	Member of the General Executive Board	1,000	–	908	1,908
1971	Teamsters Local 507		57,200	–	1,211	59,952
1971	TOTAL					$114,594

(Con't. on following page)

Year	Division	Title	Salary	Allowances	Expenses	Total
1972	Bakers Local 19	VP	49,938	—	221	50,159
1972	Bakers Local 56	3A	2,000	—	—	2,000
1972	Bakers International	Member of General Executive Board	1,000	—	1,029	2,029
1972	Teamsters Local 507		122,881	—	1,930	124,811
1972	TOTAL					$178,999
1973	Bakers Local 19	VP	65,373	—	126	65,499
1973	Bakers Local 56	BA	2,000	—	—	2,000
1973	Bakers International	Member of General Executive Board	1,000	—	838	1,838
1973	Teamsters Local 507	Pres	68,900	—	7,857	76,757
1973	TOTAL					$146,094
1974	Bakers Local 19	Pres	99,954	—	97	100,051
1974	Bakers International	Member of General Executive Board	1,000	—	641	1,641
1974	Teamsters Local 507	Pres	80,800	—	1,134	81,934
1974	TOTAL					$183,626

Comments: Harold Friedman is the son of Harvey Friedman, a nephew of William Presser, and a close associate of Jackie Presser. The members of Bakers Local 19 paid $12 a month in union dues in 1974 which produced a total of $441,343 in dues receipts for the Union's use. Approximately 22%, or around three dollars a month from every member of that Local went into Harold Friedman's pocket. In 1974 Teamsters Local 507 took in $661,393 in dues and promptly turned around and gave 12% of it to Harold Friedman and another 12% to Jackie Presser.

See Chapter 7, "The Cleveland Connection" for more details on the financial affairs of both Local 507 and Bakers Local 19.

Harvey Friedman
Cleveland, Ohio

Year	Division	Title	Salary	Allowances	Expenses	Total
1971	Bakers Local 19	Pres	43,334	—	5,888	49,222
1972	Bakers Local 19	Pres	45,575	—	5,312	50,887
1973	Bakers Local 19	Pres	44,924	—	360	45,224
1974	Bakers Local 19	Pres	10,000	—	58	10,058

Comments: Harvey Friedman was one of Bill Presser's brothers-in-law who ran Bakers Local 19 for several decades prior to his death in January, 1974. Harvey brought his own son Harold, and William's son Jackie into the Local as well. Thanks to a resolution of the Local's Executive Board, which created a severance fund for three of the Local's officers, Friedman's estate received $141,730 in severance pay due Harvey when he passed away in 1974. This severance fund still had $103,153 left in it at the end of 1974 after paying off the liability to Friedman's estate.

Whereas Harvey received a salary of "only" $44,924 for presiding over Local 19 in 1973, his son Harold took a salary of $99,954 for the same post in 1974.

Ronald M. Gamache
St. Louis, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	CCT	Org.	14,227	3,847	602	18,676
1973	LU 688	S/T	18,120	1,680	2,046	21,846
1973	TOTAL					$40,522
1974	JC 13	R/Sec	2,400	595	—	2,995
1974	LU 688	S/T	32,840	2,738	5,111	40,689
1974	TOTAL					$43,684

Comments: Even though Gamache replaced Gibbons as Secretary-Treasurer during 1973, Gibbons still received a full year's salary from Local 688.

Hyman Gauzer
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	Tee	44,632	—	3,042	$47,674

James Geoghegan
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 16	Member Advisory Board	3,600	—	—	3,600
1974	LU 282	Pres	27,694	—	2,059	29,753
1974	TOTAL					$33,433

Comments: Local 282 represents Teamsters in the Construction Industry.

Donald F. Gillette
Hallandale, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1970	LU 769	S/T	25,440	4,305	1,653	—	31,398
1971	LU 769	S/T	—	—	—	—	31,562
1972	LU 769	Pres.	17,325	2,682	871	—	20,878
1973	Ga-Fla Conf.	S/T	6,500	—	—	—	6,500
1973	LU 769	Pres.	28,445	3,438	145	—	32,028
1973	Florida Teamster Pension Trust	Tee	—	1,500	209	—	1,709
1973	TOTAL						$40,237
1974	IBT	Gen. Org.	10,000	2,675	177	—	12,852
1974	Ga-Fla Conf.	S/T	7,500	—	—	—	7,500
1974	SCT	Org.	20,000	6,263	—	1,000	27,508
1974	TOTAL						$47,860

Comments: Gillette was convicted of taking payoffs from employers on October 8, 1970 along with Joseph John Fischetti, a cousin of Al Capone and a "labor consultant" associated with Teamsters Local 769. According to press reports, Gillette and Fischetti were accused of accepting $12,000 from the Bellows Development Company so that the company would not have to live up to a Union contract. Both men were sentenced to 6 months imprisonment, given a $4,000 fine and placed on

probation for one year upon completion of imprisonment yet as the above figures indicate, Gillette retained his Teamster position and a handsome income. Gillette's influence and salary have even increased considerably since his imprisonment, inasmuch as Joseph Morgan, his former colleague in Local 769, put Gillette on the Southern Conference organizing payroll once he took over the Conference's reigns. Monitoring Gillette's handling of the books of the Georgia-Florida Conference is another Teamster official who has been convicted of taking payoffs from employers, Eli Schutzer, who serves as a Trustee of the Conference in spite of his 1972 conviction for taking payoffs.

Joseph P. Glimco
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 777	Pres	27,950	-	-	$27,950

Comments: Glimco has a long record of arrests and associations with leading organized crime figures. The court appointed Board of Monitors in the early 1960s tried to get Jimmy Hoffa to remove Glimco from Union office. In spite of his notoriety, Glimco's Local has received $18,000 in "organizational grants" from the Central Conference in each of 1971, 1972, 1973 and 1974.

According to a 1974 article in the Chicago Tribune, an estimated $600,000 in health and welfare funds of Teamster Local 777 disappeared while under the control of a court-appointed receiver.

Norman Goldstein
Hallandale, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	IBT	Ass't. to Dir. of Org.	32,083	7,100	2,098	-	41,286
1974	SCT	Org.	9,986	745	-	4,915	15,646
1974	TOTAL						$56,932

Comments: A Law School graduate, Goldstein has specialized in organizing in the Georgia-Florida area for over a decade. He has held a variety of positions with Teamster organizations in the area including Business Agent for Local 290 in Miami, Secretary-Treasurer of Local 769 immediately proceeding Don Gillette, and most recently, administrative assistant to Conference Director Joe Morgan. The $4,915 in "Other" disbursements to Goldstein by the Southern Conference represents the value of a car that was given to him as a gift.

Abe Gordon
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 805	Pres	26,000	-	2,213	28,213
1974	LU 295 Welfare Fund	Adm	16,000	-	-	16,000
1974	LU 295 Pension Fund	Adm	16,000	-	-	16,000
1974	TOTAL					$60,212

Comments: Local 805 represents 2,000 members in the confectionary and tobacco distributing trade. Back in the 1950s and early 1960s, the Local was frequently used as headquarters for the notorious Johnny Dioguardi as well as Milton Holt, who was the Local's Secretary-Treasurer for many years before he became a "labor consultant".

The Local's LM-2 reveals many highly unusual transactions. In 1965 Holt was still paid $15,134 in spite of the fact that he was listed as the "past" Secretary-Treasurer. The next year he received $15,600 as "office" help. During 1965, 1966 and 1967 respectively, the Local spent the following amounts for "resort expenses": $33,256, $17,888 and $17,555.

Some of the Local's receipts are very mysterious. From 1971 through 1974 the Local reported receiving in the vicinity of $58,000 per year in "Expenses reimbursed to Union" but would not

indicate the source of these funds. Like other Locals its size, Gordon's Local took in about $300,000 in dues receipts annually; however, in the years 1968 to 1974, the Local recorded staggering amounts of "Other Receipts" ($329,521 in 1968, $252,435 in1969, $517,646 in 1970, $421,386 in 1971, $756,885 in 1972, $854,120 in 1973 and $302,052 in 1974). These amounts may represent funds "transferred", since the Local has been reporting the transfer of huge amounts in the last several years ($575,000 in 1973, $525,000 in 1972, $150,000 in 1971, $275,000 in 1970) without reporting precisely where the money comes from or where it is going. The Local collects and spends large amounts on an unspecified "annual affair". They paid out $187,446 in expenses for their 1974 event and collected $86,525 in advance for the 1975 happening.

PROD uncovered no other LM-2 form quite like Gordon's.

William Grami
Burlingame, California

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Chm'n of a Trade Div.	33,635	1,800	9,168	882	$45,495

Norman Greene
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	CCT	Executive Asst.	29,744	2,737	2,892	35,373
1974	LU 781	Representative	13,000	-	80	13,080
1974	TOTAL					$48,453

Comments: Greene used to be both a Central Conference Organizer and a representative of Chicago Local 713. When Local 713 merged with Joseph Bernstein's Local 781 in the early 1970s, Greene became a representative of Local 781. Ray Schoessling promoted Greene from Organizer to his Executive Assistant when he moved the Conference headquarters from St. Louis to Chicago.

Jean Grihagne
Washington, D.C.

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Chef	27,341	-	-	$27,341

Comments: Grihagne's assistant, Alain Boineau, received a salary of $12,102 in 1974 which was more than the lone assistant to the Safety Director received.

Marvin K. Griswold
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 2707	S/T	30,250	-	9,095	$39,345

Comments: Griswold is also the head of the International's Airline Division. Local 2707 is an offshoot of Andy Anderson's Local 986.

John P. Hartigan
Bethesda, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	30,000	8,257	716	$38,974

Lysle R. Hazelgrove, Jr.
Richmond, Virginia

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 83	S/T	16,260	-	4,293	20,573
1974	LU 322	Pres	14,095	150	567	14,812
1974	TOTAL					$35,385

Kenneth Hester
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	S/T	44,550	-	6,038	$50,538

John Hoh
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	10,377	82	35,459
1974	JC 16	VP	5,400	-	-	5,400
1974	LU 3	Pres	11,897	-	-	11,897
1974	TOTAL					$52,756

Comments: Local 3 represents about 2,000 Brewery workers in the New York area.

Elvin E. Hughes
Springfield, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	10,337	-	40,337
1974	Ill Conf	Pres		- no compensation listed -		
1974	JC 65	Pres	17,702	-	602	18,304
1974	LU 371	Pres	300	-	-	300
1974	TOTAL					$58,941

Comments: Hughes along with a management trustee of the Illinois Conference of Teamsters Welfare Fund and several officials of an insurance firm was indicted on March 29, 1974 by a Justice Department Task Force on Organized Crime and charged with participating in a kickback scheme. The indictment was reportedly dismissed. It is not known if he will be re-indicted. In the meantime, Hughes has retired.

Edward Hutnik
Newark, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 680	Pres.	25,920	-	1,545	755	$28,220

Comments: On December 20, 1972, the members of Local 680 allegedly "voted" unanimously that any full-time officer employed by the Local for 10 or more years would receive at retirement the car he was then driving. The former President, Anthony Iorio, retired on January 1, 1974 and received a car with a book value of $5,061.

More recently, U.S. District Court Judge Herbert J. Stern appointed a lawyer to represent retired members of Local 680 who are in danger of losing their pension benefits. The lawyer charged that the employer and union trustees of the fund have no interest in helping the retirees but were more interested in the company's well-being.

David Johnson
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 299	Pres	41,935	-	1,829	$43,764

C. Howard Jones
Dallas, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1971	SCT	-	-	-	-	1,000	1,000
1971	IBT	Gen. Org.	28,115	9,387	1,628	-	39,130
1971	TOTAL						$40,130
1972	IBT	Gen. Org.	30,000	10,145	2,030	-	42,175
1972	SCT	S/T Pol Cee	8,766	-	-	-	8,766
1972	TOTAL						$50,941
1973	IBT	Gen. Org.	30,000	12,817	2,850	-	45,668
1973	SCT	S/T Pol Cee	22,298	-	-	-	22,298
1973	TOTAL						$67,966
1974	IBT	Gen. Org.	30,000	10,537	2,515	-	43,052
1974	SCT	S/T Pol Cee	26,439	-	-	-	26,439
1974	TOTAL						$69,491

Comments: Howard Jones is the son-in-law of former General Secretary-Treasurer Dusty Miller. Miller first employed Jones as an organizer for the Southern Conference in 1967. In 1969 Jones and fellow Conference organizer W. W. Teague each received a $1,000 cash bonus and a brand new automobile worth $7,915. Jones then left the Southern Conference payroll to become an International General Organizer yet the Southern Conference still gave him a $1,000 gift in 1971. In mid-1972 Jones became the Secretary-Treasurer of the Southern Conference Policy Committee just months after his father-in-law became General Secretary-Treasurer of the International. The man Jones replaced, M. Ralph Dixon, received a $16,000 gift from the Conference the year after he stepped down to make room for Jones.

Glenn Jones
Richardson, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	30,000	10,537	2,515	$43,052

Jack J. Jorgensen
Minneapolis, Minnesota

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1973	IBT	Gen. Org.	25,000	6,217	-	-	31,217
1973	JC 32	Pres.	3,000	50	333	-	3,383
1973	LU 350	S/T	29,082	-	557	1,566	31,207
1973	TOTAL						$65,807

(Con't. on following page)

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen. Org.	28,750	6,097	137	–	34,985
1974	JC 32	Pres.		– not available –			
1974	LU 359	S/T		– not available –			
1974	TOTAL						not available

Comments: Jorgensen was convicted in the 1950s of taking illegal payments from an employer who offered money to several Teamster officials to organize miners who were then represented by a union on strike against the company.

The LM-2s of Local 359 and Joint Council 32 for 1974 were incomplete. The Joint Council did indicate that it had contributed $81,532 in 1974 to Minnesota DRIVE, the union's political arm in Minnesota, and purchased a membership in the Midland Hills Country Club for $600. The political contribution may have been unlawful. See 18 U.S.C. 610. The Central Conference gave Joint Council 32 a $50,000 organizing grant in 1974.

In 1973, Jorgensen hired his son, Jack, Jr., as an organizer for Joint Council 32 and paid him nearly $20,000. It could not be determined whether he was still on the payroll in 1974.

William Joyce
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1973	CCT	Org.	14,667	–	–	–	14,667
1973	LU 710	S/T	122,716	–	–	12	122,728
1973	TOTAL						$137,395
1974	CCT	Org.	22,000	–	–	–	22,000
1974	LU 710	S/T	134,568	–	–	11	134,579
1974	TOTAL						$156,599

Comments: Local 710 represents almost 20,000 Teamsters scattered across the country. For example, UPS workers in the Indianapolis area are required to belong to Local 710 while road drivers living anywhere from Albuquerque, New Mexico to North Carolina might belong to Joyce's Local. This wide geographic distribution makes it extremely difficult for reformers to mount significant opposition to Joyce. They typically receive little or no representation from the distant Local.

It is surprising that the Central Conference would pay Joyce an organizer's salary while he was receiving such a huge salary for running his Local.

The President of Local 710, John Kelahan, also received over $100,000 in 1974 while the Vice-President, August Szucs, made nearly $70,000. The Local runs its own pension and welfare funds.

Bernard Keegan
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	Chicago Truck Drivers Union	Pres.	63,300	6,000	–	–	$69,300

Comments: Keegan is President of Ed Fenner's Union which has remained formally independent of the Teamsters. His son, Michael Keegan was the second highest paid "representative" of the CTDU in 1974 when he received $41,506 for his efforts.

John D. Kelahan
Chicago, Illinois

Year	Division	Title	Salary	Allowances	Expenses	Total
1973	LU 710	Pres	102,716	–	12	102,725
1974	LU 710	Pres	112,421	–	112	112,533

Comments: See William Joyce, above.

Cecil J. Kinney
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	LU 407	VP	27,070	1,825	2,318	31,213
1973	LU 407 Insurance Fund	Tee	–	5,416	–	5,416
1973	TOTAL					$36,629
1974	LU 407	VP	28,175	2,404	1,955	32,534
1974	LU 407 Insurance Fund	Tee	–	11,250	–	11,250
1974	TOTAL					$43,784

Comments: For more information on Local 407, see the profile of Thomas Lee below.

Joseph Konowe
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	5,777	–	30,777
1974	JC 16	Advisory Board	3,600	–	–	3,600
1974	LU 210	S/T	26,940	4,250	78	31,268
1974	TOTAL					$65,645

Peter Kurbatoff
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 42	Pres	59,359	–	10,836	$70,195

Comments: Kurbatoff also serves as the President of Local 235 but received no compensation for filling that office. Joint Council 42 represents nearly 200,000 Teamsters and is second in size only to Chicago Joint Council 25.

Roy C. Lane
Milwaukee, Wisconsin

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 200	Pres	25,969	1,530	307	27,807
1973	LU 200	Pres	28,319	2,600	452	31,372
1974	LU 200	Pres	30,620	7,000	238	37,858

Comments: Lane serves on the negotiating committee for the Central States portion of the National Master Freight Agreement. Local 200 is the home of Central States Pension Fund Trustee Frank Ranney.

On its 1974 LM-2 form, Kansas City Joint Council 56 lists disbursements of $6,800 to Roy Lane, an "Organizer". It could not be determined if this was a payment to Mr. Lane of Milwaukee.

Thomas Lee
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 407	S/T	20,300	1,700	2,017	24,017
1973	LU 407	S/T	27,070	3,075	1,681	31,826
1973	LU 407 Insurance Fund	Tee	–	5,416	–	5,416
1973	TOTAL					$37,242
1974	JC 41	Tee	1,100	–	–	1,100
1974	LU 407	S/T	28,155	2,979	2,138	33,292
1974	LU 407 Insurance Fund	Tee	–	11,250	–	11,250
1974	TOTAL					$45,642

Comments: Local 407 is a large Cleveland freight Local representing nearly 10,000 members in the trucking industry. It has its own officers' severance fund which is used to supplement the handsome benefits the International and Joint Council 41 provide. In 1974 the Local reported paying $23,184 into its severance fund on top of $40,152 in pension payments to unnamed individuals. In 1972 and 1973 the Local sold five cars, two late model Cadillacs and three Oldsmobiles, to various retiring officials for a grand total of $11. See Appendix C for details.

The Local's health insurance fund, which rewarded Lee, John Tanski (the Local's President), and Cecil Kinney (the Local's Vice-President), with generous fees in 1973, is headquartered in the Cleveland Law Offices of Bernard S. Goldfarb, an employer Trustee of the Central States Pension Fund. Local 407's Fund paid Bernard S. Goldfarb, Inc. $162,000 in 1973 and $192,000 in 1974 for "Office salary, rent, utilities for maintenance of funds".

Lee may also be receiving payments from the Ohio Conference of Teamsters which disbursed $23,807 to unnamed Ohio Teamster officials in 1974.

Gillis Jack Littleton
Chattanooga, Tennessee

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	DRIVE Field Rep	17,995	12,817	4,512	$35,325

Comments: DRIVE is the Union's political arm.

G. Lonergan
Jersey City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	JC 73	R/Sec	5,250	400	167	–	5,817
1974	LU 641	S/T	37,300	466	238	186	38,190
1974	TOTAL						$44,007

Comments: Lonergan took over the post of Secretary-Treasurer upon the death of former International Vice-President, Dominick Calabrese. Local 641 represents about 5,000 freight workers in northern New Jersey, yet its officers are higher paid than those of neighboring Local 560 which is a much larger Local. Local 641 bought seven $9,000 automobiles for its officers in 1974 and reported paying $74,761 into unspecified pension funds, presumably on behalf of its officers and employees. This amount was more than double what the Local had paid in 1973 or 1972 yet the Local did not offer any explanation for the sudden increase.

In 1971 Lonergan received nearly $3,000 from the International for serving on the key Constitution Amendments Committee.

Richard Lyter
Little Falls, Minnesota

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	30,000	12,377	2,622	$45,000

Vito Mango
Columbus, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 413	Pres	30,258	500	358	$31,116

Comments: The 10,000 member Local 413 was recently put into trusteeship by the International for alleged financial mismanagement. A U.S. Department of Justice Strike Force on Organized Crime is investigating the Local for ties to Chicago mobsters who were allegedly bleeding the Local's treasury. The Local's 1974 LM-2 contains several suspicious items. The Local apparently has incurred debts recently totalling $217,247 and has only managed to repay $113,363 of them. Schedule 11 of the Local's reporting form indicates payments of $81,916 for a "Dental Plan" to an unspecified "Labor Health Plan" in addition to disbursements of $82,968 to unspecified pension and welfare funds. In 1974 alone the Local reported making transfers of $107,436 as well as spending $60,819 on committee and meeting expenses and $19,969 on travel.

Charles Martelli
Long Island City, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 814	S/T	22,340	1,520	1,802	$25,662

Comments: Martelli is also head of the International's Household Goods, Moving and Storage Trade Division. Local 814 represents almost 5,000 movers, packers, and furniture handlers in the New York area.

R. Mascuch
Newark, New Jersey

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	LU 680	S/T	25,920	–	1,079	1,087	28,087

Comments: See the portrait of Edward Hutnik, above.

Weldon L. Mathis, Jr.
Atlanta, Georgia

Year	Division	Titles	Salary	Allowances	Expenses	Total
1971	IBT	Organizer	18,000	8,072	288	26,361
1972	IBT	Organizer	19,080	18,025	3,406	40,511
1973	IBT	Special Org.	19,080	7,577	–	26,657
1974	IBT	Special Org.	8,590	3,612	502	12,705
1974	LU 728	Employee	17,241	1,600	331	19,172
1974	TOTAL					$31,877

Comments: Weldon Mathis, Jr. is the son of International Vice-President Weldon Mathis who serves as Frank Fitzsimmons' Executive Assistant. On the 1971 LM-2 for Local 728, a W. L. Mathis is listed as receiving a salary of $18,769. PROD could not be sure if this was Weldon Mathis, Jr. or Wilbur Mathis. The younger Mathis' disbursements from the IBT in 1972 include an extraordinarily high amount of "allowances" yet no explanation was given by the IBT on its LM-2 form.

Wilbur Mathis
Atlanta, Georgia

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 728	Employee	20,894	–	–	20,894
1973	LU 728	Employee	21,808	–	–	21,808
1974	LU 728	Employee	23,200	1,930	449	25,579

Comments: Wilbur Mathis is the brother of IBT Vice-President Weldon Mathis.

Lawrence McDermott
Jersey City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1973	LU 641	Pres.	37,300	–	435	1,184	38,919
1974	LU 641	Pres.	42,900	456	20	137	43,514

Comments: McDermott's son received $18,245 in 1974 from Local 641 for serving as an "office" employee. The Local employs one other "office" employee, R. Kenny, and pays him a salary of $33,975! Good office help must be hard to find in northern New Jersey. For more information on Local 641 see the portrait of G. Lonergan above.

Rolland McMaster
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	11,417	569	$41,987

Comments: McMaster has long been known as one of Jimmy Hoffa's and later Frank Fitzsimmons', henchmen. He has spent 18 months in jail for taking illegal payments from the head of Youngstown Cartage. While on special assignment with the *Detroit Free Press*, free-lance journalist Dan Moldea discovered that McMaster had headed up a special Teamster organizing squad that was to sign up owner-operators. The so-called "McMaster Task Force" reportedly spent several million dollars between 1971 and 1973 and only produced several hundred members. The organizing campaign was allegedly marred by violence, the signing of substandard contracts and other suspicious activities.

Ted Merrill
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	9,137	7,331	$46,468

James V. Metz
Jackson, Mississippi

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 891	Pres.	22,400	–	967	4,665	$28,032

Comments: Local 691 represents about 1,000 members in the Jackson area. The $4,665 in "other disbursements" Metz received in 1974 was not otherwise identified on the Local's LM-2.

Richard Milone
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 541	VP	44,635	2,548	1,515	48,698
1974	JC 56	Organizer	2,400	–	–	2,400
1974	TOTAL					$51,098

Verne Milton
Burlingame, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	9,137	7,331	$46,468

Comments: Milton is the chairman of the Western Conference Freight Division and an important member of the Union's National Master Freight negotiating committee.

Bruce C. Mohn
Burlingame, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	27,500	7,777	1,003	$36,280

Comments: Mohn is the son of Einar Mohn, the former Director of the Western Conference.

Paul V. Murphy

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	30,000	10,577	2,784	$43,362

F. J. Murtha
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	IBT	Gen. Org.	30,000	5,145	–	35,145
1972	Central States Pension Fund	Exec. Secy.	66,344	–	–	66,344
1972	TOTAL					$101,489
1973	IBT	Gen. Org.	30,000	6,137	115	36,252
1973	Central States Pension Fund	Ret. Admin.	34,384	–	–	34,384
1973	TOTAL					$70,636
1974	IBT	Gen. Org.	30,000	5,217	–	35,217
1974	Central States Pension Fund	Ret. Admin.	21,600	–	–	21,600
1974	TOTAL					$56,817

Comments: Murtha received a loan from the International in the late 1950s for more than $40,000 to pay for a home in Skokie, Illinois. As of December 31, 1974 he owed $8,600 to the IBT on this loan. According to the International's 1975 LM-2 which PROD obtained just before going to press, Murtha made no repayments in 1975.

Murtha serves as the Recording Secretary of the Central States Drivers Council and on various Union negotiating committees.

Delbert Nabors
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Mo-Kans Conf	Org.	6,000	–	–	6,000
1974	LU 41	Org.	32,400	2,400	666	35,466
1974	TOTAL					$41,466

Comments: Nabors takes orders from Kansas City Teamster chief Roy Williams, who heads both the Missouri-Kansas Conference and Local 41.

John Nardi
Cleveland, Ohio

Year	Division	Title	Salary	Allowances	Expenses	Total
1974	JC 41	Employee	17,000	–	–	17,000
1974	LU 410	S/T	34,750	–	339	35,039
1974	LU 507	BA	15,600	–	–	15,600
1974	TOTAL					$67,639

Comments: Nardi was indicted for labor racketeering and marijuana smuggling in late 1975. Both Pressers have Nardi on their payrolls; William pays him out of Joint Council 41 funds while Jackie carries Nardi on the books of Local 507 as a "Business Agent". Local 410, Nardi's home base, is the jukebox Local that employed Joe Blumetti.

William Neidig
Bethesda, Maryland

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	ECT	Representative	23,666	9,177	640	33,484
1974	ECT	Representative	25,147	11,097	1,125	37,370

Comments: Neidig is a former officer of Local 992 in Hagerstown, Maryland

William Nuchow
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 840	Pres.	21,900	180	4,901	1,476	$28,457

Comments: Local 840 represents about 1,000 members in New York City and took in a little over $100,000 in dues revenue in 1974. Nuchow is the only full-time paid officer. He was indicted in March, 1973 for permitting a convict, Pablo Berrios, to hold office in violation of the Landrum-Griffin Act. The charge was dismissed in February, 1974.

Charles O'Brien
Hallandale, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	9,497	698	35,195
1974	LU 299	BA	5,400	–	–	5,400
1974	TOTAL					$40,595

Comment: O'Brien has been mentioned frequently in connection with the disappearance of Jimmy Hoffa.

Harold J. O'Brien
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 25	Tee	6,000	–	–	6,000
1974	LU 734	Pres	34,620	213	4,910	39,743
1974	TOTAL					$45,743

Comments: O'Brien is also the Secretary-Treasurer of the National Bakery Conference.

Mark J. O'Reilly
San Francisco, California

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1973	LU 860	S/T	35,000	270	4,568	717	40,555
1974	JC 7	S/T	3,300	300	–	–	3,600
1974	LU 860	S/T	39,570	2,886	2,440	862	45,758
1974	TOTAL						$49,358

Comments: O'Reilly also serves on the Western Conference Policy Committee.

Thomas Owens
Washington, D.C.

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	33,750	9,337	6,600	$49,688

Comments: Even though the salaries of General Organizers are limited by the IBT Constitution to $30,000, Owens received $35,000 in 1975. He also heads the National Building Materials and Construction Trade Division of the International.

Everett Oxyer
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 507	Tee	19,350	–	690	20,040
1974	Bakers Local 19 Pension Fund	Adm.	21,500	–	-	21,500
1974	Bakers Local 19 Welfare Fund	Adm.	4,725	–	–	4,725
1974	TOTAL					$46,265

Comments: For more information on the relationship between Teamsters Local 507 and Bakers Local 19, see Chapter 7, "The Cleveland Connection".

Joseph Panker
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	CCT	Chauf.	11,297	–	39	$11,336

Gid Parham
Atlanta, Georgia

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	SCT	Org.	32,811	9,978	–	$42,789

Comments: Parham just joined the Southern Conference Policy Committee in 1974.

Hubert L. Payne
Birmingham, Alabama

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 87	Pres		– no compensation reported –		
1974	LU 519	Pres	20,720	2,071	–	22,791
1974	SCT	Pol Cee	–	1,000	–	1,000
1974	TOTAL					$23,791

Joseph Pecora
Newark, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	JC 73	VP	5,250	400	–	–	5,650
1974	LU 863	S/T	48,330	–	–	–	48,976
1974	TOTAL						$54,626

Comments: Pecora's associations with organized crime figures have been widely reported. A Senate Commerce Committee in 1971-1972 listed Joseph Pecora and his brother Thomas "Timmy Murphy" Pecora as members of the Mafia family of the late Vito Genovese. That committee probed, among other things, how Pecora had used his influence to pressure A&P into carrying an inferior brand of detergent. Pecora is also the Vice-President of Joint Council 73 which has long been under the domination of Anthony Provenzano.

Pecora was indicted on August 19, 1971 for embezzlement, making false entries and false reports, and destruction of records. The indictment was, however, dismissed in November, 1974.

Local 863's LM-2 for 1974 indicated that the Local has $377,142 set aside as a "Reserve for Retirement Benefits". PROD found no other example of any Teamster Local with anywhere near that much money set aside under that designation.

Pecora's son, Joseph, Jr., is the Vice-President of Local 863 for which he received a salary of $33,900 in 1974. Another relative, Thomas Pecora, is the General Manager of Federico Trucking Company yet he holds a Local 863 Union card along with the owner and other top management of the company whose drivers belong to Teamsters Local 202.

Donald Peters
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	5,857	–	30,857
1974	LU 743	Pres	73,938	–	5,429	79,367
1974	Central States Pension Fund	Tee	–	27,980	5,164	33,144
1974	TOTAL					$143,368

Comments: Peters has presided over Local 743 since the 1940s. It now represents over 30,000 members in the Chicago area, chiefly those employed in large retail outlets, offices and various warehouses.

Peters has been a trustee of the Central States Pension Fund for many years and has been business partners with other trustees and Allen Dorfman. The fund in turn has treated him well. In 1971, Peters reported receiving $1,598 in allowances and expenses from the fund. The next year that amount increased to $14,920 and continued to increase in 1973 to a healthy $41,480. In 1974, the amount he received dipped to $33,144 but at the rate of $400 per diem in allowances that the trustees paid themselves, the reported figures indicate that Peters spent close to 70 days on fund affairs while still drawing a salary from his Local that was nearly $30,000 higher than that paid to any other officer.

One of the large health and welfare plans that cover 10,000 members of Peters' Local paid out almost $3.7 million in premiums to Republic National Life Insurance and more than $200,000 in service fees to two companies controlled by Allen Dorfman — Amalgamated Insurance Agency and the Union Insurance Agency.

Harry Peters
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	Tee	45,173	–	5,058	$50,231

Wendell J. Phillips
San Francisco, California

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Pol Cee	9,981	1,400	–	674	12,055
1974	WCT Pension Fund	Tee	–	1,225	1,106	–	2,331
1974	LU 484	R/Sec	23,400	–	670	–	24,070
1974	TOTAL						$38,456

Comments: Phillips served as chairman of the Western States Representatives Retirement Plan as well as on the Conference Policy Committee. Local 484 is a small Bakery Drivers local serving Bay area Teamsters.

W. L. Piland
Dallas, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1972	JC 80	Pres.	1,000	–	–	–	1,000
1972	LU 745	S/T	27,500	4,200	145	200	32,045
1972	TOTAL						$33,045
1971	JC 80	Pres.	– no compensation reported –				
1971	LU 745	S/T	22,800	4,250	83	4,300	31,433
1973	JC 80	Pres.	–	–	–	775	775
1973	LU 745	S/T	32,900	5,625	51	3,448	42,024
1973	TOTAL						$42,799
1974	JC 80	Pres.	1,100	–	–	750	1,850
1974	LU 745	S/T	34,200	4,875	445	200	39,720
1974	TOTAL						$41,570

Comments: Piland is also the Secretary-Treasurer of the Texas Conference of Teamsters but its LM-2 reports indicate that he receives no compensation for his services. The Texas Conference has given quite a few gifts to various Teamster officials including a $1,500 gift to Piland himself in 1969. (See also the sketches of Dusty Miller, Joe Morgan and R. B. Bunch above). Local 745 gave various officials such as Joe Morgan and W. C. Smith gifts in 1974. The Local also gave "other disbursements" of $4,000 to 5 Business Agents and two officers of the Local.

Frank Pinto
Jersey City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 617	Pres	36,370	–	–	$36,737

Comments: Pinto is also the trustee of various Northern Jersey Pension and Welfare funds.

John Pisano
New Haven, Connecticut

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	JC 64	Treas.	–	–	2,421	500	2,921
1974	LU 443	S/T	44,764	272	–	–	45,026
1974	TOTAL						$47,947

Comments: Pisano was indicted on June 28, 1971 along with three other officers of Joint Council 64, Fred J. Roberto, Henry Dauphinais and Edward Rice, for embezzlement and conspiracy to embezzle. All four were acquitted on April 17, 1973.

Local 443 represents about 4,500 workers in the New Haven area and carries on its books "Severance Obligations" to unnamed individuals of $32,000.

Vincent Pisano
New Haven, Connecticut

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	JC 64	Sec	–	–	600	200	800
1974	LU 443	Tee/BA	31,611	807	–	–	32,418
1974	TOTAL						$33,218

Jackie Presser
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1971	JC 41	Tee	1,100	–	–	1,100
1971	LU 507	S/T	57,200	–	7,954	65,154
1971	Bakers Local 19	BA	12,000	–	–	12,000
1971	Bartenders Local 10	Pres	19,500	–	–	19,500
1971	TOTAL					$97,754
1972	IBT	Gen. Org.	28,897	6,469	289	35,655
1972	JC 41	R/Sec	1,100	–	–	1,100
1972	LU 507	S/T	123,981	–	1,685	125,666
1972	Bakers Local 19	Fin Sec'y	12,000	–	–	12,000
1972	Bartenders Local 10	Pres	19,500	–	–	19,500
1972	TOTAL					$193,921
1973	IBT	Gen. Org.	30,000	5,777	71	35,849
1973	JC 41	R/Sec	1,100	–	–	1,100
1973	LU 507	S/T	70,200	–	7,717	77,917
1973	Bakers LU 19	Fin Sec'y	14,923	–	–	14,923
1973	Bartenders LU 10	Pres	19,500	–	–	19,500
*1973	Bartenders International	Organizer	11,000	4,630	301	15,931
1973	TOTAL					$168,832
1974	IBT	Gen. Org.	30,000	5,737	77	35,815
1974	OCT	R/Sec	–	800	–	800
1974	JC 41	VP	6,270	–	–	6,270
1974	LU 507	S/T	82,300	–	2,316	84,616
1974	Bakers Local 19	Fin Sec'y	12,692	–	13	12,705
1974	Bartenders LU 10	Pres	19,500	–	–	19,500
**1974	Bartenders International	Organizer	12,000	4,590	–	16,590
1974	TOTAL					$176,571

*Represents payments from 5/1/73 to 4/30/74
**Represents payments from 5/1/74 to 4/30/75

Comments: In addition to the above-listed offices, Jackie Presser holds other influential positions. He currently serves as head of Ohio DRIVE (the Union's political arm in Ohio), the chairman of the board of the *Ohio Teamster* newspaper, and trustee of numerous pension funds including the Central States Pension Fund, Teamsters Local 507 Pension Fund, Bakers' Local 19 Pension Fund, and Joint Council 41 Business Agents Pension Plan. Presser also heads up the International's National Energy Haulers Organizing Committee, a unit designed to organize truck drivers who haul coal from the fields to railroads and proposed coal-liquefication plants. Presser

apparently feels that this would be the first step in creating a new trade division within the Union, so-called "Energy" Division, with himself at the head. Presser seems to be maneuvering himself into a position to take over all his father's positions when the elder Presser retires. Jackie has been moving up in Joint Council 41 and recently became an officer of the Ohio Conference. The huge increase in Presser's reported income from 1971 to 1972 (almost a $100,000 raise!) testifies to his increased prominence as well as his willingness to designate union funds for his own use. See generally Chapter 7, "The Cleveland Connection" for more information on Presser's financial dealings.

Outside of the Teamsters Union Presser has great influence. He controls one Local of the Hotel, Restaurant and Bartenders Union in addition to serving as one of its international Organizers. He also has great influence in Cleveland city politics. In December, 1975 Presser made a concerted effort to gain control of a lucrative liquor business. One of his business partners in that venture was the Treasurer of the Cuyahoga County (Cleveland) Democratic Party Robert Moss, who also serves as a Vice-President of Leaseway Transportation, a firm that employs many Ohio Teamsters through its various subsidiaries such as Anchor Motor Freight.

Abe Price
Long Island City, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	JC 16	S/T	7,483	–	90	–	7,573
1974	LU 138	S/T	14,912	–	–	–	14,912
1974	TOTAL						$22,485

Paul W. Priddy
Louisville, Kentucky

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Crg.	25,000	7,377	–	32,377
1974	JC 94	Pres	3,600	–	–	3,600
1974	LU 89	Pres	32,350	7,129	1,871	41,350
1974	TOTAL					$77,327

Anthony Provenzano
Union City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1962	IBT	VP	12,000	4,487	1,166	–	17,654
1962	JC 73	Pres.	8,400	–	–	–	8,400
1962	LU 560	S/T	20,800	1,500	2,637	897	25,834
1962	TOTAL						$51,888
1963	IBT	VP	12,000	3,370	686	–	16,023
1963	JC 73	Pres.	12,000	–	–	–	12,000
1963	LU 560	S/T	20,800	–	3,444	–	24,244
1963	TOTAL						$52,267
1964	IBT	VP	12,000	3,370	1,155	–	16,525
1964	JC 73	Pres.	10,000	–	–	–	10,000
1964	LU 560	S/T	21,200	–	3,867	–	25,067
1964	TOTAL						$51,592
1965	IBT	VP	16,333	4,970	1,533	–	22,836
1965	JC 73	Pres.	8,000	–	–	–	8,000
1965	LU 560	S/T	20,800	–	3,886	–	24,686
1965	TOTAL						$55,522

(Con't. on following page)

1966	IBT	VP	6,883	2,080	—	—	8,963
1966	JC 73	Pres.	5,000	—	—	—	5,000
1966	LU 560	S/T	7,200	—	2,627	600	10,327
1966	TOTAL						$24,290
1967	JC 73	none	—	—	—	3,000	3,000
1969	LU 560	none	—	—	—	22,850	22,850
1970	LU 560	none	—	—	—	25,000	25,000
1971	LU 560	none	—	—	—	25,000	25,000
1972	LU 560	none	—	—	—	25,000	25,000
1973	LU 560	none	—	—	—	25,000	25,000
1974	LU 560	none	—	—	—	25,000	25,000

Comments: In December of 1962 Provenzano was granted a $25,000 pay raise at a meeting attended by less than 2% of the Local's membership and in early 1963 he was granted another $50,000 pay raise by his Local. Yet, Provenzano did not take any of these increases, which would have boosted his earnings to well over $125,000 at a time when the President of the United States was only making $100,000. Instead, he set aside these "raises" into a fund which he started to draw in 1969 while he was in prison serving time for extorting money from Dohrn Transportation. As the figures above indicate, he has been receiving this money in $25,000 chunks. As of December 31, 1974, the Local reported still owing him $98,785.

Several other aspects of Provenzano's finances should be noted. Under Local 560's bylaws, Provenzano was authorized to spend "reasonable amounts" to entertain for the purpose of maintaining contacts which may be beneficial to the Union. Local 560 also established a special severance fund for its officers and business agents which had nearly $100,000 in it at the end of 1963. Since the Local provided only the barest information on this fund, it could not be determined if Anthony Provenzano had received any of that money while he was in jail.

Provenzano officially resigned his International Union posts on May 4, 1966 and entered prison shortly thereafter for nearly four and a half years. Because of the Landrum-Griffin Act, he was barred from union office for five years after his release from prison. When he became eligible again to hold union office, his brother Nunzio stepped aside as Secretary-Treasurer so that Tony would have a place on the Executive Board. Judging from the Local's past practices, Provenzano is currently earning anywhere between thirty and fifty thousand dollars from the Local in addition to the $25,000 chunks of his "deferred compensation" that he has been receiving since 1969. It has been rumored that Frank Fitzsimmons has appointed Provenzano as a General Organizer. If so, this would net Provenzano another $30,000 to $50,000 a year and may catapult him into the already crowded $100,000-a-year club.

Provenzano's troubles with the law are almost legendary. Back in the early 1960s he was investigated for accepting a house from a New Jersey trucking industry executive as well as for the racketeering activities for which he was eventually imprisoned. More recently he has been under indictment for a kickback scheme involving the New York State Conference of Teamsters Welfare and Pension Plan (see the profile of Rocco DePerno above) and under investigation for possible kickbacks involving a loan from a Northern New Jersey Welfare Fund in which Local 560 participates. (see the profile of Salvatore Briguglio above). Finally, it has been reported that a Hartford, Connecticut grand jury has charged Provenzano with receiving $150,000 from some pension fund for his efforts on behalf of an applicant who wanted a loan to build a massive jai-alai arena with gambling playrooms attached.

Provenzano's brothers have not escaped scrapes with the law either. Brother Salvatore, an International Vice-President, has been indicted for conspiracy to counterfeit currency, food stamps and postage stamps while his brother Angelo is a Vice-President of Eastern Freightways, a company that has been under investigation by the ICC, the SEC, the DOT and the Justice Department in connection with its efforts to take over Associated Transport, a much larger trucking company.

Nunzio Provenzano
Union City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 560	S/T	28,600	—	853	$29,453

R. L. Rampy
San Francisco, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	JC 23	Pres	6,892	4,940	272	12,104
1973	LU 53	S/T	13,844	480	245	14,569
1973	TOTAL					$26,673
1974	IBT	Int. Auditor	30,000	10,577	2,784	43,362

Frank Ranney
Milwaukee, Wisconsin/Coral Springs, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	5,457	8	35,466
1974	LU 200	Tee	12,900	—	—	12,900
1974	Central States Pension Fund	Tee	—	59,840	16,519	76,359
1974	TOTAL					$124,734

Comments: In 1972 the Central States Pension Fund reported paying Ranney only $15,300. That amount mysteriously jumped to $65,000 in 1973 and $76,359 in 1974. At the rate of $400 per day plus expenses, Ranney must have spent roughly 150 days on Fund business which would have left him little time to serve either the IBT or Local 200.

Ranney serves with fellow Central States Fund trustees Roy Williams, Frank Fitzsimmons, and William Presser on the Central States Drivers Council, which negotiates contracts and settles grievances with trucking industry employees in the Mid-West. Fitzsimmons also appointed Ranney International Trustee over recalcitrant Local 695 in Madison, Wisconsin which would not subscribe to the International's pro-Nixon political line. It is hard to tell how active a presence Ranney maintained since he signed four of the six periodic Trusteeship reports on file with the Department of Labor from Coral Springs, Florida where he reportedly has a home.

Local 200 pays Ranney more than its two other trustees who received only $3,710 and $2,710 respectively in 1974.

Louis D. Richard
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Org.	16,866	12,376	3,061	$32,103

Comments: Richard is affiliated with Los Angeles Local 986, the home base of Western Conference Director M. E. "Andy" Anderson.

Michael J. Riley
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 986	S/T	37,400	—	1,643	$39,043

Comments: Riley started out 1974 as the President of Local 986 but midway through August, he switched places with then Secretary-Treasurer M. E. "Andy" Anderson.

Loran Robbins
Indianapolis, Indiana

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Indiana Conf	Pres.	11,200	–	28	11,228
1974	JC 69	Pres.	– no compensation reported –			
1974	LU 135	Pres.	31,808	–	277	32,085
1974	TOTAL					$43,313

Comments: Local 135 represents the freight drivers and dockmen in the Indianapolis area. Robbins has been a long-time supporter of International Vice-President Roy Williams. In July, 1975, Robbins was appointed Safety and Health Coordinator for the Central Conference.

The Indiana Conference of Teamsters took in $368,105 in 1974 and promptly poured $139,965 of that into the Indiana Conference Severance and Retirement Fund which was created in September, 1962 to pay severance benefits to full-time paid representatives of all Locals affiliated with the Conference. These officials are of course also covered by the International's Affiliate's Pension Fund which pays a handsome severance benefit.

Frank J. Roberto
Bridgeport, Connecticut

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen. Org.	21,919	7,106	103	–	30,125
1974	JC 64	Pres.	–	–	2,573	500	3,073
1974	LU 191	S/T	27,300	–	4,522	–	31,822
1974	TOTAL						$65,020

Comments: Roberto was indicted on charges of embezzling the funds of Joint Council 64 in mid-1971 but was acquitted in April, 1973. Local 191 reimbursed two of its trustees, Mario Salvatore and Anthony Rosetti and a Business Agent, Joseph Scott, for expenses totalling $9,617, $10,465. and $11,501 respectively on top of paying them salaries of $27,000 each. Such large reimbursements for expenses are unusual for a 4,000 member Local. The Local also reports a "Contingent Liability for Paid Officers and Full Time Agents Severance" but gives no further details of how much this liability may tax the Union's treasury.

Charles L. Rockenmeyer
St. Louis, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Int. Auditor	30,000	12,697	3,843	$46,540

Karl Rogers
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Mo-Kans Conf	S/T	6,000	160	1,781	7,941
1974	JC 56	S/T	7,800	–	–	7,800
1974	LU 541	Pres.	44,635	2,548	4,257	51,440
1974	TOTAL					$67,181

George F. Rohrer
Salt Lake City, Utah

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	14,217	5,229	$49,446

Comments: Rohrer has been the International Trustee for Local 17 in Denver.

Arnold Ross
Newark, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 97	Pres.	32,860	7,420	514	242	$41,036

Comments: Ross took over Local 97 after its two previous top officers, Joseph G. Biancardi, the former President and E. Henry Garrod, the former Secretary-Treasurer, were convicted on May 7, 1973 of making false entries on the financial reports.

John Rusnak
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 507	Tee	26,000	–	148	26,148
1974	LU 507 Welfare Fune	Adm.	24,000	–	–	24,000
1974	Bakers Local 19	Treasurer	12,750	–	1,551	14,501
1974	TOTAL					$64,649

John F. Ryan
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 25	S/T	18,500	–	–	18,500
1974	LU 786	Pres.	28,535	–	1,652	30,187
1974	TOTAL					$48,687

Comments: Lawrence Ryan received over $20,000 for serving as a trustee of Local 786 in 1974.

Max Sanchez
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 810	VP	36,180	150	10,872	781	$47,938

Comments: Local 810 represents nearly 10,000 workers in the New York area. It has been run by the Silvermans, first Milton until he went to jail, and then by his son Dennis. In 1974 the Local made 20 loans totaling nearly $30,000 to various officers and employees including a $2,000 loan to Sanchez and a seemingly illegal loan of $2,440 to T. Auld, a "delegate". The Local supplies automobiles to its top officers and includes an estimate of the value of the private use of that automobile under the "expense" column next to that individual's name on the LM-2 form. Thus part of the $10,872 in expenses that Sanchez received in 1974 is an estimate of what the union-provided car is worth to him personally, a sum on which he was liable to pay income tax.

In 1974 the Local made substantial payments into several pension plans for its officers and staff. It contributed $8,680 to the International's pension fund, $20,975 to unspecified "Welfare & Pension" plans, and $118,631 into a staff retirement plan.

For more information on Local 810, see the sketches of Milton and Dennis Silverman below.

David O. Sark
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 25	Sec'y	17,300	–	–	17,300
1974	LU 726	S/T	23,156	–	408	23,564
1974	TOTAL					$40,864

Comments: David D. Sark received nearly $22,000 for serving as a Trustee of Local 726 in 1974. Part of the younger Sark's responsibilities as a Trustee was to audit the books and accounts of the Local that had been prepared by his father, the Secretary-Treasurer of the Local.

Donald Sawochka
Gary, Indiana

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1973	LU 142	S/T	32,312	2,065	2,799	362	37,538
1974	LU 142	S/T	40,578	75	1,062	362	42,077

Stephen Schultz
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 43	R/Sec	1,500	–	–	1,500
1974	LU 283	Pres.	30,800	6,175	148	37,123
1974	TOTAL					$38,623

Eli Schutzer
Miami, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Total
1970	LU 198	S/T	15,750	–	225	15,975
1971	LU 198	S/T	24,975	–	2,364	27,339
1972	LU 198	S/T	22,525	–	3,385	25,910
1973	LU 198	S/T	11,475	–	1,125	12,600
1974	LU 198	S/T	24,100	–	2,090	26,190

Comments: Schutzer was indicted on August 22, 1972 and convicted on November 10, 1972 of taking payoffs from an employer and sentenced to serve 8 months in prison and pay a $5,000 fine. Convicted along with him were the Chairman of the Board and President of the Royal Baking Company. In spite of this gross breach of fiduciary duty no attempt has been made by Fitzsimmons to oust Schutzer from the Teamsters. In fact, since 1972 Schutzer has served as a Trustee of the Georgia-Florida Conference where he must audit the books of Donald Gillette, the Conference's Secretary-Treasurer, who has also been convicted of taking payoffs from employers.

Frank Seban
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 744	S/T	36,488	–	94	36,582
1974	National Conf of Brewery & Soft Drink Workers	S/T	24,852	852	448	25,756
1974	TOTAL					$62,338

Comments: Seban has worked closely with Ray Schoessling, the Union's current General Secretary-Treasurer, who headed both Local 744 and the Brewery and Soft Drink Workers trade division for many years.

Joseph Selly
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	25,000	5,697	23	$30,721

Comments: Selly heads the Communications Trade Division of the International.

Harry Serio
Union City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 478	BA	27,820	–	127	242	$28,190

Comments: Serio was temporarily barred from Union office in the early 1960s due to a conviction for aggravated assault. Serio's son George received almost $30,000 for administering Local 478's Pension and Welfare funds. The Local's pension plan has come under close scrutiny lately because of reports that executives of Eastern Freightways used money they owed the fund to purchase more stock when they were making a big push to acquire Associated Transport.

Walter Shea
Washington, D.C.

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Exec. Asst. to the Gen. Pres.	45,300	4,257	1,520	$51,078

Comments: Shea drove a 1973 Cadillac for much of 1974 (operating cost—$2,185) until he traded it in for a 1975 Lincoln which cost the Union's members $11,928.

John J. Sheridan
Burlingame, California

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	WCT	Chm'n of a Trade Division	33,635	2,400	19,690	862	$56,587

Dennis M. Silverman
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1971	LU 810	Pres.	33,153	3,008	–	–	36,161
1972	LU 810	Pres.	45,742	2,887	1,331	–	49,961
1973	LU 810	Pres.	43,935	1,575	6,186	–	51,096
1974	LU 810	Pres.	47,385	–	4,941	–	56,566

Comments: Dennis Silverman took over the Local in 1971 when his father, Milton Silverman went to jail for embezzlement. Currently S. Silverman is a "delegate" collecting nearly $20,000 a year from the Local for unspecified services.

Dennis Silverman also received a $2,000 loan from the Local in 1974 which he paid back within the year. For more information on the Local, see the profiles of Max Sanchez above and Milton Silverman below.

Milton Silverman
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1968	LU 810	Pres.	32,400	4,730	–	–	37,130
1969	LU 810	Pres.	40,102	2,310	193	–	42,605
1970	LU 810	Pres.	43,335	2,730	1,095	–	47,160
1971	LU 810	Pres.	41,730	1,575	902	4,240	44,207

Comments: Silverman was convicted on February 14, 1969 of embezzlement and making false entries and sentenced to serve eight months in prison and pay a $16,000 fine. Silverman continued to be listed as the Local's President until he went on a leave of absence effective April 29, 1971. Indeed, even though he only served in office four months in 1971, he still managed to collect a full year's salary of $41,370. That year the Local also paid his successor, Dennis Silverman, a salary of $33,153. Thus the rank and file had to pay nearly $75,000 in salary alone to their "president(s)" in 1971. In 1972 the Local suddenly owed $64,601 in "Severance Pay Payable" to an unnamed individual(s) which it is paying off in annual installments of roughly $20,000. One might assume that this money is going for Milton Silverman and that in a very real way, the rank and file actually paid Silverman's fine for his betraying their trust. Section 503(b) of the Landrum-Griffin, 29 U.S.C. 503(b), however expressly prohibits a labor organization from "directly or indirectly" paying the fine of an officer convicted of a willful violation of the embezzlement provisions of the Act.

Ken Silvers
Lexington, Kentucky

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	5,137	–	35,137
1974	LU 651	Pres.	— no report on file in Washington —			

Comments: Silvers was installed as an International Trustee of Local 651 when it was chartered on April 11, 1972. The first elections in the new Local were not held until December 10, 1973 and by then Silvers had solidified his position so that he was able to win the election. It is estimated that Silvers receives slightly more than $30,000 a year for running Local 651.

Robert Simpson
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	R/Sec	44,196	–	6,875	$51,071

William C. Smith
Jackson, Mississippi

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen. Org.	30,000	10,737	425	–	41,162
1974	SCT	Member Pol Cee	–	–	–	1,000	1,000
1974	TOTAL						$42,162

Comments: Smith received a $1,000 gift from the Southern Conference in 1971, 1972 and 1973.

W. C. Smith, III

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Org.	16,666	12,295	2,056	$31,468

Jackie Spero
Jersey City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 641	VP	37,300	466	31	20	$37,817

Comments: Spero received $1,900 in Trustees' fees from the Trucking Employees of North Jersey Welfare Fund in 1973 but it could not be verified if he still held that post in 1974 and/or received any compensation for it.

Paul Steinberg
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	CCT	Exec. Asst.	32,116	3,889	4,027	$40,042

Comments: Steinberg came out of Local 20 in Toledo, Ohio to serve as one of two Executive Assistants to (then) Conference Director Ray Schoessling.

Andy Suckart
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	LU 407	Org.	21,220	350	3,317	24,887
1974	LU 407	Org.	22,399	851	2,896	26,146
1974	Warehouse Local	Tee	1,889	–	–	1,889
1974	TOTAL					$28,035

Comments: Warehouse Local 742 is not affiliated with the Teamsters or the AFL-CIO but appears to be competing for members with several Cleveland area Teamster Locals perhaps leaving Suckart vulnerable to dual unionism charges. See the profile of Allen Friedman above and footnote 135 in Chapter 7 for more details.

Suckart was one of the country's leading Teamster dissidents until he got in trouble with federal authorities over a shipment of stolen property. After his legal problems cleared, he went to work for William Presser, one of the chief targets of his reform activities.

George Suttle
Dallas, Texas

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	SCT	Organizer	32,811	10,338	–	$43,149

Comments: Suttle received a $1,500 gift from the Texas Conference of Teamsters in 1969.

August R. Szucs
Chicago, Illinois

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 743	VP	68,128	–	30	$68,158

John Tanski
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	LU 407	Pres.	27,070	2,850	2,369	32,289
1973	LU 407 Insurance Fund	Tee	–	5,416	–	5,416
1973	TOTAL					$37,705
1974	LU 407	Pres.	28,727	2,679	2,967	34,373
1974	LU 407 Insurance Fund	Tee	–	11,250	–	11,250
1974	TOTAL					$45,623

Walter W. Teague
Auburndale, Florida

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen. Org.	30,000	9,297	6,634	–	45,832
1974	SCT	Pol Cee	–	–	–	1,000	1,000
1974	Central States Pension Fund	Tee	– no compensation reported –				
1974	Ga-Fla Conf.	Pres.	4,000	2,754	393	–	7,147
1974	JC 89	Pres.	– no compensation reported –				
1974	LU 444	Pres.	– no compensation reported –				
1974	TOTAL						$54,079

Comments: Teague served as a Southern Conference Organizer for many years under Dusty Miller. In 1969 the Conference gave him a $1,000 cash bonus and a new car worth $7,195. Teague also served for many years on the Executive Board of the Georgia-Florida Conference. He moved up from Secretary-Treasurer to the President of that Conference when Morgan left to head the Southern Conference in 1973. Two members of the current Executive Board of the Georgia-Florida Conference, Don Gillette and Eli Schutzer, have been convicted of taking payoffs from employers.

Local 444 is one of the smallest in the International with an annual revenue of only $50,000 or so. In June, 1975 it absorbed Local 308, another small Florida Local. Joint Council 89 is just as small compared to other Joint Councils. As of the 1971 convention, Joint Council 89 reported representing only 2,119 members, yet it still sent a single delegate with full voting powers to the Convention.

Teague was recently elevated to a spot as a trustee of the Central States Pension Fund.

A certain R.W. Teague received over $20,000 in 1974 for serving as an organizer for Miami Local 769.

Rudy Tham
San Francisco, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1971	LU 856	S/T	25,650	5,600	12,005	43,255
1972	LU 856	S/T	25,650	–	7,025	32,675
1973	LU 856	S/T	29,700	112	18,208	48,020
1974	IBT	Gen. Org.	25,700	5,377	–	31,127
1974	JC 7	R/Sec	– no compensation reported –			
1974	LU 856	S/T	30,850	–	7,924	38,774
1974	TOTAL					$69,901

Comments: Tham was indicted in 1972 along with the notorious "labor consultant" Milton Holt on charges of extortionate picketing, aiding and abetting extortion, and interstate transportation to promote bribery. After a change of venue to the San Francisco area, the indictment against Tham was dismissed in 1973.

Evelyn Tham received a salary of $17,247 from Local 856 as "office help". No other clerical employee makes more than $12,945.

Vincent Trerotola
New York, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	20,000	6,297	60	26,358
1974	ECT	AA	11,564	–	–	11,564
1974	JC 16	Ass't. Office Mgr.	16,200	–	–	16,200
1974	JC 16 Pens Fund	Ass't. Adm.	3,600	–	–	3,600
1974	LU 803	S/T	– no compensation reported –			
1974	TOTAL					$57,722

Comments: Vincent Trerotola is the son of Joe Trerotola who heads Local 803, Joint Council 16, and the Eastern Conference. Vincent's father also serves as an International Vice-President and Chairman of the Board of Trustees of Joint Council 16's Pension Fund.

Nunzio Louis "Babe" Triscaro
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1973	OCT	VP	–	1,640	2,882	4,522
1973	JC 41	VP	12,500	–	–	12,500
1973	LU 436	Pres.	39,324	20	3,680	43,024
1973	TOTAL					$60,046
1974	OCT	VP	–	300	592	892
1974	JC 41	VP	8,000	–	–	8,000
1974	LU 436	Pres.	24,408	20	3,325	28,285
1974	TOTAL					$37,177

Comments: Triscaro died in August 1974 of a stroke. While he lived, his Local supplied him with a new Cadillac as well as an unlimited travel account that enabled him to charge all expenses of his wife and aides to the Union. Upon his death, Joint Council 41 paid his estate $12,619 while his Local contributed over $40,000. Triscaro financed his home in suburban Cleveland with the help of a $20,000 loan from Joint Council 41's Business Agents' Pension Plan. (See Appendix A).

Triscaro had a long arrest record including two robbery convictions and a 1970 indictment on kickback charges involving Local 436's Welfare funds. The indictment was dismissed in February, 1972.

Henry Trotto
Pittsburgh, Pennsylvania

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 40	VP	–	5,794	4,768	10,562
1974	LU 341	Pres.	19,080	8,360	1,847	29,287
1974	TOTAL					$39,849

Comments: Local 341 is a small Local representing building material and construction drivers and helpers in the greater Pittsburgh area.

John Trunzo
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	Bakers Local 19	BA	16,960	–	–	16,960
1974	LU 507 Pension Fund	Adm.	24,700	–	–	24,700
1974	TOTAL					$40,660

Charles Ullrich
Bronx, New York

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 16	Member Advisory Board	3,600	–	–	3,600
1974	LU 202	Pres.	33,876	1,500	–	35,376
1974	TOTAL					$38,976

Comments: Warren Ullrich received a salary of $19,355 in 1974 as an Organizer.

J. P. Uzzollino
Union City, New Jersey

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	LU 478	Pres.	34,580	300	1,359	913	$37,152

Comments: Uzzollino's son, J.A. Uzzollino drew a salary of $27,820 in 1974 as an organizer for Local 478.

George Vitale
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1972	LU 283	VP	19,600	500	552	20,652
1973	LU 283	VP	26,050	1,380	901	28,331
1974	LU 283	VP	8,500	500	155	9,155

Comments: Vitale was convicted of embezzlement on November 21, 1972 and given 2 years probation and a $1,000 fine. A month earlier he had been convicted of taking illegal payoffs from employers and given two years probation and a $2,000 fine. Normally an embezzlement conviction bars an individual from holding union office for five years. See 29 U.S.C. 504. Vitale, however, secured an exception from his parole board. In fact, Vitale was given a raise large enough in 1973 to pay both his fines and still put his "after-fine" earnings above his 1972 total. It is not clear whether this violates 29 U.S.C. 503(b) or not. See the profile of Milton Silverman above. Vitale was appointed director of the Central Conference's Automotive, Petroleum and Allied Trade Division in early 1975 to replace the retiring Stephen Schultz.

G. Sam Webb
Birmingham, Alabama

Year	Division	Titles	Salary	Allowances	Expenses	Other	Total
1974	SCT	Member Pol Cee	–	–	–	1,000	1,000
1974	JC 87	S/T	3,859	–	–	–	3,859
1974	LU 612	Pres.	25,650	5,125	1,913	1,173	33,861
1974	TOTAL						$34,720

Otto Wendel, Sr.
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 299	S/T	40,585	250	–	$40,835

Otto Wendel, Jr.
Detroit, Michigan

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 43	Administrator	14,850	400	683	15,933
1974	LU 299	BA	10,855	–	–	10,885
1974	TOTAL					$26,818

Joseph Whiteford
Vancouver, British Columbia, Canada

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	IBT	Gen. Org.	30,000	14,777	2,435	$47,213

Albert Williamson
Cleveland, Ohio

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	LU 545	S/T	23,541	1,800	–	25,341
1974	LU 545 Welfare Fund	Tee	–	5,000	–	5,000
1974	TOTAL					$30,341

Comments: The Local 545 Welfare Fund is another one of the many pension and welfare funds that Central States Trustee Bernard S. Goldfarb has some control over. Goldfarb himself received $5,000 in fees from the fund while his corporation, Bernard S. Goldfarb, Inc., received $30,202 for "maintenance of the funds" and his law firm received $1,500 in legal fees.

Charles D. Winters
New Orleans, Louisiana

Year	Division	Title	Salary	Allowances	Expenses	Other	Total
1974	IBT	Gen. Org.	30,000	7,497	334	–	37,831
1974	SCT	Member Pol Cee	–	–	–	1,000	1,000
1974	JC 93	S/T	– no compensation reported –				
1974	LU 270	Pres.	31,579	5,220	728	–	37,527
1974	TOTAL						$76,358

Comments: Winters died in October, 1975.

Jack Yager
Kansas City, Missouri

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 56	Organizer	20,405	2,200	10	22,615
1974	LU 41	Organizer	15,236	–	33	15,269
1974	TOTAL					$37,884

Comments: Yager takes his orders and gets his paychecks from Roy Williams, the President of both Local 41 and Joint Council 56.

Thomas L. Young
Los Angeles, California

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	JC 42	S/T	6,660	–	1,170	7,830
1974	LU 196	S/T	42,594	–	1,235	43,829
1974	TOTAL					$51,659

Comments: Young died in the middle of 1975.

Tony Zivalich
Atlanta, Georgia

Year	Division	Titles	Salary	Allowances	Expenses	Total
1974	SCT	Organizer	32,811	7,498	–	$40,309

APPENDIX A

LOANS FROM TEAMSTER JOINT COUNCIL, NO. 41
BUSINESS AGENTS PENSION PLAN – 1969-74

Part IV – Section D.

3. Loans	YEAR	FACE AMNT OF LOAN	OUTSTANDING END OF YEAR	SECURITY
–Dan Darrow, Trustee 3749 Cottage Grove Rd. Akron, Ohio –#1..	1969	5,000.00	3,960.00	Home
	1970	5,000.00	2,973.00	Home
	1971	5,000.00	1,945.64	Home
	1972	5,000.00	800.00	Home
–Dan Darrow, Trustee – #2..	1969	3,000.00	550.00	Home
–Dan Darrow, Trustee – #3..	1973	81,000.00	80,760.50	Home
	1974	81,000.00	54,888.54	Home
–John Fait, Trustee 346 Walworth Ave., Euclid, Ohio – #1..	1969	1,000.00	949.38	Home
	1970	1,000.00	872.43	Home
–John Fait, Trustee – #2..	1969	5,000.00	4,448.41	Home
	1970	5,000.00	4,348.07	Home
–John J. Felice, Trustee 14300 Uhlin Dr., Middleburgh Hts., OH	1969	15,000.00	14,000.00	Home
	1970	15,000.00	14,000.00	Home
–Joseph Fontana, Trustee 13577 Cedar Rd., University Hts., OH #1..	1969	14,000.00	9,479.74	Home
–Joseph Fontana, Trustee – #2..	1970	7,000.00	6,968.78	Home
–Joint Council #41 2070 E. 22nd St., Cleveland, Ohio #1...	1969	15,000.00	14,869.14	Note
	1970	15,000.00	14,869.14	Note
–Joint Council #41 #2...	1971	54,000.00	49,127.64	Note
	1972	54,000.00	45,036.03	Note
	1973	54,000.00	41,064.61	Note
	1974	54,000.00	35,977.93	Note
–Joint Council #41, Bldg. Assoc. 2070 E. 22nd St., Cleveland, OH #1...	1969	37,000.00	36,699.54	Bldg.
	1970	37,000.00	35,746.43	Bldg.
#2...	1971	52,000.00	49,698.93	Bldg.
	1972	52,000.00	48,233.74	Bldg.
	1973	52,000.00	46,714.29	Bldg.
	1974	52,000.00	45,049.99	Bldg.

(Con't. on following page)

3. Loans	YEAR	FACE AMNT OF LOAN	OUTSTANDING END OF YEAR	SECURITY
–William Presser, Trustee 2525 Claver Rd., University Hts., OH	1969	30,000.00	30,000.00	Home
	1970	30,000.00	25,739.47	Home
–N. Louis Triscaro, Trustee 29299 Gates Mills Blvd. Gates Mills., OH	1969	20,000.00	7,237.32	Home
	1970	20,000.00	7,237.32	Home
	1971	20,000.00	5,602.32	Home
	1972	20,000.00	3,597.46	Home
	1973	20,000.00	2,250.39	Home
–Local Union No. 545 2070 R. 22nd St., Cleveland, OH *1...	1969	5,000.00	1,659.52	Note
	1970	5,000.00	763.31	Note
–Local Union No. 545 *2...	1970	2,000.00	1,589.71	Note
	1971	2,000.00	687.42	Note
–John Hearns	1971	17,000.00	16,753.15	Home
–Sam Busacca 6383 Longridge R. Mayfield Hts., OH	1972	25,000.00	24,742.29	Home
	1973	25,000.00	24,150.21	Home
	1974	25,000.00	23,462.90	Home

APPENDIX B

ALL IN THE FAMILY

This is a list of situations where various relatives appear on Teamster payrolls. Hiring an unqualified relative to fill a union post may constitute a breach of a Union officer's fiduciary duty under Section 501 of the Landrum-Griffin Act, 29 U.S.C. 501. For more information on these individuals, see Part IV.

The following abbreviations are used throughout this Appendix:

Divisions of the Union
IBT — the International
ECT — Eastern Conference of Teamsters
SCT — Southern Conference of Teamsters
CCT — Central Conference of Teamsters
WCT — Western Conference of Teamsters
OCT — Ohio

JC — Joint Council
LU — Local Union
Conf — Conference
Pol Cee — Policy Committee

Offices and Positions
Pres — President
VP — Vice-President
R/Sec — Recording Secretary
S/T — Secretary-Treasurer
Tee — Trustee
BA — Business Agent
Org — Organizer
Rep — Representative
Adm — Administrator
AA — Administrative Assistant
Chm'n — Chairman
Int Aud — International Auditor
Gen Org — General Organizer

NAME	POSITIONS	DISBURSEMENTS
Adelstein, Alan	Pres. LU 813	21,311
	Tee, LU 813 Pension Fund	900
	Tee, LU 813 Insurance Fund	900
	R/Sec LU 1034	17,435
	Tee, LU 1034 Pension Fund	900
Adelstein, Bernard	S/T LU 813	47,499
	Adm, LU 813 Pension Fund	14,000
	Tee, LU 813 Pension Fund	900
	Adm, LU 813 Insurance Fund	14,000
	Tee, LU 813 Insurance Fund	900
	Pres LU 1034	47,436
	Adm, LU 1034 Pension Fund	10,100
	Tee, LU 1034 Pension Fund	900
Adelstein, Martin	Tee, LU 813	19,669
	Tee, LU 813 Pension Fund	900
	Tee, LU 813 Insurance Fund	900
	S/T LU 1034	30,476
	Tee, LU 1034 Pension Fund	900
TOTAL		$230,126
Allgood, J. O.	SCT Org.	40,909
Allgood, Jos. W.	IBT Org.	33,483
TOTAL		$ 74,392
Bane, Joseph Sr.	Pres. LU 641	31,507
Bane, Joseph Jr.	BA LU 641	19,175
TOTAL		$ 50,682

NAME	POSITIONS	DISBURSEMENTS
Bernstein, Joseph	Org. CCT	10,417
	VP JC 25	15,500
	Pres. LU 781	107,731
Bernstein, Joseph L.	S/T LU 781	87,478
Bernstein, Robert	BA LU 781	76,743
TOTAL		$297,869
Busacca, Sam	Director JC 41	1,100
	VP LU 436	34,383
Triscaro, N. Louis	VP OCT	892
	VP JC 41	8,000
	Pres. LU 436	27,403
TOTAL		$ 71,778
Cimino, Anthony	Tee, LU 400	21,781
Cimino, Charles Sr.	S/T JC 41	15,500
	S/T LU 400	31,955
Cimino, Charles Jr.	Pres. LU 400	17,171
TOTAL		$ 86,407
Connell, Lester	R/Sec JC 16	5,842
	S/T LU 816	54,226
Connell, Vincent	Tee LU 816	20,920
TOTAL		$ 77,968
Cook, Robert C.	Pres. LU 528	50,541 (1973)
Cook, R. J.	Employee LU 528	24,647 (1973)
Cook, Carl	Employee LU 528	32,366 (1973)
TOTAL		$107,554
Davidoff, Harry	S/T LU 851	33,800
	Tee LU 295 Welfare Fund	1,300
	Tee LU 295 Pension Fund	1,300
Davidoff, Mark	S/T LU 295	57,667
	Tee LU 295 Welfare Fund	1,300
	Tee LU 295 Pension Fund	1,300
TOTAL		$ 97,427
DePerno, Rocco Sr.	Gen. Org. IBT	30,897
	Pres. JC 18	840
	Pres. LU 182	46,216
	Tee, Various Funds	19,792
DePerno, Rocco Jr.	Adm. LU 182	13,172
TOTAL		$104,297
Felice, John Sr.	Pres. LU 73	11,415
	Pres. LU 293	40,106
	Tee LU 293 Welfare Fund	7,250
Felice, John Jr.	R/Sec JC 41	4,100
	VP LU 73	11,125
	S/T LU 293	38,020
TOTAL		$119,226
Fitzsimmons, Donald	Org. LU 641	17,371
Fitzsimmons, Frank E.	Pres. IBT	133,339
Fitzsimmons, Richard	Gen. Org. IBT	35,202
	VP LU 299	31,098
TOTAL		$217,010

NAME	POSITIONS	DISBURSEMENTS
Holmes, Robert Sr.	VP & Gen. Org. IBT	40,284
	Pres. JC 43	4,427
Pres LU 337	52, 150	
Tee Central States Fund		3,684
Holmes, Robert Jr.	Tee LU 337	28,950
TOTAL		$129,459
Jones, C. Howard	Gen. Org. IBT	43,052
	S/T SCT Pol Cee	26,439
Miller, Murray W.	Scn S/T IBT	109,047
	SCT (retired)	45,787
TOTAL		$224,325
Jorgensen, Jack J. Sr.	Gen. Org. IBT	31,217 (1973)
	S/T LU 359	31,207 (1973)
	Pres. JC 32	3,383 (1973)
Jorgensen, Jack Jr.	Org. JC 32	19,432 (1973)
TOTAL		$ 85,239
Mathis, Weldon Sr.	VP & Gen. Org. IBT	58,995
	Pres. LU 728	20,894
Mathis, Weldon Jr.	Org. IBT	12,705
	Employee LU 728	19,172
Mathis, Wilbur	Employee LU 728	25,579
TOTAL		$137,345
McDermott, Lawrence	Pres. LU 641	43,514
McDermott, T.	Employee LU 641	18,245
TOTAL		$ 61,759
Mohn, Einar	VP & Gen. Org. IBT	54,877
	Chm'n WCT Pol Cee	17,809
Mohn, Bruce	Int. Aud. IBT	36,280
TOTAL		$108,966
Pecora, Joseph	VP JC 73	5,650
	S/T LU 863	48,976
Pecora, Joseph Jr.	VP LU 863	34,533
TOTAL		$ 99,159
Pisano, John	S/T LU 443	45,026
	S/T JC 64	2,921
Pisano, Vincent	BA LU 443	32,418
	R/Sec JC 64	800
TOTAL		$ 81,265

NAME	POSITIONS	DISBURSEMENTS
Presser, Jackie	Gen. Org. IBT	35,815
	R/Sec OCT	800
	VP JC 41	6,270
	S/T LU 507	84,616
	Fin. Sec'y. Bakers LU 19	12,705
Friedman, Harold	Pres. LU 507	81,934
	Pres., Bakers LU 19	100,051
	Pres. Bartenders Local 10	19,675
	Gen. Org. Bartenders	16,590
Presser, William	VP & Gen. Org. IBT	37,698
	Pres. OCT	8,920
	Pres. JC 41	40,296
	Tee Central States Fund	28,934
TOTAL		$485,004
Provenzano, Anthony	Retired LU 560	25,000
Provenzano, Nunzio	S/T LU 560	29,453
Provenzano, Salvatore	VP & Gen. Org. IBT	36,773
	Pres. JC 73	16,972
	Pres. LU 560	31,200
TOTAL		$139,398
Sark, David O.	Sec'y. JC 25	17,300
	S/T LU 726	23,564
Sark, David D.	Tee LU 726	21,532
TOTAL		$ 62,396
Schoessling, Ray	VP & Gen. Org. IBT	60,802
	Tee JC 25	28,500
	Pres. LU 744	5,000
	S/T Pol Cee CCT	25,998
	S/T Nat'l. Brewery Conf.	5,000
Schoessling, James	Tee LU 744	25,131
TOTAL		$150,431
Smith, William C.	Gen. Org. IBT	41,162
Smith, W. C. III	Org. IBT	31,468
TOTAL		$ 72,630
Trerotola, Joseph	VP & Gen. Org. IBT	60,137
	Chm'n Pol Cee ECT	1,268
	Pres. JC 16	25,500
Trerotola, Vincent	Gen. Org. IBT	26,358
	AA ECT	11,564
	Office Mgr. JC 16	16,200
	AA JC 16 Pension Fund	3,600
TOTAL		$144,627
Ullrich, Charles	Pres. LU 202	33,584
Ullrich, Warren	Org. LU 202	17,552
TOTAL		$ 51,136
Uzzolino, J. P.	Pres. LU 478	37,152
Uzzolino, J. A.	Org. LU 478	29,159
TOTAL		$ 66,311
Wendel, Otto Sr.	S/T LU 299	40,835
Wendel, Otto Jr.	BA LU 299	10,885
	Adm. JC 43	15,932
TOTAL		$ 67,652

APPENDIX C

AUTO GIVE-AWAY

Donor Organization	Year of Gift	Recipient	Model & Year of Car (if given)	Book Value (if given)	Price, if any, to beneficiary
LU 293 – Cleveland	1972	"retired officers"	1968 Pontiac 1971 Mercury	not stated	
LU 400 – Cleveland	1972	Mike Rini, ret. ofcr.	1970 Pontiac	$2,059	$1
LU 407 – Cleveland	1973	John Kalnicki, ret. pres.	1972 Cadillac	N/S	$3
	1973	Rudolph Balogh, ret. v.p.	1972 Cadillac	N/S	$3
	1973	Charles Symkowski, ret. bus. agnt.	1973 Olds	N/S	$3
	1973	Harry Anderson, ret. b.a.	1971 Olds	N/S	$1
	1972	Will Cassidy, ret. orgnzr.	1968 Olds	N/S	$1
LU 680 – Newark	1974	*Anthony Iorio, ret. pres.	not stated	$5,061	
LU 705 – Chicago	1974	unnamed retiree	N/S	$4,197	
	1972	5 employees, retired	N/S	N/S	
	1971	2 employees, retired	N/S	N/S	
LU 743 – Chicago	1971	Stephen Javolin, ret. ofcr. Frances Carey	N/S	$2,480	
			N/S	$2,480	
LU 744 – Chicago	1972	Retiring v.p.	N/S	$6,923	
LU 964 – Cleveland	1973	Widow of Joseph Olah, Scty-Treas.	N/S	$3,173	
LU 986 – Los Angeles	1973	L. J. Coombes, ret. employee	1971 Chevy	N/S	
LU 555 – Cleveland	—*	William Presser and two other officers will have the right to purchase the car assigned to them when they retire for $1.			

*By resolution dated 12/20/72, any full-time officer with 10 years of service, will at retirement, receive the car he was then driving.

(Con't. on following page)

AUTO GIVE-AWAY

Donor Organization	Year of Gift	Recipient	Model & Year of Car (if given)	Book Value (if given)	Price, if any, to beneficiary
JC 13 – St. Louis	1973	*Harold Gibbons, ret. pres.	Pontiac	$4,406	
JC 25 – Chicago	1973	*Ray Schoessling, ret. pres.	N/S	$7,450	
JC 38 – [redacted]cramento	1972	*George Mock	1969 Cadillac	$2,200	
JC 41 – Cleveland	1970	Frank Rubino, ret. bus. agnt.	Olds	$2,700	
JC 42 – Los Angeles	1972	Cletus Chapman, ret. employee	N/S	$5,516	
Southern Conference of Teamsters	1969	C. Howard Jones	N/S	$7,195	
	1969	W. W. Teague	N/S	$7,195	
	1974	Norman Goldstein	N/S	$4,915	
	1974	Jennie K. Dixon	N/S	$4,915	

*Member of the GEB

APPENDIX D

LOANS MADE BY THE INTERNATIONAL TO STAFF, OFFICERS AND MEMBERS

Source: Schedule one –– "Loans Receivable" –– of the International's LM-2

(a) Name of Officer or Employee	(b) Property of Loan, Security, if any and Arrangement for Repayment	(d) Repayments received During Period	(e) Balance at end of Period
1961			
J. M. & M. G. Casey	–R. E. Loan – Property Located in Bethesda, Md. 110.92 per month	823	16,454
T. E. & M. W. Flynn	–R. E. Loan – Property Located in Bethesda, Md.	1775	27,233
W. M. & M. A. Griffin	–R. E. Loan – Property Located in Bethesda, Md.	1178	21,753
T. L. & E. E. Hughes	–R. E. Loan – Property Located in Fairfax, Va.	1044	4,891
D. & H. H. Kaplan	–R. E. Loan – Property Located in Bethesda, Md.	1517	21,807
J. W. & M. Morgan	–R. E. Loan – Property Located in Ft. Lauderdale, Fla.	1244	24,409
W. T. & M. L. Mullenholz	–R. E. Loan – Property Located in Bethesda, Md.	1114	12,230
F. J. & M. R. Murtha	–R. E. Loan – Property Located in Skokie, Ill.	1132	39,484
F. A. & H. E. Tobin	–R. E. Loan – Property Located in Bethesda, Md.	1434	22,382
1971			
J. M. & M. G. Casey	same as above	1111	6,702
W. M. & M. A. Griffin	same as above	1593	7,676
J. W. & M. Morgan	same as above	1672	9,892
F. J. Murtha	same as above	3351	15,401
1974			
J. M. & M. G. Casey	same as above	1216	3,160
W. M. & M. A. Griffin	same as above	1743	2,597
F. J. & M. R. Murtha	same as above	2584	8,868

MOTION FILED
JUN 22 1978

IN THE

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October Term, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* AND BRIEF

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association moves for leave to file the attached brief *amicus curiae* in the above-entitled cases. This leave is requested on the ground that the Association is in a position to assist the Court with respect to the issue

presented: whether pensions negotiated within the framework of collective bargaining are subject to the federal statutes regulating securities.

Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties but was refused.

Interest of Amicus Curiae

The American Bar Association ("ABA") is a voluntary bar association whose membership is open to the members of the bars of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 230,000 members.

The ABA, through its various Sections, has a substantial and continuing interest in the systematic development of national labor law and policy as well as of securities law and policy. ABA members have had the primary responsibility for advising private citizens, corporations, employers, employees, labor organizations, and others as to their rights and obligations with respect to private pension plans. The Section of Labor Relations Law has been particularly involved with such matters over the years.

The Council of the ABA Labor Relations Law Section has recently adopted the following resolution:

> RESOLVED, that it is the practical judgment of the members of the Council that expanded application of the antifraud provisions of the federal securities laws to employee benefit plans would cause a substantial disruption of plan administration and is not needed to protect the interests of the plans and of their participants and beneficiaries.

Accordingly, permission is sought to submit the attached brief.

June 19, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

v.

JOHN DANIEL,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

SUMMARY OF ARGUMENT

The Claim

Respondent John Daniel worked 22½ years for various employers who had bargained collectively with his union, Local 705 of the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America. Eventually included in the compensation structure negotiated by Local 705 and embracing respondent was a pension plan (the "Plan") into which each such employer made fixed contributions. After nine years of employment, respondent underwent a four-month break in service. Under the terms of the Plan, he thereby failed to accrue a vested pension. In the case at bar, respondent alleges that representations and omissions misled him into believing that he had vested under the Plan. On these facts, he asserts (among other things) a right to recovery under the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the "1933 Act"), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "1934 Act").

ABA Position

The American Bar Association ("ABA") contends that the securities claims alleged in the Complaint should be dismissed and that the decision of the Court of Appeals herein should be reversed.

The "economic reality," the controlling factor under the *Forman* decision, is that a working man who accepts and continues employment and whose compensation package includes participation in a compulsory, non-contributory pension plan, has not thereby purchased a security within the meaning of the 1933 and 1934 Acts. A pension is not a "security"; it defies credibility to contend that by taking a job and keeping it, a worker has made an investment decision. Similar considerations show that coverage under an involuntary pension plan to which the worker has made no contribution involves no securities "sale."

Additionally, the Court of Appeals' holding is inconsistent with the pattern of existing federal regulation.

Congress has historically dealt separately with labor problems. As to pension matters in particular, it has regulated comprehensively through the Employee Retirement Income Security Act of 1974 ("ERISA"), in which Congress embodied its decision not to impose retroactive liability for previous practices and evidenced its assumption that the federal securities laws did not apply.

Finally, the serious adverse practical consequences that would flow from an affirmance herein, properly considered after *Blue Chip*, preclude creation of a private right of action under the securities laws in the circumstances of this case. If the rule asserted by the Court of Appeals were affirmed, an undue financial burden would be imposed on the pension plan system and its beneficiaries. The disclosure rule mandated by the lower court cannot feasibly be implemented in the labor-management context. Such factors would provide an incentive for employers to further abandon the idea of the pension plan.

ARGUMENT

Introduction

Respondent argues, in essence, that the federal securities laws are applicable because he failed to learn, at the time of "sale," of certain facts and rights pertinent to his "investment."

Such argument overlooks the reality that the learning process in employment relations is a unique phenomenon, one that has been characterized by this Court as a gradual absorption of customs and practices—applied within the framework of a separate "government," cultivated under federal labor law:

> 'Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work. The newly hired employee, the "green hand," is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often has different "weather conditions" such as sudden drafts of heat, cold or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.' *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 n.2, quoting Walker, *Life in the Automatic Factory*, 36 Harv. Bus. Rev. 111, 117.

In assessing the merits of respondent's securities law argument, the Court should and no doubt will give due weight to the distinctive nature of the labor environment in which it is asserted.

I.

THE ECONOMIC REALITY IS THAT A WORKMAN WHO ACCEPTS AND CONTINUES EMPLOYMENT —AND WHOSE COMPENSATION PACKAGE INCLUDES PARTICIPATION IN A COMPULSORY, NON-CONTRIBUTORY PENSION PLAN—HAS NOT THEREBY PURCHASED A SECURITY WITHIN THE MEANING OF THE 1933 AND 1934 ACTS.

Respondent, the Securities and Exchange Commission ("SEC"), and the courts below have constructed an argument that when an employee accepts and remains on a job where benefits include participation in a compulsory, non-contributory pension plan, he has thereby acquired, in a "sale," a "security" within the meaning of the federal securities laws.

Such an argument necessarily brings to mind a venerable canon of construction: The risk of misunderstanding increases if the focus is on the literal at the expense of the substantive. St. Paul's admonition that "the letter killeth, but the spirit giveth life," 2 Corinthians 3:6, has not been lost on this Court, which recently reiterated a traditional principle of statutory interpretation:

> '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837, 849.

A fair application of this principle to the question before the Court necessarily precludes, we submit, the conclusion

that the federal securities laws are brought into play when a worker takes a job and keeps it.

We approach the securities issue herein not by an exhaustive analysis of every case in which the courts have determined the scope of the terms "security" or "sale." Instead, the essence of our argument is that the "economic reality" of involuntary, non-contributory pensions is a labor reality, not an investment reality, and that this Court's most pertinent precedents underscore the significance of such a difference.

A. A Pension Is Not a "Security": It Defies Economic Reality To Contend That By Accepting and Continuing in Employment, a Worker Has Made an Investment Decision.

United Housing Foundation, Inc. v. *Forman,* 421 U.S. 837, was, of course, a securities-law case. It reiterated the truth that for purposes of defining a "security" within the meaning of § 2(1) of the 1933 Act, 15 U.S.C. §77b(1), and § 3(a)(10) of the 1934 Act, 15 U.S.C. § 78c(a)(10), form should be disregarded in favor of substance; that is, the focus must be upon the "economic realit[y] of the transaction . . . ." 421 U.S. at 852.[1] This "context over text" approach, *FBS Financial, Inc.* v. *CleveTrust Realty Investors,* Fed. Sec. L. Rep. (CCH) ¶96,341, at 93,154 (N.D. Ohio 1977), should be dispositive in the case at bar. For in economic reality, the expectation of a worker as to his pension plan—to the extent that he has an expectation—is that of a wage earner, not an investor.

The court below deemed respondent's participation in the pension plan an "investment contract"—and therefore a

1. Preceding the statutory definitions of both "security" and "sale" in the 1933 and 1934 Acts is the same cautionary prescription: ". . . unless the context otherwise requires. . . ." *Compare* § 2 of the 1933 Act, 15 U.S.C. § 77b, *with* § 3(a) of the 1934 Act, 15 U.S.C. § 78c(a).

"security"—under sections 2(1) and 3(a)(10) of the 1933 and 1934 Acts, respectively. (221a-222a)[2] The touchstone of that conclusion was the Court of Appeals' determination that respondent's interest in the Teamsters' pension plan satisfied this Court's classic definition of an investment contract:

> [A] contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . .

SEC v. *W. J. Howey Co.,* 328 U.S. 293, 298-99.

Indisputable realities suggest otherwise. It seems surely doubtful that a worker beginning his career has any significant expectations at all regarding pension benefits; far more likely is such an employee to focus on such considerations as wage levels, working conditions, the nature of the job, the opportunity for advancement and training, and medical and vacation benefits. *See* D. Alef and G. Short, *Problems Created by CA-7 Decision that Pension Plan Participation is a Security,* 47 The Journal of Taxation 282, 284 (November 1977) [hereinafter cited as *Alef and Short*].[3] To the extent, however, that a worker does have specific expectations regarding a pension, he is properly inclined to look upon such benefits more as deferred compensation for his services than as economic "profits" to be reaped on account of the investment skills of others. *See A Report to the [ABA] Committee on Federal Regulation of Securities from the Study Group of 1933 Act—General Subcommittee on Daniel, et al.* v. *International Brotherhood of Teamsters,* 32 Bus. Law. 1925, 1936 (1977) [hereinafter cited as *ABA*

2. Parenthetical citations ending in "a" refer to the appendix in this Court.

3. Respondent Daniel did not himself even learn of the Plan at issue until five years after he began his employment (214a).

General Subcommittee Report]. Such expectations of deferred compensation comport with the reality by which such pension benefits are secured: through negotiation by employee representatives as part of a total wage package. *See ABA General Subcommittee Report* 1938.

These perceptions are reinforced, moreover, by pertinent congressional understandings that pension benefits do indeed resemble deferred compensation. Thus, the Senate Committee Report that preceded the 1958 passage of the first federal pension legislation, the Welfare and Pension Plans Disclosure Act, P.L. 85-836, concluded:

> Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of *compensation*.

S. Rep. No. 1440, 85th Cong., 2d Sess. 3, 4 (1958) (emphasis added). Similarly, the Senate Committee Report that preceded the 1974 passage of ERISA confronted the history of pension abuse and asked whether workers could fairly "be denied benefits they have earned as deferred compensation." S. Rep. No. 93-127, 93d Cong., 1st Sess. 9 (1973). In the same vein, the House Committee Report on ERISA observed: "The Act presumes that promised pension benefits are in the form of a conditional deferred wage." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 13 (1973). Indeed, the portion of the Internal Revenue Code amended to regulate pension plans in conjunction with ERISA is entitled "Deferred Compensation, Etc." I.R.C. Subtitle A, Ch. 1, Subch. D.

That pension benefits are in fact in the nature of deferred compensation, not investment profits, is exemplified most clearly—and the Court of Appeals' misconception stands out most sharply—in that type of plan brought by respondent Daniel to the Court: a defined benefit plan. In such

a plan, the participant enjoys specified benefits, normally payable on retirement, in accordance with a pre-determined, mutually agreed upon benefit schedule, ordinarily fixed in proportion to the amount of time spent on the job. He expects and is entitled to these specified benefits without regard to either the amount contributed by the employer or any gain realized through investment or other employees' forfeitures. *See Alef and Short* 283.[4]

None of this is to denigrate the importance that pension benefits assume, at least at some point, in the minds of workers generally. Because of that importance and because of a national sensitivity to the matter, pensions are of course comprehensively regulated through ERISA (discussed at Point IIB, *infra*). To conclude, however, that workers could or do look upon pension benefits as investment returns, as opposed to deferred compensation for their labor, is to premise a legal construct upon an empirical fiction—a well-intended fiction, presumably, but a fiction nonetheless.[5]

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4. The type of plan at issue here is the one most clearly within the labor relations context: a defined benefit, collectively bargained, non-contributory plan in which membership is involuntary and which does not involve employee investment in employer securities.

5. In light of the "economic realities" that here govern, it seems hardly surprising that most of the courts that have considered the issue have rejected the securities' law analysis embraced by the Court of Appeals. *See Robinson* v. *United Mine Workers of America Health and Retirement Funds*, 435 F. Supp. 245 (D.D.C. 1977); *Weins* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,005 (C.D. Calif. 1977); *Hurn* v. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 424 F. Supp. 80 (C.D. Calif. 1976); *but see Schlansky* v. *United Merchants and Manufacturers, Inc.*, 443 F. Supp. 1054 (S.D.N.Y. 1977).

B. Similar Considerations Show That Working Under a Compulsory, Non-Contributory Pension Plan Involves No "Sale".

Insofar as the court below was prepared to find a securities "sale" without volition by the employee (244a), such conclusion seems flatly inconsistent with the undisputed central purpose of the securities laws: the protection of the investor. Thus, while "in certain instances investors who became 'forced' buyers or sellers have been deemed to fall within the class for which the statutes were enacted [citations omitted], there is no evidence that the definition was intended to be stretched to include persons who had no intent to be, or no knowledge that they were, investors." *Adato* v. *Kagan,* [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,241 at 92,622-23 (S.D.N.Y.), *appeal docketed,* No. 77 Civ. 7620 (2d Cir. Dec. 20, 1977).[6]

Conversely, to the extent that the court below discerned volition by participants in an involuntary pension plan (244a), that court again appears to have bottomed its conclu-

6. And, of course, until the filing of its *amicus* brief with the Seventh Circuit in this case, the SEC had historically taken the position that "no sale" occurred upon a worker's entry into an involuntary, non-contributory plan. Opinion of Assistant General Counsel of the Commission [1941-44] Fed. Sec. L. Rep. (CCH) ¶ 75,195 at 75,386 (1941). The SEC did so because it properly understood that in such a plan, "there is no element of volition on the part of employees whether or not to participate and make contributions." *Id.* To reverse its position on such a critical point is, of course, the SEC's prerogative. To reverse its position and simultaneously claim the considerable weight that would otherwise be accorded an administrative agency is not. *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 858-9 n.25. Under such circumstances, the SEC's views are entitled to "no special weight". *Id.* Neither, of course, should the agency's views be adopted when its reasoning is unpersuasive and its construction exceeds the scope of the governing statute. *SEC* v. *Sloan,* 46 U.S.L.W. 4426, 4430 (U.S. May 15, 1978).

sion upon dubious premises.[7] For the reality appears that, both in law and in fact, employees do not make investment decisions regarding pension benefits. Where a union is their statutory representative, employees cannot make *any* decision regarding the nature and amount of compensation, including pension benefits; such matters may only be negotiated by the union, which is the exclusive statutory bargaining representative. Labor-Management Relations Act § 9(a), 29 U.S.C. § 159(a); *J.I. Case Co.* v. *NLRB,* 321 U.S. 332.

The Court of Appeals' alternative conclusion (244a)—that by ratifying the collective bargaining agreement workers evidence volition in an investment decision as to pension benefits—seems equally at odds with economic reality. For one thing, there may or may not be a ratification vote. For another thing, such votes, when they do occur, are referenda (often by voice vote) on the aggregate compensation package, not on the individual components. *See ABA General Subcommittee Report* 1941. Under such circumstances, to infer a conscious choice by all employees to participate in a compulsory pension plan—i.e., a plan where no employee may opt out—is, we contend, to misapprehend reality. *See* B. Nimkin, *The Daniel Case,* 11 The

7. Respondent and the SEC argued in the court below that Congress in 1934 considered a statutory exemption of pension plans, that the Senate passed such an amendment, but that the conferees deleted it from the 1934 Act as passed. But the testimony of Commissioner Purcell and his express recollection of that history (which corresponds to the language of the conference report) makes it clear that the reason for the deletion was the 1934 conferees' concern that securities regulation might be appropriate for "employees' stock investment plans." As to these plans, in which contributions are voluntary and employers' securities are purchased, different considerations may well apply. *See Hearings Before the House Committee on Interstate and Foreign Commerce,* 77th Cong., 1st Sess. 895-96 (1941); H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).

Review of Securities Regulation 963, 965 n.10 (Feb. 28, 1978) [hereinafter cited as *Nimkin*].

In sum, the "economic reality" of pension accrual is admittedly unique. Clearly, however, pension benefits are properly perceived more as compensation for labor performed than as investment profits generated by the entrepreneurial skills of others. And a laborer presented with participation in an involuntary pension plan cannot plausibly be said to have made an investment decision. Accordingly, the "sale" of a "security" cannot fairly be discerned, we submit, when a worker takes and keeps a job.[8]

II.

THE COURT OF APPEALS' HOLDING IS INCONSISTENT WITH EXISTING FEDERAL REGULATION, WHICH DEALS SEPARATELY WITH PENSION RIGHTS AND EVIDENCES CONGRESSIONAL UNDERSTANDING THAT THE SECURITIES LAWS DO NOT APPLY.

A. Congress Has Historically Regulated Labor Problems Separately.

Insofar as the Court of Appeals applied the law of the marketplace—for that is classically the province of the federal securities laws—to the sphere of employment rela-

8. Insofar as the SEC has urged otherwise, its position may fairly be seen as the latest in a series of recent instances where the agency has put forth a legal interpretation not properly cognizable under the federal securities laws. *See, e.g., SEC* v. *Sloan, supra,* 46 U.S.L.W. at 4431 (Brennan, J., concurring); *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 n.27; *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 206-08; *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 858-9 n.25; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 738-9; *cf., Foremost-McKesson, Inc.* v. *Provident Securities Co.,* 423 U.S. 232, 259.

tions, it impermissibly blurred a distinction repeatedly drawn by the Congress and respected by this Court.

To cite but a few representative examples of congressional design to deal separately with labor problems: The law of labor-management negotiations generally is not the law of sales, but rather is the National Labor Relations Act, Ch. 7 Sub. Ch. II, 29 U.S.C. §§ 151-68, administered by the National Labor Relations Board. The law governing relations between unions and their members is not that pertaining to private associations and corporations, but rather is the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531, administered by the Labor Department. As to contracts, commercial arbitration law is displaced, under the Labor-Management Relations Act § 301, 29 U.S.C. § 185, by federal labor law and the "common law of the shop." *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574, 580; *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. Tort law in the marketplace is that of negligence, but is universally replaced by workers' compensation in the workplace. *See Cudahy Packing Co. of Nebraska* v. *Parramore,* 263 U.S. 418. Ordinary rules of antitrust are replaced by special secondary boycott rules under § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), administered by the National Labor Relations Board. Safety standards mandated for purchasers under the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81, are fixed separately for workers—by the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, administered by the Labor Department. The federal courts' power to grant injunctions is tempered by separate labor standards prescribed by the Norris-LaGuardia Act §§ 1-15, 29 U.S.C. §§ 101-15.

And, of course, the very subject at issue, pension accrual, is regulated through the separate and comprehensive legislation that is ERISA, discussed below.

In brief, the pervasive congressional design has been to acknowledge and preserve the *sui generis* nature of the workplace. That design will no doubt be respected by this Court in judging the lower court's holding that the Congress that regulated the securities market—through the 1933 Securities Act and the 1934 Securities Exchange Act—thereby intended to regulate the labor market.

B. Congress Has Regulated Pension Problems Comprehensively Under ERISA Without Imposing Retroactive Liability and Has Evidenced Its Understanding that the Securities Laws Did Not Apply.

The pension reform movement that culminated in the 1974 enactment of ERISA evidences three legislative elements that bear significantly on the resolution of the case at bar: 1) the comprehensive regulation of the pension system itself, including a prohibition of the particular practices on account of which respondent failed to vest; 2) a judgment not to impose retroactive liability for previous practices; and 3) Congress' understanding that the federal securities laws had no application to the pension field. Singly and together, these factors militate in favor of reversing the lower court's holding.

1. *ERISA Provides Comprehensive Regulation of Pension Plans.*

ERISA regulates every aspect of pension plan design and administration. Had respondent worked under a plan qualified since ERISA, he could not have failed to vest for the reasons that he did.

The principal features of ERISA include the following:

> —Vesting must occur within 10 years, or on comparably favorable schedules, § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A); *see also* I.R.C. § 411(a)(2);[9]
>
> —short breaks in service may generally not result in loss of vesting, § 203(b)(3), 29 U.S.C. § 1053(b)(3); *see also* I.R.C. § 411(a)(6);[9]
>
> —employees must receive a description that summarizes the plan (including "the circumstances which may result in disqualification"), § 102(b), 29 U.S.C. § 1022(b), and is written in language "calculated to be understood by the average plan participant," § 102(a)(1), 29 U.S.C. § 1022(a)(1);
>
> —pension trust funds must be managed under a new federal prudence standard, § 404, 29 U.S.C. § 1104;
>
> —contributions must be made on a new federal funding schedule, § 302, 29 U.S.C. § 1082; *see also* I.R.C. § 412;
>
> —employees must be shown, upon request, a copy of the annual report, § 104(b)(2), 29 U.S.C. § 1024(b)(2), which must include an actuarial statement, § 103(a)(1)(B)(ii), 29 U.S.C. § 1023(a)(1)(B)(ii), disclosing "actuarial assumptions and methods used to determine costs," § 103(d)(3), 29 U.S.C. § 1023(d)(3); and
>
> —annually, on request, employees are entitled to a written statement of their accrued and nonforfeitable pension benefits, § 105, 29 U.S.C. § 1025.

Such comprehensive regulation of the pension field—mandating elaborate standards for disclosure, vesting, funding, and fiduciary conduct—would almost surely never have been enacted had Congress assumed that the federal

9. In light of these provisions and of respondent's length of service (22½ years) and break-in-service (four months), Mr. Daniel would have vested under an ERISA-qualified pension.

securities laws already applied. Under the circumstances, an earlier teaching of the Court is instructive: "Courts may properly take into account the later [a]ct when asked to extend the reach of the earlier [a]ct's vague language to the limits which, read literally, the words might permit." *NLRB* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 291-92.

2. *Congress Chose Not To Impose Retroactive Liability for Past Pension Practices.*

The practical effect of the Court of Appeals' holding would be to circumvent an unambiguous congressional judgment not to impose retroactive liability for previous pension practices. That judgment was embodied in ERISA, which not only did not provide for redress of past wrongs; it specifically mandated a three-year delay in general effectiveness. Such delay was necessary, Congress decided, "to provide sufficient time for pension and profit-sharing retirement plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire [*sic*]." S. Rep. No. 93-127, 93d Cong., 1st Sess. 36 (1973).

As to why Congress chose not to impose liability for pre-ERISA conduct, Senator Williams, Chairman of the Labor & Public Welfare Committee, later explained:

> In considering these 'minimum standards,' Congress dealt carefully with the subject of break-in-service rules and, while setting a prospective standard, deliberately did not make retroactive changes, recognizing that the sudden imposition of costs relating to funding periods already passed would simply be prohibitive for plan sponsors.

Oversight of ERISA, 1977, Hearings Before the Subcomittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. 129 (1977).

This Court has recently acknowledged the legislative design in this respect, noting that "[i]n 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." *City of Los Angeles* v. *Manhart,* 46 U.S.L.W. 4347, 4352 n.40 (U.S. Apr. 25, 1978). Observing that ERISA had "paid careful attention to the problem of retroactivity," *id.,* the Court concluded that "the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislature has plainly commanded that result." *Id.* at 4352.

Insofar as the Court of Appeals' holding would necessarily impose retroactive liability where Congress and this Court have directed otherwise, that holding seems especially unwarranted.

3. *Legislative History Shows a Congressional Understanding that Federal Securities Law Did Not Apply.*

In enacting ERISA, Congress specifically found that "owing to the lack of employee information . . . it is desirable in the interests of the employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans. . . ." § 2(a), 29 U.S.C. § 1001(a). Substantially the same finding appears in the Welfare and Pension Plans Disclosure Act ("WPPDA"), P.L. 85-836, as amended, § 2a, 16 years earlier. Both findings evidence congressional understanding that the federal securities laws did not address the problem of a worker and his pension.

Significantly, these findings—and the inherent legislative understanding they reflect—followed repeated instances where the SEC had disavowed securities law jurisdiction over the field. Thus, in 1957 testimony that preceded the passage of WPPDA, the SEC Chairman had acknowledged that the proposed pension bill lay outside the securities perimeter:

> The functions of the Securities and Exchange Commission are devoted to the regulation of the capital securities markets. . . . But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital securities markets.

Hearings Before the Subcommittee on Welfare and Pension Plans Legislation, Committee on Labor and Public Welfare, U.S. Senate, 85th Cong., 1st Sess. 107 (1957).[10]

One year later, as WPPDA neared enactment, SEC representatives told the House Special Subcommittee on Welfare and Pension Plans that "they did not feel that they were the proper agency to handle the administration of this type of legislation. . . ." H. R. Rep. No. 2283, 85th Cong., 2d Sess. 1-8 (1958); *see* U.S. Department of Labor, *Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, as Amended by Public Law 87-420* 77 (1962).

And in 1962, the SEC again resisted the prospect of administering pension and welfare plan legislation. Chairman Cary, in a letter to Senator McNamara of the Labor and Public Welfare Committee, acknowledged that such plans "are the fruits of collective bargaining [and] are inseparably intertwined with labor-management relations,"

10. The relevant legislative history is set forth and analyzed in detail in *Oversight of ERISA, 1977, Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate,* 95th Cong., 1st Sess. 777 and generally at 106-45, 776-801 (1977).

an area in which "this agency does not possess expertise. . . ." Daily Cong. Rec. 1756-59, Senate, February 7, 1962; U.S. Department of Labor, *Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, as Amended by Public Law 87-420* 231-32 (1962).

Against this backdrop, the Senate Committee that was to spearhead the passage of ERISA understandably deemed pension plans generally "exempt from coverage under the Securities Act of 1933. . . ." S. Rep. No. 92-634, 92d Cong., 2d Sess. 96 (1972).[11]

Accordingly, the 1974 enactment of ERISA seems clearly to have evidenced and followed upon a consistent congressional understanding that the federal securities law had no general application to the pension sphere. Senator Williams, ERISA's principal architect, has recently reaffirmed as much.[12] This Court should do likewise—and should reject a securities law interpretation itself at odds with the legislative assumptions that underlay modern pension reform.

11. The Committee did properly understand coverage to extend to that type of pension plan not before the Court: a voluntary plan whereby employer security purchases exceed employer contributions. *Id.*

12. Senator Williams has declared:

> Congress carefully tailored that [ERISA] disclosure to meet its national policy objectives. . . . [I]t did not conceive that satisfactory disclosure under ERISA might merely be the trigger for further disclosure to meet the case-by-case standard of the antifraud provisions of the Securities Acts.

Oversight of ERISA, 1977, Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. 135 (1977).

III.

SERIOUS ADVERSE PRACTICAL CONSEQUENCES PRECLUDE CREATION OF A PRIVATE RIGHT OF ACTION UNDER THE SECURITIES LAWS IN THESE CIRCUMSTANCES.

In determining the scope of private claims under the securities laws, policy factors are properly assessed. The Court acknowledged in *Blue Chip Stamps* v. *Manor Drug Stores* that since Rule 10b-5 gives rise to a "private cause of action which has been judicially found to exist," 421 U.S. 723, 749, it would be "disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present rule of the law. . . ." *Id.* at 737. "It is therefore proper," said the Court, "that we consider . . . what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Id.*

In refusing to recognize the expanded right of action contended for in *Blue Chip,* the Court reviewed such policy considerations as the risk of "strike suits," *id.* at 741-3, the potential for unbridled perjury upon the trial of "hazy issues of historical fact the proof of which depended almost entirely on oral testimony," *id.* at 743, the scope of potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class," *id.* at 748, and other "practical factors" which "are entitled to a good deal of weight." *Id.* at 749.

Such factors in this case—where respondent must rely on a literalistic interpretation of the securities laws to suggest their applicability—militate against discerning a private right of action in the circumstances here presented.

A. The Rule Adopted by the Court of Appeals Would Inflict an Undue Financial Burden on the Private Pension System.

Respondent, opposing *amici* and the court below have contended that the financial impact of the rule adopted would be "limited" (259a), the occasional result of rectifying an aberrational fraud. In fact, the practical consequence of the Court of Appeals' holding, which has been properly characterized as a "sudden, giant extension of the reach of the federal securities laws," *Nimkin* 964, would be to pose a widespread financial threat to the private pension system—to the industry that funds and administers the system, to the innocent millions who depend on its solvency.

For an affirmance herein would at once empower millions of would-be pensioners who never vested—and whose plight ultimately prompted the passage of ERISA—to state non-dismissible claims under the federal securities laws. These newly enfranchised litigants could presumably offer juries testimony of conversations that may (or may not) have taken place years earlier with union business agents, hiring hall representatives and personnel officials—few of whom, if available at all, would be prepared to refute individual plaintiff's accounts of long forgotten encounters. Under the circumstances, the prospect for perjury seems powerful; the incentive to settle—and to pay substantial sums in the process—would be irresistible.

As to the dollar cost of such newly created liability, two results seem inevitable: First, the cost would be unacceptably large;[13] and second, such cost would be imposed on a

13. A recent study commissioned by the Department of Labor estimates potential liability to all plans at between $23.8 billion and $39.6 billion. 185 Bureau of National Affairs Pension Reporter R-11-R-12 (Apr. 24, 1978). The study was prepared for George B. Buck Consulting Actuaries, Inc. by Donald S. Grubbs, Jr., F.S.A., formerly chief actuary to the Internal Revenue Service and consultant to the Senate Labor and Public Welfare Committee during consideration of the legislation that became ERISA. *See* S. Rep. No. 93-127, 93d Cong., 1st Sess. 73 Appendix (1973).

pension plan system that may not be able to pay for benefits already earned; a congressional finding that preceded ERISA was that "plans may not have sufficient assets to discharge the accrued benefits and liabilities. . . ." S. Rep. No. 92-634, 92d Cong., 2d Sess. 71 (1972).

It seems equally inevitable that the ultimate bearers of such cost, however large it would eventually prove, would be the countless number of innocent persons currently dependent on existing pensions.

B. The Implementation of the Disclosure Rule Mandated by the Court of Appeals Is Not Feasible in the Labor-Management Context.

The Court of Appeals has mandated disclosure of information that is feasible neither to collect nor to disseminate.

Representative in this respect is the lower court's insistence (216a) that a plan sponsor "disclose the actuarial probability . . . that a member actually will receive pension benefits. . . ." The Court of Appeals explicitly assumed (258a) that such disclosure would be simple to effect, since the actuaries "needed all of the information in order to set up the plan in the first place."

In fact, actuarial turnover assumptions may never have been made at all; annual contributions for most plans are in practice calculated by reference to but a single variable: interest. American Academy of Actuaries, *Enrolled Actuaries Report,* Vol. 3, No. 4, 1 (Apr. 1978). More fundamentally, such turnover assumptions as are made necessarily speak to the average of a statistically diverse pool of plan participants; for any particular employee, the turnover rate derived from the aggregate average would almost surely prove misleading.

Finally, it seems impractical that disclosure be made in the way and at the time mandated by the lower court's

securities law analysis. For the analysis that views this as "any other securities fraud case," (259a) necessarily calls for disclosure at or before the time of "sale." Yet a sale said to occur when a person "acquire[s] an interest in a pension fund," i.e., "at inception [hiring], or during subsequent ratifications or upon a job offer" (254a-255a), presents obvious and profound disclosure problems. Simply put, it is difficult to envision a well-intended but overburdened and unlettered hiring hall representative (or union business agent or personnel clerk) making meaningful disclosure of the panoply of information that underlies a pension plan—including such diverse factors as actuarial assumptions, investment policy, funding programs, eligibility, accrual, vesting, breaks in service, joint and survivor annuities, and social security offsets. It was in light of such pragmatic considerations that Congress specified, under ERISA, that which is to be disclosed regarding pensions and directed the more realistic timetable and manner by which such disclosure is to be made. *See* Point IIB, *supra.*

C. Given These Practical Problems, There Would be Strong Incentive for Employers To Abandon Pension Plans.

Recent congressional hearings have focused on a disturbing increase in pension plan terminations, effected in the wake of new ERISA requirements. In 1975, 4,000 defined benefit plans terminated, while in 1976, 7,300 such plans terminated. *Oversight of ERISA, 1977, Hearings before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate,* 95th Cong., 1st Sess. 59 (1977). The IRS, after a preliminary survey, concluded that "possibly 30 percent of the Nation's 500,000 private pension plans may have or will terminate." *Id.* at 60.

Whatever the precise validity of this prediction, it seems self-evident that on top of massive federal pension legislation still not fully implemented, the addition of retroactive liability based on securities laws never previously thought applicable could only accelerate the termination process.

Such a prospect would be sobering in any event; this is but the latest in a series of hard cases that threaten to make bad law. It is all the more unacceptable given that respondent need not have an affirmance to vindicate his personal plight; Mr. Daniel may and presumably will litigate vigorously his pending non-securities claims—under theories of common law fraud, of breach of fiduciary duty (National Labor Relations Act), and of breach of trust (Labor-Management Relations Act).

CONCLUSION

On the basis of the foregoing analysis, we respectfully urge this Court to find that under the circumstances here presented, there has been no "sale" of a "security" within the meaning of the federal securities laws, and, accordingly, we urge that the decision of the Court of Appeals be reversed.

June 19, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF AMERICAN BAR ASSOCIATION FOR RECONSIDERATION BECAUSE OF EXTENUATING CIRCUMSTANCES TO REVIEW ORDER OF JULY 3 DENYING MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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The American Bar Association respectfully moves for reconsideration of this Court's recent order denying leave to file a brief *amicus curiae* in the above-entitled actions. Leave was originally requested on the ground that the Association is in a position to assist the Court with respect to the issue presented: whether pensions negotiated within the framework of collective bargaining are subject to the federal statutes regulating securities.

Pursuant to Rule 42(2) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties but was refused by counsel for respondent.

Leave to file the brief was originally sought from the Court on June 22, 1978, but denied by order of July 3, 1978, without explanation but apparently because it was considered as untimely. Because of the serious nature of the issue before the Court in this case, and the fact that no other *amicus* who has sought leave of Court has been denied such permission, the American Bar Association now renews its motion to the Court. The Association acknowledges the apparent untimeliness thereof but urges extenuating circumstances which prevented it from filing such brief earlier and warranting special consideration for granting its motion at this point, particularly in the absence of prejudice to any party to the case or undue burden to the Court.

The American Bar Association does not lightly file *amicus* briefs in the Supreme Court and it takes an issue of serious magnitude which would start into motion the laborious and time-consuming notice and consultation procedures necessary to permit such action. The present case is of such concern.

The Court granted the petition for certiorari on February 21, 1978. The Section of Labor Relations Standing Committee on Pension and Welfare Plans, at its midwinter meeting in late March, passed a resolution urging the Section to take affirmative steps to present its views in the case. Accordingly, the Executive Council of the Section on April 28, 1978, instructed the Chairman, Jay S. Siegel, to take the necessary steps to secure Board of Governors approval for permission to file an *amicus* brief with the Court.

Under the policy and procedures of the Association, a detailed application must be filed with the Secretary of the Association for approval by the Board of Governors. At the time of filing of such application, other interested Sections of the Association must be given notice of the application and offered an opportunity for consultation on the matter. In this particular instance, the Board of Governors specifically requested the Section of Labor Relations to consult with the Taxation and the Corporation, Banking and Business Sections for their views on the proposed *amicus* brief.

In addition, since the Brief is being filed in the name of the Association, it must be submitted to a "special committee of three members expert in appellate procedures and learned in brief writing" appointed annually by the President of the Association. This committee is composed of Professor Archibald Cox of Harvard Law School, Erwin Griswold of Washington, D.C., and Professor Robert Stern of Northwestern University Law School. Two of the members of the special committee are former Solicitors General of the United States. Professor Stern disqualified himself because of a potential conflict of interest.

After extensive discussions extending over several weeks with the other two Sections and the special committee, the version of the brief filed with the Court was approved. The Board of Governors gave its approval at its meeting on June 10, 1978.

It is highly unlikely that any of the other organizations that have sought leave in this case to file *amicus* briefs had to endure a procedure such as the one outlined above to produce the brief filed by the Association.

The Respondent has been granted additional time and now must file his brief on August 7, 1978. Since a copy

of the Association's brief was served on the Respondent on June 21, he will have had the benefit of the ABA position for nearly seven weeks while preparing his own brief, and thus would not be prejudiced by any untimely filing. Likewise the Court will not be unduly burdened as the case will not be argued until the October Term.

Accordingly, the American Bar Association asks special leave of the Court for permission to file its proposed brief as *amicus curiae* notwithstanding its untimely filing.

August 7, 1978

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vs.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

October Term, 1978
Nos. 77-753, 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Brief Amicus Curiae of Stephen W. Holohan in Support of the Respondent John Daniel.

MOTION OF STEPHEN W. HOLOHAN FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Stephen W. Holohan respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in support of the Respondent John Daniel. In

support of this motion, Stephen W. Holohan shows as follows:

1. The parties in this action have refused to consent to Stephen W. Holohan filing an amicus curiae brief in support of Respondent John Daniel.

2. Stephen W. Holohan is a Los Angeles attorney, who is a plaintiff's attorney in a Rule 10b-5 litigation in the Central District of California, which litigation involves issues similar to those in the instant case.

3. There are issues presented in this case which transcend the interests of the parties. Those issues relate to omission cases, specifically the applicability of deceit elements, recklessness, and aiding and abetting.

WHEREFORE, it is respectfully moved and requested that Stephen W. Holohan be granted leave to file the accompanying brief as amicus curiae.

STEPHEN W. HOLOHAN, Esq.,
Attorney for Amicus Curiae.

Of Counsel:
NOBLE, CAMPBELL & UHLER.

BRIEF AMICUS CURIAE OF STEPHEN W. HOLOHAN.

Interest of the Amicus.

The interest of the amicus is the application of consistent theory in Rule 10b-5 matters.

Introduction and Summary of Argument.

A limitation on liability addressed in the Seventh Circuit decision is justifiable reliance on a material misrepresentation or omission causing them injury. The purpose of this brief is to demonstrate that justifiable reliance on an omission is a fiction spawned by *Affiliated Ute Citizens v. United States. Affiliated Ute Citizens* is linked to this case because it is the basis of the *Sundstrand Corp. v. Sun Chemical Corp.* decision which is cited in the *Daniel* decision.

The gist of the argument is that *Affiliated Ute Citizens* misread Rule 10b-5(2) in that the Rule does not forbid omissions to state material facts. Rather the Rule forbids omitting to state material facts necessary . . . to make the statements made . . . not misleading, in other words half truths requiring speaking defendants to disclose enough to prevent the words from being misleading.

The ramifications of *Affiliated Ute Citizens* are generally as follows:

1. *Reliance. Affiliated Ute Citizens* provides that positive proof of reliance is not a prerequisite to recovery under circumstances involving primarily a failure to disclose. If there has been a statement and an omission, a half-truth, then reliance does apply. If there has been no state-

ment and an omission, then Rule 10b-5(2) does not apply.

2. *Causation. Affiliated Ute Citizens* provides that the obligation to disclose and this withholding of a material fact establish the requisite element of causation, and cite *Chasins v. Smith, Barney & Co.* in support. Chasins based causation on reliance on recommendations without disclosure, a half-truth, and expressly predicated causation in fact on adequate reliance.
3. *Duty to disclose. Affiliated Ute Citizens* provides that there is an affirmatiave duty to disclose under Rule 10b-5. If liability is predicated on a breach of duty, then liability is predicated upon equity standards. This conflicts with *Ernst & Ernst v. Hochfelder* which expressly established scienter as intent, which is not an equity standard.
4. If the above is correct, then each prohibitive clause in Rule 10b-5 constitutes an independent basis for liability.
5. Rule 10b-5(3) as an independent basis for liability would supersede presently utilized aiding and abetting concepts.
6. Rule 10b-5(1) and Rule 10b-5(2) distinguish fraud and deceit. Recklessness has two distinct though related applications: recklessness as to circumstances (deceit . . . e.g. utterer not know whether statement is true or false) and recklessness as to consequences (actor not desire the consequence, but foresees the possibility and consciously takes the risk). Hence the theory of recklessness would vary depending upon

which clause the claim for relief was brought upon.

7. The definition of recklessness utilized in omissions contexts has been Professor Prosser's definition. First, if *Affiliated Ute Citizens* is not correct about omissions, neither can this definition be correct. Second, Professor Prosser's definition comes from a section in his treatise on aggravated negligence. This notion is incompatible with the *Ernst & Ernst v. Hochfelder* notion that in certain areas of the law recklessness is considered to be a form of intentional conduct for the purposes of imposing liability for some act.

I.

RELIANCE AND CAUSATION IN OMISSIONS CASES.

A statement within the Parade of Horribles section of the Daniel decision of the Seventh Circuit Court at 561 F.2d at 250-251 reads:

> Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws. *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1049-1051 (7th Cir. 1977), certiorari denied ..... U.S. ....., 98 S.Ct. 225, 54 L.Ed. 2d 155.

Regarding reliance on an omission *Sundstrand* at 1048 states:

> With materiality established, reliance in an omissions case is presumed. *Affiliated Ute Citizens v. United States,* 406 U.S. 128.

Affiliated Ute reads at 406 U.S. 153-154 as follows:

> To be sure, the second paragraph of this rule specifies the making of an untrue statement of a material fact and the omission to state a material fact.

Rule 10b-5(2) reads in part:

> . . . (t)o omit to state a material fact necessary in order to make the statement made in light of the circumstances under which they were made not misleading.

At common law, this notion was called a half-truth in that the defendant does speak, he must disclose enough to prevent his words rfom being misleading. A half truth is a form of deceit.

The problem raised in this brief is illustrated in the chapter on Fallicies of Observation in John Stuart Mill's, *A System of Logic* (Volume VIII of The Collected Works, University of Toronto Press 1974) at 773 which in part reads:

> A fallacy of misobservation may be either negative or positive; either Non-observation or Mal-observation. It is non-observation, when all the error consists in overlooking, or neglecting, facts or particulars which ought to have been observed. It is mal-observation, when something is not simply unseen, but seen wrong; when the fact or phenomenon, instead of being recognized for what it is in reality, is mistaken for something else.

The view of this brief is that Rule 10b-5(2) has been misread in the *Affiliated Ute* decision insofar as that decision treats "the omission to state a material fact" as an independent ground for relief. A corollary view is that the latter part of Rule 10b-5(2) is nothing more or less than the half truth notion applied to the securities field. The *Affiliated Ute* decision obliquely illustrates this position. *Affiliated Ute Citizens* reads at 406 U.S. 154 as follows:

> The obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins v. Smith, Barney Co.*, 438 F.2d, at 1172.

Chasins at 1172 reads:

> Chasins relied upon Smith, Barney's recommendations of a purchase made without the disclosure of a material fact, purchased the securities recommended, and suffered a loss in their resale. Causation in fact on adequate reliance was sufficiently shown.

Clearly, this passage from *Chasins* evidences a half truth situation, *i.e.*, recommendations which mislead because of the omission of the material fact. In short, it is a classic deceit case. Moreover, *Chasins* explicitly bases causation in fact on reliance, and not an obligation to disclose and the withholding of a material fact as stated in *Affiliated Ute*.

The consequence of the mal-observation of Rule 10b-5(2) was the oft-cited *Affiliated Ute* passage.

> Under the circumstances, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense

that a reasonable investor might have considered them important in the making of this decision. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (CA 2 1968), cert. denied sub nom.; *Coates v. SEC*, 394 U.S. 976 (1969); 6 L. Loss, *Securities Regulation* 3876-3880 (1969 Supp. to 2d ed. of Vol. 3); A. Bromberg, *Securities Law Fraud—SEC Rule 10b-5* §§ 2.6 and 8.6 (1967).

Hence, while the "omission to state a material fact" was severed from its common law deceit antecedents, the decision immediately applied the elements of common law deceit to the freshly minted cause of action for omitting to state a material fact. The result was that the facts of the *Affiliated Ute* case did not evidence a statement. Hence, there was no statement, falsehood or half truth, to rely on. The decision then force fitted the concepts of deceit to the facts. Reliance was to be presumed or ignored, and materiality became paramount in what were called "circumstances, involving primarily a failure to disclose."

II.
AFFILIATED UTE: THE ROAD NOT TAKEN AND ITS CONSEQUENCES.

A fuller excerpt in *Affiliated Ute* reads at 406 U.S. 152-153:

> To be sure, the second subparagraph of this rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted. These defendants' activities, outlined above, disclose, within the very language

of one or the other of those subparagraphs, a "course of business" or a "device, scheme, or artifice" that operated as a fraud upon the Indian sellers. *Superintendent of Insurance v. Bankers Life & Casualty Co., supra.* This is so because the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell. The individual defendants, in a distinct sense, were market makers, not only for their personal purchase constituting 8-⅓% of the sales, but from the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed blood sellers. See *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (C.A. 2d 1970).

The decision performed some sleight of hand; a cause of action predicated upon clauses (1) and (3) of Rule 10b-5 was expressly noted by the decision, but having said that the decision was silent as to clauses (1) and (3) thereafter, and specifically found a cause of action for clause (2), because of an affirmative duty to disclose. A shorthand version of this result can be stated as follows: If an actor violates clauses (1) and (3) of Rule 10b-5, he will be liable for violating clause (2) of Rule 10b-5 for failure to disclose violations of clauses (1) and (3), but will not be liable for violating clauses (1) and (3) independently.

In *Ernst & Ernst v. Hochfelder*, it is stated at 425 U.S. 194:

> In this opinion the term "scienter" refers to a mental state embracing intent to deceive, manipulate, or defraud.

There is a conflict between *Ernest & Ernst* and *Affiliated Uute,* which the Supreme Court appears to be unaware, in that liability predicated upon a breach of a duty is an equity notion and liability predicated on intent is not, and the two are mutually exclusive.

Professor Salmond, in *Law of Torts,* (16th ed.) at 466 elaborates upon the equity nature of breaches of fiduciary duty in a deceit context:

> When there has been a breach of a special duty recognized in equity, whether arising from the fiduciary relationship of parties or the special circumstances of the cases, the defendant will be liable for "constructive" fraud even though he has no fraudulent intention. In such a case no damages can be given for tort, but the plaintiff will be given an indemnity for the loss he has suffered—an equitable remedy.

In *SEC v. Texas Gulf Sulphur Co.,* which was cited in *Affiliated Ute,* the Second Circuit Court states at 401 F.2d 848:

> Whether predicated on traditional fiduciary concepts (citation omitted), or on the "special facts" doctrine (citations omitted), the Rule is based in policy on the justifiable expectation of the securities market-place that all investors trading on impersonal exchanges have relatively equal access to material information.
>
> Thus, anyone in possession of material inside information must either disclose it to the investing

> public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed.

Texas Gulf Sulphur like *Affiliated Ute* does not distinguish between the clauses of Rule 10b-5. Nevertheless, in light of *Ernst & Ernst* the duty standard is irreconcilable with the scienter requirement for Rule 10b-5 liability since equitable relief requires no intent. Hence, the alternative of establishing independent liability for violating the individual clauses of Rule 10b-5 appears feasible.

At the opening of the argument a citation from *Daniel* cited *Sundstrand. Sunstrand* involved recklessness, relied upon *Affiliated Ute,* and applied equitable concepts.

Equity comes into play in Sundstrand in connection with a duty to disclose, and recklessness. The interrlationship of these factors will be discussed under subheadings:

1. *Duty to disclose.* The Seventh Circuit Court states at 553 F.2d 1043:

> In this posture as a quasi-fiduciary with respect to Sundstrand, Meers had an affirmative common law duty to disclose material facts relating to the proposed merger.[13]

The distinction between liability for intent and breach of duty, as indicated by Salmond is not discussed, but applies.

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[13]In contrast, Ernst & Ernst did not owe a common law duty to the plaintiffs in *Hochfelder.* 425 U.S. at 192 n.9.

2. *Affiliated Ute.* The Seventh Circuit Court stated in part at 553 F.2d 1043:

> The district court held him liable for three independent reasons: (1) failure to disclose the Burke and Ernst & Ernst reports even though he had a duty to do so; . . .

This claim is predicated on the "omit to state a material fact"-"duty" concept of *Affiliated Ute.*

3. *Recklessness.* Because *Affiliated Ute* funnelled all Rule 10b-5 claims into Rule 10b-5(2) claims, the scope of the concept of recklessness has been misunderstood. First, a brief survey of recklessness will be presented, and then the definition of recklessness in the *Sundstrand* decision will be examined. An outline of the survey is:

A. Criminal Law
  1. G. Williams, The Criminal Law
    a. Recklessness as to circumstance
    b. Recklessness as to consequence
    c. Common element
    d. Wilful blindness
    e. Crimes requiring intention

B. Tort Law
  1. Reckless disregard for the truth
    a. Objective standard
      1. Holmes, The Common Law
    b. Subjective standard
      1. Derry v. Peek
  2. Recklessness as to consequence
    a. Subjective standard
      1. Restatement of Torts, §500
    b. Perception of risk
    c. Appreciation of extent and gravity of risk

C. Recklessness and Negligence
  1. LeFave and Scott, Criminal Law
  2. Prosser, Law of Torts

A. Criminal Law.

1. G. Williams, The Criminal Law (2d ed. 1961).

It is important to understand that recklessness has two distinct though related applications. A skeletal outline derived from the English treatise, *The Criminal Law,* by Professor Glanville Williams illustrates these applications, and is as follows:

a. *Recklessness as to circumstance*
(§54, at 149)

1. Involves knowledge of the circumstances, or of the possibility of the circumstances. It occurs where there are some circumstances, specified by law as part of the actus reus, which the actor does not positively know to be present in his own case, but which he consciously takes the risk of being present.

2. A good example is deceit or fraud. This can be committed intentionally or recklessly: intentionally where the falsity of the statement is known, recklessly where the falsity is not positively known but where the utterer does not know whether the statement is true or false. The leading authority is *Derry v. Peek* (1889).

b. *Recklessness as to consequence*
(§24 at 53, §26 at 62, §25 at 58)

1. Occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk.

2. Occurs where the consequence is foreseen not as morally or substantially certain but only as "probable" or "likely," or perhaps as "possible."

3. The subjective theory of recklessness requires that the defendant should have foreseen the degree of probability of the consequences which is held to make the act reckless.

4. It (recklessness) is like intention in that the consequence is foreseen, but the difference is that whereas in intention the consequence is desired, or foreseen as a certainty, in recklessness it is foreseen as possible or probable but not desired.

5. Recklessness is a branch of the law of negligence; it is that kind of negligence where there is foresight of consequences. The concept is therefore a double barrelled one, being in part subjective and in part objective. It is subjective in that one must look into the mind of the accused in order to determine whether he foresaw the consequence. If the answer is in the affirmative, that is the end of the subjective part of the enquiry and the beginning of the objective part. One must ask whether in the circumstances a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk. Only if this second question, too, is answered in the affirmative is there subjective recklessness for legal purposes. If the first requirement is negatived one may still proceed to ask the second question, but the result can only be to establish inadvertent negligence.

c. *Common element* (§54 at 149)

1. The element common to the two kinds of recklessness is the conscious taking of the risk.

d. *Wilful blindness* (§57 at 157-159)

1. To the requirement of actual knowledge there is one strictly limited exception. Men readily regard their suspicions as unworthy of them when it is to

their advantage to do so. To meet this, the rule is that if a party has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.

2. In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind".

3. There must have been something to put the accused on enquiry. Hence, . . ., it was held to be wrong to direct the jury that if a man is reckless and does not care, he is just as guilty as if he received the property, knowing at the time that there was something wrong with it. Recklessness and "not caring" are not quite the same thing as wilful blindness; such words express the latter doctrine rather too widely.

e. *Crimes requiring intention or recklessness* (§27 at 64-65)

1. It is a general, though not a universal, principle that recklessness is classed with intention for legal purposes. The thing that usually matters is not desire of consequence but merely foresight of consequence, which is the factor common to intention and recklessness. It is this foresight of consequence that, it is submitted, constitutes mens rea. Consequently, every crime requiring mens rea, if it does not positively require intention, requires either intention or recklessness. This holds for crimes of perjury or (it seems) deceit or obtaining by false pretenses; in these the accused may either know that his statement is false (intention) or realize the possibility of falsity and

yet affirm the statement as though it were true (recklessness).

B. Tort Law.

1. Reckless Disregard for the Truth.

a. *Objective standard*

1. *Holmes, The Common Law* (1881) (108-109)

But again, it is enough in general if a representation is made recklessly, without knowing whether it is true or false. Now what does "recklessly" mean. It does not mean actual personal indifference to the truth of the statement. It means only that the data for the statement were so far insufficient that a prudent man could not have made it without leading to the inference that he was indifferent. That is to say, repeating an analysis which has been gone through with before, it means that the law, applying a general objective standard, determines that, if a man makes a statement on those data, he is liable, whatever was the state of his mind, and although he individually may have been perfectly free from wickedness in making it.

b. *Subjective standard*

1. *Derry v. Peek,* 14 App.Cas. 337, 374 (1889)

I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false . . .

Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

2. Recklessness as to Consequence.

a. *Subjective standard*

1. *Restatement of Torts (1939), § 500 Reckless Disregard for Safety Defined, Vol. 2 at 1293-95*

The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him. Comments:

b. Perception of risk. Conduct cannot be in disregard of the safety of others unless the act or breach of duty is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others.

c. Appreciation of extent and gravity of risk. In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger

may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

C. Recklessness and Negligence.

1. Le Fave and Scott, Criminal Law (1972) at 215.

It would seem most desirable that courts, legislatures and text writers should standardize their language with reference to the types of negligence which criminal law requires in order to make for clarity in communication. In this book, the word "negligence" is thus used to indicate conduct which will qualify for tort liability, *i.e.*, conduct creating an unreasonable risk, measured by the objective standard. "High degree of negligence" means conduct creating a high degree of risk (higher than just an unreasonable risk), also measured by the objective standard. "Recklessness" means conduct involving a high degree of risk, of which risk the actor is subjectively aware. The more ambiguous expressions, like "gross negligence" and "culpable negligence" and "wilful and wanton" conduct, will not be used, except when discussing statutes so phrased.

2. Prosser, Law of Torts (4th ed. 1971) at 185.

The usual meaning assigned to "wilful", "wanton", or "reckless", according to the word used is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

The result is that "wilful", "wanton", or "reckless" conduct tends to take on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of risk is apparent. As a result there is often no clear distinction at all between such conduct and "gross" negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care.

In *Sundstrand,* the Seventh Circuit Court stated:

> Apparently the only post-*Hochfelder* reported definition of recklessness in the context of omissions appears in *Franke v. Midwestern Oklahoma Development Authority,* CCH Fed. Sec. L. Rep. ¶95,786 at 90,850 (W.D. Okl. 1976).
>
> "reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."

As the Supreme Court conceded in *Hochfelder:*

> "In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act." 425 U.S. at 193-194 n. 12.

The *Franke* definition of recklessness is "the kind of recklessness that is equivalent to wilful fraud." *SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 868 (2d Cir. 1968) (Friendly, J., concurring) (en banc), certiorari denied sub om. *Coates v. SEC,* 394 U.S. 976.

The problems with the *Franke* definition are numerous.

First. One of the arguments in this brief is that the notion of liability based on an omission predicated upon *Affiliated Ute* is a fiction. If so, a definition of recklessness as to an omission is similarly a fiction.

Second. The definition of recklessness used in *Franke* originated in *Prosser,* which definition is in the outline immediately above. If the *Franke* definition of recklessness is "the kind of recklessness that is equivalent to wilful fraud", why did Professor Prosser include it in his section on Aggravated Negligence? Further, in his section on Intent, Professor Prosser states at 31-32:

> Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does.
>
> The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.
>
> Apparently the line (between intent and negligence) has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty.

This language compares favorably with Professor Williams' concept of recklessness as to consequences outlined above. The views of Professor Prosser and Professor Williams differ as to the degree of probability of the consequence:

A. *Prosser:* Substantially certain.

B. *Williams:* Probable or likely, or perhaps as possible.

In other matters, Professors Prosser and Williams seem to agree. Common elements are:

A. Subjective element

1. Foresight of the consequences

B. Objective element

1. A reasonable man test in light of such foresight

Since Professor Williams writes that recklessness is like intention in that consequences are foreseen, this concept is compatible with the *Ernst & Ernst* notion of recklessness being a form of intentional conduct for purposes of imposing liability. It is submitted that the Prosser-Williams notion is the appropriate notion of reckless conduct for Rule 10b-5 matters.

This brief leaves open the question of what degree of probability of the consequences is necessary to make the act reckless. Professor Williams illustrates the mechanics of the concept as follows:

> The subjective theory of recklessness requires that the defendant should have foreseen the degree of probability of the consequences which is held to make the act reckless. Since the probability of an event rests upon knowledge or experience, one must take the actual knowledge and experience of the accused if the subjective test is to be maintained.

Third. The concluding language of the *Franke* definition "or is so obvious that the actor must have been aware of it", is an example of simple negligence which inarguably was banished by *Ernst & Ernst.*

Fourth. Should the occasion arise where the *Franke* definition is construed to include a duty notion, since *Texas Gulf Sulphur* is cited, the language in Torts § 500 is instructive. In comment b. Perception of risk, it is stated:

> Conduct cannot be in disregard of the safety of others unless the act or breach of duty is itself intended, notwithstanding that the actor knows of the facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others.

This is language which is compatible with *Ernst & Ernst's* notion of intent. Moreover, it is important to point out that it is not the breach of duty which is objectionable, but rather the intended breach of duty. This Restatement, then, illustrates and reconciles the conflict between *Ernst & Ernst* and *Affiliated Ute.*

Consequently, the *Affiliated Ute* decision by not distinguishing between the clauses, and the *Ernst & Ernst* decision by not being aware of the conflict with *Affiliated Ute* has impeded the application of recklessness to the securities field.

Fifth: Sundstrand also states at 1045:

> While this definition might not be the conceptual equivalent of intent as a matter of general philosophy, it does serve as a proper legally functional equivalent for intent, because it measures conduct against an external standard which, under the circumstances of a given case, results in the conclusion that the reckless man should bear the risk of his omission. See O. Holmes The Common Law 130-163. . .

Holmes' view as stated in the excerpt in the survey is an objective standard, *i.e.,* data from the statement were so far insufficient that a prudent man could not have made it without leading to the inference that he was indifferent. *Ernst & Ernst* requires intent or recklessness that is considered to be a form of intentional conduct. Professor Williams emphasizes that the common element to the two kinds of recklessness is the conscious taking of the risk. Neither *Ernest & Ernst's* nor Professor Williams' view would equate intent or conscious taking of a risk with indifference judged objectively. On recklessness, Holmes is in conflict with *Ernst & Ernst.*

Sixth, if the independent clauses of Rule 10b-5 provide alternative bases of liability, then by juxtaposing the definitions of aiding and abetting and Rule 10b-5(3) the two concepts are strikingly similar.

A. Aiding and Abetting. (Williams, The Criminal Law (2d ed. 1961) at 346).

A person is guilty of aiding and abetting if he is . . . anyone who knowingly assists or encourages at the time of the crime, whether present or not.

B. Rule 10b-5(3).

To engage in any act, practice or course of business which operates as a fraud or deceit upon any person.

If Rule 10b-5(3) were to supersede aiding and abetting, then the scienter standards of *Ernst & Ernst* and recklessness would apply. A by-product would be that

the nettlesome question of whether the aider and abettor's conduct was substantial assistance would disappear.

An epilogue to this brief is that all of the ideas have been anticipated by Professors Bromberg and Jacobs as follows:

A. *Bromberg. Securities Law: Fraud, Sec. 2.-6(3), 52-53 (1975)*

Of course it makes no difference which clause is used in a given case, if all of them are violated, or if none is. In between, we might expect a careful consideration whether the clauses related to different things, and that the meaning of one is affected by the context of the other. But as in 10b-5's relations to other fraud rules, things just do not work out that tidily, and few people are concerned about it.

B. *Jacobs. The Impact of Rule 10b-5 (1975) at 157*

This overlap matters only if courts look at the Rule as three separate provisions and glean different elements of a cause of action from each.

Conclusion.

If there is to be theoretical consistency in Rule 10b-5 matters, *Ernst & Ernst* and *Affiliated Ute* must be reconciled.

The Seventh Circuit Court foresaw a limitation of liability in a pension plan securities violation because disclosure will preclude a violation and because a plaintiff must show justifiable reliance on a material misrepresentation of omission causing them injury. This brief

submits that Rule 10b-5(2) deals with representations and omissions not just omissions. Where there is just an omission, *i.e.*, acts without representations which violate Rule 10b-5(1) or (3) and not the deceit clause Rule 10b-5(2), deceit elements will be inapplicable. Hence, justifiable reliance would not limit liability. The facts of *Daniel* are tailor-made representations and omissions, *i.e.*, deceit, facts, and it is to those facts taken together which the scienter standards ought apply. As long as *Affiliated Ute* stands, such an interpretation is unlikely regardless of the literal reading of Rule 10b-5.

Respectfully submitted,

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